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OF
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DAVID S. GARLAND.

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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

UTMOST CARE—(See also **REASONABLE CARE**, vol. 2, p. 732, n).—See note 1.

UTTER; UTTERING—(See also **FORGERY**, vol. 8, p. 452; **COUNTERFEITING**, vol. 4, p. 339).—To utter and publish a counterfeit note is to assert and declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary that it should be passed in order to complete the offense of uttering.²

VACANCY; VACANT; VACATE—(As to filling vacancies in public offices, see **PUBLIC OFFICERS**, vol. 19, p. 430).—The verb "to vacate," in its English form, has acquired an active sense through a long period of transition, by popular usage, and in consequence of its early adoption as a technical and legal term. "To leave empty;" "to cease from occupying;" "to annul;" "to make void," undoubtedly express the different meanings in which,

1. **Utmost Care.**—The term "utmost care," as used to express the care required of a car-driver for the safety of his passengers, was explained by Cole, C. J., in *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, thus: "'The utmost care and diligence,' 'the highest degree of care and diligence,' are expressions to measure the care and diligence which a prudent man would exert in that business, under like circumstances. The rule required that the car-driver should exercise the utmost care for the safety of the passengers in the car; should be vigilant and careful, to avoid collisions with all vehicles upon the track, especially at crossings. This was no more care than every prudent man would exert for the safety of the passengers, who was carrying on such business. When the charge is considered with reference to the facts disclosed by the evidence, and the particular act of

negligence complained of, it will be found unobjectionable." That the term "utmost," in this connection, means reasonable proper care, see *Willey v. Allegheny City*, 118 Pa. St. 497; 4 Am. St. Rep. 608.

2. *Bouv. Law Dict., citing Com. v. Searle*, 2 Binn. (Pa.) 339; 4 Am. Dec. 446.

Utter and Publish.—The terms "utter" and "publish," in a statute against counterfeiting and forgery, are synonymous, and, therefore, it has been held that an indictment, charging that the defendant did "utter and publish" a certain forged order, was not bad for duplicity. *Johnson v. Com.*, 90 Ky. 488.

An averment in an action for libel that the defendant "uttered" the libelous matter, was held to sufficiently aver the publication of the words. *Benedict v. Westover* (Wis. 1878), 7 Cent. L. J. 153.

as a verb, the word has come to be employed. But it does not follow that its derivatives have acquired exclusively equivalent meanings in popular, or legislative, or legal usage. In its original Latin form, the word was invariably used to define the state and condition of some existing thing at some particular point of time. It had no transitive power whatever. It meant "to be empty, void, or vacant;" "to be void of, free from or without, to lack or want a thing." Vacant lands were described as lands that were "uninhabited or uncultivated." The Roman law gave the word precisely the same meaning. And many of the derivatives from the English verb retain the exact meaning of the original Latin word. To be "vacant," in its primary sense, is "to be deprived of contents; empty; not filled." The first definition of "vacancy" is "the quality of being vacant; emptiness." Usage has warranted the employment of these words in an enlarged and broader sense, but the primary and strictly grammatical meaning which they still retain is identical with their exclusive original signification. The result is that the word "vacancy" aptly and fitly describes the condition of an office when it is first created and has been filled by no incumbent. The need to strain and torture terms would lie in the opposite direction.¹

1. *Walsh v. Com.*, 89 Pa. St. 425; 33 Am. Rep. 771. In this case it was held that when a new county is erected, a vacancy happens within the meaning of the constitutional provision that the governor shall fill vacancies.

The word "vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied, in the manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it; and, conversely, it is vacant in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event. *Stocking v. State*, 7 Ind. 326; *Collins v. State*, 8 Ind. 344; *Akers v. State*, 8 Ind. 484; *State v. Bemenderfer*, 96 Ind. 374; *Butler v. State*, 20 Ind. 169; *People v. Tilton*, 37 Cal. 614; *State v. Lusk*, 18 Mo. 333; *Com. v. Hanley*, 9 Pa. St. 513.

When an office has been conferred upon one legally eligible, and has been accepted, no vacancy can be said to exist therein until the term of service and right to hold, as fixed by the law, expires, or until the death, resignation, or removal of the person elected or appointed. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

Of course, it is not to be understood that an office cannot become vacant, as respects the appointing power, so long as it remains in the actual physical occupancy of some one who asserts a claim thereto. An office is legally vacant unless the occupant has an unexpired right or title, founded in the constitution or law, precisely as a house is vacant of a lawful tenant, in case the lessee, without any provision authorizing him to hold over, refuses to surrender at the expiration of his term. *State v. Harrison*, 113 Ind. 439.

Whether a Newly Created Office is Vacant.—In *State v. Askew*, 48 Ark. 89, *Smith, J.*, said: "The controversy is thus narrowed to the point, whether, upon the creation of an additional circuit, there is a present vacancy in the office of circuit judge. Can a vacancy occur in an office which has never been filled? Vacancy is the state of being empty or unfilled. Vacant lands are unoccupied lands. A vacant house is an untenanted house. A vacant office is an office without an incumbent; and it can make no difference whether the office be a new or an old one. An old office is vacated by death, resignation, or removal. An office newly created becomes *ipso facto* vacant in its creation." See *State v. McMillan*, 108 Mo. 153.

In *Stocking v. State*, 7 Ind. 329,

Stuart, J., said: "We lay no stress on the declaration of the legislature that there was a vacancy in the office of circuit judge of the new circuit. If there was a vacancy, it existed independent of that declaration. If there was no vacancy, that body could not create one by a declaratory enactment. The vacancy flowed as a natural consequence of their doing what they had a right to do—to create a new circuit. There is no technical nor peculiar meaning to the word 'vacant,' as used in the constitution. It means empty, unoccupied; as applied to an office, without an incumbent. There is no basis for the distinction urged, that it applies only to offices vacated by death, resignation, or otherwise. An existing office without an incumbent is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years, which was abandoned yesterday. We must take the words in their plain, usual sense."

West Virginia Code 1891, ch. 116, p. 773, relative to petit juries, provides that jury commissioners shall be appointed for the term of four years, which shall commence on the first day of June next after their appointment, and that "vacancies caused by death, resignation, or otherwise, shall be filled for the unexpired term in the same manner as the original appointments." In *State v. Scott*, 36 W. Va. 704, it was held that, where the act went into effect in May, an appointment on June 10th following, for the unexpired term, commencing June 1st, was authorized, since the word "vacancy" does not necessarily presuppose a former incumbent of the office.

To the same effect, viz., that an existing office without an incumbent is vacant, whether it is a new or an old one, see *Rice v. State*, 7 Ind. 332; *Driskill v. State*, 7 Ind. 338; *Collins v. State*, 8 Ind. 350; *State v. Irwin*, 5 Nev. 129; *State v. Boecker*, 56 Mo. 17; *State v. Boone County Ct.*, 50 Mo. 317; *Walsh v. Com.*, 89 Pa. St. 419; 33 Am. Rep. 771; *Gormley v. Taylor*, 44 Ga. 76; *People v. Osborne*, 7 Colo. 605.

Contra.—But a contrary decision was reached in *Wisconsin*. In *State v. Messmore*, 14 Wis. 177, the court, by Dixon, C. J., said: "But an adjudication of the supreme court of the State of *Indiana* has been found, where it was decided, under a similar provision of the constitution of that state, that in such case an appointment might be made. Stocking

v. State, 7 Ind. 326. Upon the strength of that decision it has been strenuously insisted by counsel, that the power of making temporary appointments is a part of the elective system provided for by the constitution, and that a vacancy, within the meaning of section nine, exists in such a case, as much as when a judge dies or resigns his office. Unluckily for the views of counsel, the learned judges of *Indiana*, in their discussion of the question, seem entirely to have passed over the language of the section of their constitution, which authorizes the governor to fill vacancies by appointment. It is in all material respects like that of our own. They limited their examination to the question, whether there was in any sense a vacancy, and having concluded that there was, they took it for granted that it was such a one as the governor could fill. That there was a vacancy, in the sense in which they applied the word, we are not inclined to dispute. Certainly, 'a new house may be as vacant as one tenanted for years, which was abandoned yesterday.' But aside from the requirement that judges of new circuits shall be elected, the question is not whether there is in any sense a vacancy, but whether it is such a one as the framers of the constitution contemplated should be filled by executive appointment. It seems clear to us that it is not, and that they looked solely to vacancies in existing offices, occasioned by the death, removal, or resignation of a previous incumbent. Their language is: 'Where a vacancy shall happen in the office of judge of the supreme or circuit court, such vacancy shall be filled by an appointment by the governor, which shall continue until a successor is elected and qualified.' The use of the word 'happen,' in this connection, is very significant, and evidently has reference to some casualty not provided for by law, and which could not be remedied by the usual means of an election. The primary principle established by the constitution is, that judges shall be elected, and the power of temporary appointment seems only to have been conferred from necessity, to cure certain defects which are inseparable from the system adopted. In the creation of a new circuit, no such necessity exists. The business of our courts is never such that the public would suffer inconvenience by the delay of an election in such a case. It is not a casualty in any sense of the word, but the

deliberate act of a legislative body, which may well and conveniently be provided for by the usual method prescribed by the constitution."

Judgment of Forfeiture.—When a statute declares that if a sheriff shall not renew his bond within a specified time, his office shall immediately expire and become vacant, a failure to renew the bond within the prescribed time does not, *per se*, vacate his office. He is an officer with a defeasible title, until the judgment of forfeiture is pronounced in due form, and all his acts prior to such judgment are valid as to the public and third persons. *Clark v. Ennis*, 45 N. J. L. 69.

Temporary Vacancy—Absence through Sickness.—A statute provided that the chief clerk might act when the principal office was "vacant." This was held to apply to a temporary vacancy. *Woodworth v. Hall*, 1 Woodb. & M. (U. S.) 391. The court, by Woodbury, J., said: "It is contended by the defendant that this clause empowers the chief clerk to act as commissioner only when his office is entirely, or *de jure*, vacant; and not when he is merely absent from sickness, or other necessary cause, constituting a *de facto* vacancy only, or a want of the commissioner present to discharge the duties arising from some such cause. It is certain that the words here used, looking no farther, appear to countenance the more narrow and limited view of the word 'vacancy;' but if we look to the object of the clause, to other sections of this and the succeeding patent act, to the contemporaneous construction placed upon it, to the long acquiescence under that construction, and the great public as well as private interests which have grown up in conformity to it within the last ten years, a broader meaning to the term seems fortified by the whole spirit of the act, and by the analogies of the case."

Suspension.—That suspension for the time being creates a vacancy, see *Steubenville v. Culp*, 38 Ohio St. 23.

Failure to Qualify.—In *Virginia*, it is provided that the failure of a county corporation or district officer to qualify before his term commences, shall create a vacancy. *Vaughn v. Johnson*, 77 Va. 300.

Failure to Elect.—A "vacancy" has been held to occur in *Rhode Island*, upon the failure of any candidate to receive a majority of the legal votes

cast. *In re Representation Vacancy*, 15 R. I. 621. And in *People v. Crissey*, 91 N. Y. 634, it is said: "Although it has been held, in special instances, that the term 'vacancy' relates only to cases where officers have been duly elected, and not to those where there has been a failure to elect (*People v. Van Hørne*, 18 Wend. (N. Y.) 518; *Hayden v. Bucklin*, 9 Paige (N. Y.) 512), yet that construction cannot apply here, since the legislation, respecting the election of aldermen of Troy, specially defines a failure to elect as one cause of a vacancy."

Expiration of Term.—While the expiration of a term, for which a particular person was elected to an office, does not create any "vacancy" in the office, within the meaning of the statute which provides for filling vacancies by appointment or election, still *Wisconsin Rev. Stat.*, § 248, ch. 120, which declares that "whenever the office of any justice of the peace shall become vacant by resignation, removal, or otherwise," the justice to whom the books and papers of such former justice shall be delivered shall proceed to try the action, etc., must be construed as including the case of one who ceases to be justice by reason of the expiration of his term; and the same construction must be given to the similar provision in *Wisconsin Rev. Stat.*, § 3591. *Stamm v. Dixon*, 49 Wis. 328.

Incumbent Holding Over.—It has been held that where an incumbent is lawfully holding over until his successor is elected or qualified, there is no vacancy in the office. *State v. Brewster*, 44 Ohio St. 593; *State v. Howe*, 25 Ohio St. 596; 18 Am. Rep. 321. Compare *Johnson v. Mann*, 77 Va. 271.

Appointment by President During Recess of Senate.—*United States Const.*, § 2, art. II., which declares that "the President shall have power to fill up all vacancies which may happen during the recess of the Senate," authorizes the President to fill a vacancy which happens during the session of the Senate and continues to exist after the Senate has adjourned.

The filling of a vacancy in the office of a district attorney or marshal, by a circuit justice, under authority of *United States Rev. Stat.*, § 793, does not preclude the President from making an appointment to the same office during the recess of the Senate. *In re Farrow*, 4 Woods (U. S.) 491.

Vacancy Applicable to Office Rather

VACANCY AND NON-TENANCY (FIRE INSURANCE).—(See also FIRE INSURANCE, vol. 7, p. 1002 ; INSURANCE, vol. 11, p. 280.)

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I. IN GENERAL.—Probably all contracts of fire insurance at the present day, so far as they relate to buildings, contain provisions calculated to prohibit the subject of insurance from becoming vacant. The added danger of fires, both accidental and incendiary, in the case of unoccupied buildings, has become so well recognized as to have passed into a proverb among underwriters and those engaged in the business of insuring.¹ Hence the omnipresence of the "vacancy clause" in modern fire policies, and hence, also, the precise and explicit, not to say verbose, language, with which it is clothed as it appears in the standard policy which has now, for the most part, superseded prior forms of the contract.²

Yet this clause, universal as it has now become, was not always a part of the fire policy. Like most of the other provisions of that instrument, it is the result of a gradual growth; its first appearance, though comparatively late in the history of insurance,

than the Term.—Vacancy in an office means the want of an incumbent at the time. It has no reference to duration of time, and the appointment of a person to fill a vacancy, *pro tempore*, does not invest him with a full term, unless the law so expressly provides. Vacancy in an office is one thing, and term is another. An office may be vacant and filled many times during a term of four years. *State v. Johns*, 3 Oregon 537.

Vacancy "has been sometimes applied to the office as contradistinguished from the term of service, and at others to the term of office. I understand it

as applicable to the office alone." *Marcy, J.*, in *People v. Green*, 2 Wend. (N. Y.) 273. But that the term "vacant" may, under certain circumstances, refer to the term and not the office, see *Scott County v. Ring*, 29 Minn. 405.

1. This is also a subject of judicial observation. See the remarks of the court in *Alston v. Old North State Ins. Co.*, 80 N. Car. 326; 8 Ins. L. J. 428; *Lancy v. Home Ins. Co.*, 82 Me. 492; *White v. Phoenix Ins. Co.*, 83 Me. 279; *Sleeper v. New Hampshire F. Ins. Co.*, 56 N. H. 401; 5 Ins. L. J. 538.

2. See *Richards on Insurance* (1st ed. 1892), ch. XI.

but faintly anticipated its present form; and its ever-changing phraseology has been carefully adjusted to meet the joint demands of underwriting and of litigation.

It is for this reason that the "vacancy clause" and the decisions construing it, can best be understood by studying them from the historical standpoint. Few portions of the fire policy have been the subject of such extensive judicial discussion. But the value and significance of each of these numerous adjudications depend largely upon its date and the form of the clause which it construes. The decisions mark the progressive development of the contract. It will be the aim of this treatise to present them in the order above indicated, to show the proper historical position of each case, and to discuss the law of the subject, both in its present state and—as it can only be studied satisfactorily—in such way as to show its indissoluble relation to the state from which it has grown.

II. FIRST STAGE: VACANCY AND NON-TENANCY NOT MENTIONED.—The earlier¹ policies of fire insurance appear to have contained no provision regarding the effect of ceasing to use or inhabit the insured premises.² The insurer seems to have rested his claims to exemption for this cause entirely upon general principles, and to have urged that there was an implied obligation on the part of the insured to keep his property tenanted. This view, however, seems at no time to have received judicial sanction. Thus, in an early *Louisiana* case,³ the defendants in an action on a policy answered "that they were not liable, because, at the time of the fire and long previous thereto, the house had been abandoned and was left open and without a tenant, and that, with ordinary care, attention and supervision, the loss would not have occurred." The truth of the allegation respecting non-tenancy was admitted by the court in its opinion, yet the defense was held insufficient.⁴ Shortly after this, Chief Justice Carter, speaking for the supreme court of *New Brunswick*, observed: "Can it be said that it is a part of the contract of insurance on a dwelling house, that it must be continually occupied? Surely the assured is to be allowed those rights and privileges which the owner has in the ordinary use of his own dwelling, and surely the right to cease to occupy it must be considered as one of those. He does not alter the nature of the building; it still continues to be what it was originally described to be, a dwelling house, that is, a house fit for dwelling

1. By this is meant earlier in point of fact and phraseology, not necessarily in time. Some of the companies changed the wording of their policies much sooner than others, and adjudications concerning them were not, of course, uniform in time throughout all jurisdictions.

2. An illustration of this is seen in the fact that the earliest text writers on

the law of insurance, such as Marshall (1810), Hughes (1833), and Hammond (1840), ignore entirely the subject of non-tenancy.

3. *Soye v. Merchants' Ins. Co.*, 6 La. Ann. 761; 3 Bennett F. Ins. Cas. 266.

4. In *Soye v. Merchants' Ins. Co.*, 6 La. Ann. 761, the court said: "There is no clause in the policy, nor are we aware of any rule or usage, which

in."¹ Later, the supreme court of *Wisconsin*, dealing with the defense of non-occupancy, said: "If there is anything in the by-laws or conditions which prevented the owner from leaving the premises, or for leaving them unoccupied, the answer should have averred it."² There are other *dicta* from which the same doctrine may be at least inferred,³ and it may be stated as the undisputed law that there can be no forfeiture on the ground of non-tenancy, without some express stipulation to that effect. What will amount to such a stipulation has been the chief subject of a judicial controversy, whose result it is the purpose of this treatise to summarize.

III. SECOND STAGE: USE OF DESCRIPTIVE WORDS RELATING TO TENANCY—1. Description of Present Tenancy.—Apparently the first efforts to frame an effective clause against vacancy, consisted in the employment, either in the policy or in some instrument collateral to it, of language describing how the premises were occupied. For the most part⁴ the words first used related to the tenancy at the time of the insurance. Thus, in an early *New York* case,⁵ where the policy stated that the insured building was "occupied . . . as a dwelling," it was urged that subsequent non-tenancy was fatal because the description was to be construed as a promissory warranty, but the court held that the policy was not avoided, since the statement was merely "an affirmative stipulation." Somewhat later the supreme court of *Massachusetts* approved a charge that where a policy simply insured a building as a "dwelling house," and the latter had been left unoccupied before the fire, even though the risk may have been increased by that fact, the owner might still recover if he had made all reasonable

would make it the duty of the assured to have his house, if untenanted, guarded by a keeper. It is said by counsel that leaving an untenanted house open is a temptation to incendiaries. But there is no evidence that the house was in that condition on the night of the fire, so that the legal effect of such negligence need not be determined."

1. *Foy v. Aetna Ins. Co.*, 3 Allen (N. B.) 29; 3 Bennett F. Ins. Cas. 695.

2. *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 196.

3. *E. g., compare Liverpool, etc., Ins. Co. v. McGuire*, 52 Miss. 227; 5 Ins. L. J. 851; *Becker v. Farmers' Mut. F. Ins. Co.*, 48 Mich. 610.

4. In one early case (*Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (U. S.) 434), the words used related wholly to the future.

5. In *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 122, the court said: "Assuming that there was a written application by

the plaintiff, describing the house as occupied by Goodhue, the description in the policy must be regarded as a warranty of the fact that he was the occupant at the date of the policy, and nothing more. The description imports nothing more. The defendant insists that the description warrants not only that he was the occupant at the date of the policy, but that he was to remain the occupant during the continuance of the risk. But the parties have not thought proper to express themselves to that effect. . . . The defendants, in support of their construction of the contract, refer us to the cases of marine policies. In those cases, if the vessel insured is described as a Swedish, American, or Spanish ship, the description is in most cases held to be a warranty, not only that the vessel is Swedish, American, or Spanish accordingly, but that her documents and papers are in conformity with her nationality, and that she is to remain and

efforts to obtain a new tenant.¹ Even before either of the above adjudications, Mr. Justice Story had observed: "Suppose a policy against fire, underwritten on the house of A, in Boston, described as a dwelling house, or as occupied as a dwelling house. Would the policy be void if the house should cease for a time to have a tenant? Such a doctrine has never, to my knowledge, been asserted; nor should I deem it maintainable."² And it was said a few years later, in an insurance case before the English king's bench, that "a misdescription, it should seem, takes place only where the representation is false at the time of making."³ The doctrine of these early cases has been amply confirmed by later adjudications,⁴ and has even been carried to the extent of holding that a description of the premises in the policy⁵ or applica-

be navigated in that character as long as the risk continues. A marine policy is a commercial contract, and it is construed according to the import of the words as they are understood among merchants. (Marsh. 347.) Without the proper documents and papers the ship insured would have no national character, and the possession of such papers is, therefore, a part of what is warranted; and the continuance of that character is manifestly material to the risk, and, indeed, the main object of the warranty; and for that reason it is held to be implied for the purpose of carrying out the clear intention of the parties. If a fact be in plain terms expressly warranted, its materiality to the risk is of no importance; it becomes a condition precedent, although entirely immaterial. But where a circumstance is sought to be included by implication, in the warranty, it can never be supposed that the parties intended to include it, unless it be manifestly material to the risk."

1. *Gamwell v. Merchants', etc., Mut. F. Ins. Co.*, 12 Cush. (Mass.) 167.

2. *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (U. S.) 434; 5 Bennett F. Ins. Cas. 436.

3. *Patteson, J.*, in *Shaw v. Roberts*, 6 Ad. & El. 75; 33 E. C. L. 12; 1 Nev. & P. 279; W. W. & D. 94; 1 Bennett F. Ins. Cas. 621.

4. "This policy contains no stipulation or condition against the house becoming vacant. The house is described in the policy as the 'dwelling house occupied by' the insured. That was not a warranty that it should remain occupied. *Flanders on Fire Insurance* 256, note 2, and authorities therein cited; *ib.*, p. 485." *Campbell J.*, in

Liverpool, etc., Ins. Co. v. McGuire, 52 Miss. 227; 5 Ins. L. J. 851.

"No condition or provision is in the policy relative to the premises being occupied. Where the insurance is on an occupied dwelling house, without more, there is no agreement or promise that it shall remain occupied." *Trunkey, J.*, in *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80; 56 Am. Rep. 308. See, to the same effect, *Joyce v. Maine Ins. Co.*, 45 Me. 168; 71 Am. Dec. 536; *Stout v. City F. Ins. Co.*, 12 Iowa 371; 79 Am. Dec. 539; 4 Bennett F. Ins. Cas. 556; *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. St. 419; 98 Am. Dec. 298; 5 Bennett F. Ins. Cas. 213; *Schultz v. Merchants' Ins. Co.*, 57 Mo. 331; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605; *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 468; 15 Ins. L. J. 352; *Burlington Ins. Co. v. Brockway*, 138 Ill. 644; *Evans v. Queen Ins. Co.*, 5 Ind. App. 198; *Driscoll v. German American Ins. Co.*, 74 Hun (N. Y.) 153; 26 N. Y. Supp. 646. Compare *Smith v. Mechanics', etc., F. Ins. Co.*, 32 N. Y. 399*; *Blood v. Howard F. Ins. Co.*, 12 Cush. (Mass.) 472; *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282; 91 Am. Dec. 229; *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361; *Hobby v. Dana*, 17 Barb. (N. Y.) 111; 3 Bennett F. Ins. Cas. 581.

There is some early authority to the contrary. Compare *Miller v. Germania F. Ins. Co.*, 13 Phila. (Pa.) 551.

5. *Browning v. Home Ins. Co.*, 71 N. Y. 508; 27 Am. Rep. 86; *Hill v. Hibernia Ins. Co.*, 10 Hun (N. Y.) 26; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 140, where the statement was in the application, but the latter was made

tion,¹ as a "dwelling house" merely, is not a warranty that it is then occupied as such, and that, in the absence of concealment, vacancy of the building when insured will not avoid the policy. So the subsequent vacancy of a building described in the policy as "occupied all the year around" is cured, "if the occupation is resumed so long before the fire that the temporary absence of an occupant plainly appears to have had no connection with the loss."² In *New Hampshire*³ it has even been held that a statement in an application that the insured building "is occupied by tenants, including a cabinet-maker tenant in the third story," is merely a representation, and that the policy is not void though the third story was vacant at the time. And in *Iowa* a statement in the policy that the insured building is "occupied as stores on first floor," was regarded as complied with if any room on that floor was so occupied.⁴ Generally, however, if the descriptive words are "occupied as a dwelling," it seems that non-occupancy at the time of issuing the policy is fatal.⁵

a part of the policy. The insurer's agent, however, was informed of the vacancy at the time.

1. *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. St. 419; 98 Am. Dec. 298; 5 Bennett F. Ins. Cas. 213. Compare *German Ins. Co. v. Penrod*, 35 Neb. 273.

2. *Holmes, J., in Ring v. Phoenix Assur. Co.*, 145 Mass. 426. But compare *Moore v. Phoenix Ins. Co.*, 62 N. H. 240; 13 Am. St. Rep. 556; *East Texas F. Ins. Co. v. Kempner* (Tex. 1890), 27 S. W. Rep. 122.

3. In *Boardman v. New Hampshire Mut. F. Ins. Co.*, 20 N. H. 551; 2 Bennett F. Ins. Cas. 548, the court said: "We conclude, therefore, that the words in which the application describes the premises as 'occupied by tenants, including a cabinet-maker tenant in the third story,' were merely representation, and not express warranty; and that the plaintiff is bound by them no further than they were material. They were material if they were such as may be supposed to have had a bearing upon the contract, and to have influenced the defendant in adjusting its terms; and a misrepresentation of any fact that is not material, does not, as has been said, avoid the contract. Whether the misrepresentation was or was not material is a question for the jury."

4. In *Carter v. Humboldt F. Ins. Co.*, 17 Iowa 456, the court distinguishes *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 372, and says: "The language refers to the first floor as a whole, and not to the rooms or apartments into

which it was divided. It does not say that these several apartments are thus used, but the first floor is thus occupied. And, while we cannot concur in the argument of the plaintiff, that the word 'occupied' means the same as 'constructed,' nor yet fully in the position that the clause under consideration is descriptive merely of the object or purpose to which the first floor was to be devoted, we, nevertheless, think it was intended more to describe the manner of its intended occupancy and use, than as a warranty that each room was so used at the time. Thus it was contemplated that stores, in their ordinary signification, were kept (or to be kept) there, rather than billiard saloons, liquor shops, carpenter shops, or other establishments of a like character. And this view is strengthened by the fact that the building was a large one; that it was unfinished; the larger portion (all above the first floor) was to remain unoccupied during the continuance of the policy; that was intended for a hotel, while the lower or first floor was designed for stores. Its purpose and object was clearly shown in the manner of its construction, and while, according to the strict letter of this warranty, some occupancy of the first floor was necessary, we do not believe that it means that all the subdivisions were occupied. The first floor was not unoccupied. And yet such was its condition, according to appellee's argument, in the light of the requirements of this policy."

5. *Premises Described as Occupied.*—

2. Description as to Future Tenancy.—The next modification of the vacancy clause consisted in employing words relating to the future tenancy of the premises. The new phraseology, with an important limitation, was construed by Judge Story as early as 1833.¹ The clause there read: "At present occupied as a dwelling house, but to be occupied hereafter as a tavern, *and privileged as such.*" Upon the strength of the phrase here printed in italics, it was held that the clause was not "a warranty of the assured that it should be at all times, during the risk, occupied as a tavern, but a license or privilege granted by the company that it might be so occupied."² Similarly, in *Connecticut*,³ the insured's answer in the survey that the building was "to be occupied by tenant," was regarded merely as the reservation of a privilege, though the policy provided that the survey should be deemed a warranty. In the same year as the latter, a case came before the supreme

In *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464; 23 Am. Rep. 76, *reversing* 2 Hun (N. Y.) 655, the court said: "By the terms of the policy the defendant insured the plaintiff against loss, etc., 'on his two story extension frame, shingle-roof building, occupied as a dwelling, situate,' etc. This was clearly a warranty that the building was, at the time of the insurance, occupied as a dwelling. The description and location of the building were fully set forth. The statement that it was occupied as a dwelling was not necessary for its identification, and could have been inserted for no other purpose than as a statement of a fact relating to the risk." See, to the same effect, *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 372; *Stout v. City F. Ins. Co.*, 12 Iowa 371; 79 Am. Dec. 539; 4 Bennett F. Ins. Cas. 556; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212; 20 Ins. L. J. 652. Compare *Pottsville Mut. F. Ins. Co. v. Fromm*, 100 Pa. St. 347; 12 Ins. L. J. 21; *Sarsfield v. Metropolitan F. Ins. Co.*, 61 Barb. (N. Y.) 479; *Ring v. Phoenix Assur. Co.*, 145 Mass. 426; *Burleigh v. Gebhard F. Ins. Co.*, 90 N. Y. 220.

"A statement in a policy, of the existing use of the premises, is undoubtedly a warranty that they are so used *in presenti*. Flanders on Insurance 289, and authorities there cited. And if this were not so, it is competent for the parties to contract that such statements shall be so considered, and in this case that was done." Cofer, J., in *Farmers*, etc., Ins. Co. v. Curry, 13 Bush (Ky.) 312; 26 Am. Rep. 194; 6 Ins. L. J. 733. The authority of this

last case, however, is somewhat shaken by *Germania L. Ins. Co. v. Rudwig*, 80 Ky. 223; 11 Ins. L. J. 603. Compare *Prudhomme v. Salamander F. Ins. Co.*, 27 La. Ann. 695, where the building, though described as a store, was in fact a hotel, and the policy was held to be avoided under a clause declaring risks on "taverns" to be extra hazardous.

1. *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (U. S.) 434; 1 Bennett F. Ins. Cas. 436.

2. In this case of *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (U. S.) 434, the learned judge further observed: "The construction would be, not that the words restrained, but that they enlarged, the general words of the policy. Let me put another case. Suppose a policy against fire, underwritten on the house of A, in Boston, described as a dwelling house, or as occupied as a dwelling house. Would the policy be void if the house should cease for a time to have a tenant? Such a doctrine has never, to my knowledge, been asserted; nor should I deem it maintainable."

3. In *Hough v. City F. Ins. Co.*, 29 Conn. 10; 76 Am. Dec. 581, the court said: "The object of the inquiry was to ascertain the kind and character of the business carried on in the buildings, in order to enable the insurer to calculate the degree of hazard to which those buildings would be exposed. Hence the inquiry 'how'—that is, in what manner, not by whom—are the several stories occupied. And the first clause of the answer 'unoccupied,' is directly and completely responsive to the question. Nothing more need have

court of *Maine*,¹ where the application contained the phrase "will be occupied by a tenant." The court, taking the suggestion from an early marine case,² distinguished between the representation of an expectancy, which it held this phrase to be, and that of an existing fact, holding that the former was not even in the nature of a warranty. In *Massachusetts*, the rule was broadly stated that there could be no forfeiture for failure to fulfill an express promise of occupancy, even though an increase of risk resulted, unless fraud were proved.³ It may then be regarded as settled that, under such phrases as the above, no matter how seemingly strong, the policy will not be avoided for non-tenancy, if it is possible to construe them as representations.⁴ A clause by which there is "warranted a family to live in said house throughout the year," was held by the supreme court of *Massachusetts* to require "literal and exact fulfillment," and not to be complied with because, for a time, the building was used merely as the lodging place of two workmen;⁵ but the federal circuit court sitting in *New Hampshire* sustained a finding upon the same facts, to the effect that a family was living in the house.⁶

IV. THIRD STAGE: "INCREASE OF RISK" PROHIBITED.—The use of language merely stating the present or proposed occupancy of the premises having thus proved, for the most part, insufficient, the insurer next sought to guard against non-occupancy by a general clause prohibiting any increase in the risk. But the courts have almost unanimously held that non-tenancy does not *per se* increase the risk or hazard, and that, under such a provision alone, the policy is not avoided for that cause,⁷ for whether or not the

been said, or was said, by way of answer to that interrogatory. But as the plaintiff had already advertised the premises to let, it was natural, if not necessary, that he should notify the defendants of the fact, and accordingly he added 'but to be occupied by a tenant,' intending thereby to reserve to himself the right, not to incur an obligation, to put a tenant into the vacant buildings. And so we think the defendant ought to have understood it."

1. *Herrick v. Union Mut. F. Ins. Co.*, 48 Me. 558; 77 Am. Dec. 244; 4 Bennett F. Ins. Cas. 510.

2. *Rice v. New England Marine Ins. Co.*, 4 Pick. (Mass.) 439.

3. *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.) 540; 85 Am. Dec. 786, citing *Higginson v. Dall*, 13 Mass. 100; *Whitney v. Haven*, 13 Mass. 172; *Rice v. New England Marine Ins. Co.*, 4 Pick. (Mass.) 443; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200.

4. There is, however, a *dictum* in *Stout v. City F. Ins. Co.*, 12 Iowa 371; 79 Am. Dec. 539; 4 Bennett F. Ins.

Cas. 556, that the phrase "to remain unoccupied" is a promissory warranty. But compare *Royal Ins. Co. v. Lubelsky*, 86 Ala. 530; 18 Ins. L. J. 868.

5. *Poor v. Humboldt Ins. Co.*, 125 Mass. 274; 28 Am. Rep. 228.

6. *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 432.

7. *Vacancy Not "Increase of Risk" Per Se.*—One of the earliest authorities on this point is *Foy v. Aetna F. Ins. Co.*, 3 Allen (N. B.) 29; 3 Bennett F. Ins. Cas. 695. From the opinion the following extracts are taken: "If it be said that the ceasing to occupy a dwelling house amounts to some degree of negligence, in withdrawing the care and protection which, it may be supposed, would arise from the presence of a family constantly living on the premises, still negligence, unless it be very gross, so as almost to amount to willful misconduct or fraud, is one of the ordinary risks against which the policy of insurance is intended to protect. *Shaw v. Robberds*, 6 Ad. & El. 79. The great majority of fires arise from

risk has been increased is generally¹ a question of fact for the jury,² and it has even been held that the testimony of expert underwriters is not admissible concerning it,³ though this is not

negligence, and if the doctrine contended for were carried to its full extent in this point of view (and it is not easy to see where we are to stop), the protection of an insurance would become, in insurance parlance, extra hazardous. See 1 Phil. Insurance, ch. XIII, § 2, p. 576, and § 7, p. 633. . . . If insurance offices intend to rely on any general doctrine of risk on an unoccupied house being greater than one which is occupied, they must provide for it by some special condition, which will give the assured fair notice on the subject. But if they rely on the very general terms of the 4th condition of this policy, they must at all events give evidence that, under the circumstances and situation of the premises in each particular case, the probability of destruction by fire was greater when the premises were unoccupied. The general opinion of an insurance agent will not be sufficient; the fact must be made out as existing in the particular circumstances of the individual case." See also Gilliat v. Pawtucket Mut. F. Ins. Co., 8 R. I. 282; 91 Am. Dec. 229; 5 Bennett F. Ins. Cas. 90; Gould v. British America Assur. Co., 27 U. C. Q. B. 473; Joyce v. Maine Ins. Co., 45 Me. 168; 71 Am. Dec. 536; Residence F. Ins. Co. v. Hannawold, 37 Mich. 103; Becker v. Farmers' Mut. Fire Ins. Co., 48 Mich. 610; Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; 11 Ins. L. J. 40; Herrman v. Merchants' Ins. Co., 81 N. Y. 184; 37 Am. Rep. 488, where there was a clause against the increase of risk "internally or externally," but also one against becoming "vacant and unoccupied." Compare Luce v. Dorchester Mut. F. Ins. Co., 105 Mass. 301; 7 Am. Rep. 522; Liverpool, etc., Ins. Co. v. McGuire, 52 Miss. 227; 5 Ins. L. J. 851; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. (Va.) 88; 6 Ins. L. J. 497.

1. "But where the undisputed facts, as naturally interpreted, show vacancy and non-occupancy, and consequent increase of risk, or when there is no evidence to rebut, modify, or explain the evidence of increased danger from the change, there is no question of fact to submit to the jury, and it becomes the duty of the court to declare the verdict." Allen, J., in Moore v. Phoe-

nix Ins. Co., 64 N. H. 140; 10 Am. St. Rep. 384, citing Sleeper v. New Hampshire F. Ins. Co., 56 N. H. 401; Ashworth v. Mutual F. Ins. Co., 112 Mass. 423; 17 Am. Rep. 117, Dittmer v. Germania Ins. Co., 23 La. Ann. 458; 8 Am. Rep. 600.

2. Increase of Risk a Question for the Jury.—Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535; 20 Am. Dec. 547; Gramwell v. Merchants', etc., Mut. F. Ins. Co., 12 Cush. (Mass.) 167; Rice v. Tower, 1 Gray (Mass.) 426; Lyman v. State Mut. F. Ins. Co., 14 Allen (Mass.) 329; Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; 11 Ins. L. J. 40; Grant v. Howard Ins. Co., 5 Hill (N. Y.) 10; Luce v. Dorchester Mut. F. Ins. Co., 105 Mass. 297; 7 Am. Rep. 522; Smith v. Mechanics', etc., F. Ins. Co., 32 N. Y. 399; Williams v. Peoples' F. Ins. Co., 57 N. Y. 274; Cornish v. Farm Buildings F. Ins. Co., 74 N. Y. 297; Driscoll v. German American Ins. Co., 74 Hun (N. Y.) 153; 26 N. Y. Supp. 646; Schmidt v. Peoria Marine, etc., Ins. Co., 41 Ill. 298; North British, etc., Ins. Co. v. Steiger, 124 Ill. 81; Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361; White v. Phoenix Ins. Co., 83 Me. 279; Russell v. Cedar Rapids Ins. Co., 71 Iowa 69; Thayer v. Providence Washington Ins. Co., 70 Me. 531; Griswold v. American Cent. Ins. Co., 70 Mo. 654; Peck v. Phoenix Mut. Ins. Co., 45 U. C. Q. B. 620. Compare Robinson v. Mercer County F. Ins. Co., 27 N. J. L. 134; 4 Bennett F. Ins. Cas. 277.

3. In Lyman v. State Mut. F. Ins. Co., 14 Allen (Mass.) 329, the court said: "It is quite clear that no witness can be permitted to testify to his own individual opinion merely, upon the issue whether the risk was increased, when that depends upon facts which involve no peculiar science or information, but are within the common knowledge of men. Mulry v. Mohawk Valley Ins. Co., 5 Gray (Mass.) 541; 66 Am. Dec. 380; White v. Ballou, 8 Allen (Mass.) 408; Durrell v. Bed-erly, Holt N. P. 283; Berthon v. Loughman, 2 Stark. 258; Campbell v. Rickards, 5 B. & Ad. 840; 27 E. C. L. 207; Hawes v. New England Mut. Marine Ins. Co., 2 Curt. (U. S.) 230; 1 Arnold on Ins. 572." See also Luce

the universal rule.¹ At any rate, they may state whether underwriters generally (though not in a particular instance) would charge a higher premium for untenanted buildings.² It has also been held that they may testify to relative degrees of hazard of different uses.³

In *Maine*, it is provided by statute that no breach of the conditions of the policy shall be fatal, "unless the risk was thereby materially increased,"⁴ and this provision applies in full force to the "vacancy clause."⁵ But increase of risk is presumed from the mere fact of vacancy, even in that state.⁶

V. FOURTH STAGE: VACANCY AND NON-TENANCY PROHIBITED IN EXPRESS TERMS—1. In General.—A new stage in the evolution of the vacancy clause is reached when it assumes, for the first time,

v. Dorchester Mut. F. Ins. Co., 105 Mass. 301; 7 Am. Rep. 522; *Joyce v. Maine Ins. Co.*, 45 Me. 168; 71 Am. Dec. 536; *White v. Phoenix Ins. Co.*, 83 Me. 279; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; 5 Bennett F. Ins. Cas. 401; *Thayer v. Providence Washington Ins. Co.*, 70 Me. 531; *Liverpool, etc., Ins. Co. v. McGuire*, 52 Miss. 227; 5 Ins. L. J. 851; *Kirby v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 142.

1. "The authorities are not so harmonious as to whether it is a question to be determined by the testimony of experts, though the weight of authority is in favor of the admission of such testimony to guide the jury as to the materiality of circumstances affecting the risk, especially when the determination of the question calls for a degree of knowledge not likely to be possessed by an ordinary jury. *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 108; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 188; *Jefferson Ins. Co. v. Cothel*, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567. In the case last cited it was held that the testimony of experts was not receivable, but the decision went upon the ground that the circumstances were such that the jury were as competent as any expert to determine whether there was any increase of risk in that case, and that it was so obvious that there was no increase of risk, that they would have been justified in finding against the testimony of any number of experts. It must depend somewhat upon the facts in each case, whether the testimony of experts is necessary, and whether it should be controlling. The jury in some cases, at least, should be at liberty to exercise their own judgment upon all the facts, and upon the

applicability of the reasons given by the experts to the case in hand." *Rapallo, J.*, in *Cornish v. Farm Buildings F. Ins. Co.*, 74 N. Y. 298.

2. In *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 302; 7 Am. Rep. 522, *Gray, J.*, said: "That being a matter within the peculiar knowledge of persons versed in the business of insurance, testimony of such persons upon that point is admissible. *Webber v. Eastern R. Co.*, 2 Met. (Mass.) 147; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.) 541; 66 Am. Dec. 380; *Story J.*, in *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 188; *Hawes v. New England Mut. Marine Ins. Co.*, 2 Curt. (U. S.) 229. The testimony of the defendants' agent that it was their custom to charge extra premiums upon such unoccupied dwelling houses, was indeed inadmissible, because it went further than to prove a particular custom of the defendants, not shown to have been known to the plaintiff. *Carter v. Boehm*, 3 Burr. 1095; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684; *Adams v. Otterback*, 15 How. (U. S.) 539; *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417."

3. *Hobby v. Dana*, 17 Barb. (N. Y.) 111; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236; *Kirby v. Phoenix Ins. Co.*, 13 Lea (Tenn.) 340; *Hervey v. Mutual Fire Ins. Co.*, 11 U. C. C. P. 394.

4. *Maine Laws* 1861, ch. 34, § 4.

5. *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; 5 Bennett F. Ins. Cas. 401; *Thayer v. Providence, etc., Ins. Co.*, 70 Me. 531.

6. *White v. Phoenix Ins. Co.*, 83 Me. 279; on rehearing, 85 Me. 97; *Lancy v. Home Ins. Co.*, 82 Me. 492.

the form of a specific prohibition of non-tenancy. Up to this period the insurer had relied for protection upon general provisions, or upon rights alleged to be implied from the contract or some collateral instrument. Experience, however, had now shown that the courts, for the most part, would not sustain defenses founded upon the construction which these provisions had been intended by the insurer to bear. It became necessary, therefore, to use language which would no longer be uncertain, and the history of this fourth stage is largely the record of a search for, and experiment in, such phraseology. Theretofore the question had been whether the contract actually prohibited non-tenancy. Now the principal subject of controversy became one as to whether there was a vacancy within the meaning of the phrases employed to prevent it.

2. *Phrases Employed*—*a*. "IF THE PREMISES BECOME UNOCCUPIED."—The word "unoccupied" appears to have been used in the prohibitory clause earlier than any other.¹ Under this form of the clause it has been held that "some practical use of the building must have been made;" in the case of a trip hammer shop insured with the machinery therein, "it is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around and see if things were right."² So a dwelling house and barn are "unoccupied," if the former is used by the insured and his servants for the sole purpose of taking meals there while working upon an adjacent farm, and the barn is a mere storage room.³ And a dwelling house "becomes unoccupied" when the insured goes elsewhere to reside, though furniture is left in the house and a man placed in charge with instructions to sleep there.⁴ But a building insured as a "ten tenement frame-

1. *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 262; 23 Am. Rep. 111.

2. *Keith v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.) 228; 5 Bennett F. Ins. Cas. 51.

3. *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117; 5 Bennett F. Ins. Cas. 497; *Reid v. Lancaster F. Ins. Co.*, 90 N. Y. 382. In the first case the policy contained the words "if the premises shall be vacant," etc., and also the clause "buildings unoccupied are not covered by this policy." It is the latter clause which the court in its opinion construes.

The remarks of Miller, J., in *Williams v. North German Ins. Co.*, 24 Fed. Rep. 625, seem hardly reconcilable with this line of cases. Speaking there of a grain elevator, the learned judge says: "As to the occupancy of the building, if I was a juror I should say

that the property was occupied; that the elevator remained there, with its machinery, sometimes used and sometimes not used, as it had been for years. The cessation from use simply meant that no steam was up and that nobody went there to work; but men were around there all the time, and Williams went there frequently—had his papers there; and I think that I, as a juror, notwithstanding some part of the time they were not using the elevator, would find it was not vacant."

4. In *Cook v. Continental Ins. Co.*, 70 Mo. 610; 35 Am. Rep. 438; 9 Ins. L. J. 887, the court said: "When this policy was issued, the plaintiff kept what witnesses called a 'Ladies' Boarding House,' and had eight girls with her. After she left the premises, there was no one living in it. She lived in Kansas City, and Southwick was, by her, instructed to sleep in the house, but he

block" is not "unoccupied" so long as two of the apartments therein are used as residences,¹ though it has been held that a policy covering a house and outbuildings, and containing this clause, is void if the house becomes unoccupied for a time,² and one insuring "eight double tenement houses" is forfeited as to each single house by its non-tenancy.³ In *Indiana*, a provision that the policy shall cease and be of no force if the building "become unoccupied," does not avoid the policy on that ground, but merely suspends its operation during non-tenancy and is not

did not sleep in it after Wednesday night next preceding the Saturday night of the fire. His sleeping there at night was not an occupation of the house within the meaning of the policy. He did not occupy the house during the day. It is true that there is more danger from incendiaries at night than in the day time, but dwelling houses unoccupied during the day are in more danger from that class than when occupied, and the abandonment of the premises by plaintiff diminished the security against the destruction of the house by fire. It will be observed that the condition avoids the policy if the premises become unoccupied, without regard to the period of time that they remain unoccupied, therein differing from the cases cited; and giving it a liberal construction, while the temporary absence of the entire family for a day, or a few days, might not avoid the policy, yet, if the family occupying the house abandon it, as in this case, for another residence, requesting a person to sleep there until it should be rented, and such person leaves the place several days before the fire occurs and remains away until it is consumed by fire, with what propriety can it be said that it was 'occupied' when burned? If the absence of plaintiff had been for a visit, and not to change her residence, the case might (we do not say would) be different. 'Occupation of a dwelling house is living in it.' 'A mere supervision over it is not sufficient.' It was plaintiff's business, under the policy, to see that the house was occupied. If she had put a tenant in possession under a lease for a month, or a year, and four days previous to the fire the tenant had vacated the premises and taken another house, her agreement with that tenant would not have availed her in a suit with the insurance company. So her instructions to Southwick, admitting that the observance of them by him would have saved the policy, cannot

avail her, if, with or without her consent, he did vacate the premises several days before they were burned." *Compare* *Abrahams v. Agricultural Mut. Assur. Assoc.*, 40 U. C. Q. B. 175, where the tenant moved before the insured expected.

1. In *Harrington v. Fitchburg Mut. F. Ins. Co.*, 124 Mass. 126; 7 Ins. L. J. 618, the court, by Lord, J., said: "The phrase 'tenement block' gives but slight indication of what portions of the block the tenements consist, whether a single room, a floor, or flat, or suite of rooms. It imports only of necessity that the building is designed for the accommodation of various families. The phrase in the policy, 'whenever a building insured shall be unoccupied,' cannot mean that the absence of an occupant of a single apartment of a tenement house, while other apartments are occupied, shall render the building an unoccupied building. The cases cited by the defendant do not in any manner sustain its position. Neither in *Keith v. Quincy Ins. Co.*, 10 Allen (Mass.) 228, nor in *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117, was there an occupancy, within the meaning of that phrase, of the whole, or of any part, of the building insured; and it would be doing violence to language to say that a tenement block, insured as a single building, is an unoccupied building, with two of the tenements in actual use and occupation as residences; and, while it is not within the words, it is not within the mischief which the clause is designed to protect the insurer against." *Compare* the dictum of Green, J., in *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. L. 220; 43 Am. Rep. 365.

2. *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. L. 427; 18 Ins. L. J. 56; *Bishop v. Norwich Union F. Ins. Co.*, 14 Can. L. Times (Nova Scotia) 311.

3. *Connecticut F. Ins. Co. v. Tilley*, 88 Va. 1024; 21 Ins. L. J. 558.

applicable in any event to a temporary vacancy incident to a change of tenants.¹ In *Texas*, it seems that the non-occupancy must be for an unreasonable time in order to avoid the policy under this clause;² and in *Tennessee*, it is a sufficient excuse that vacancy was occasioned by an epidemic.³ A variance of the foregoing form of the clause, by forbidding the premises to be left unoccupied, does not appear to have resulted in a different construction. Under it the policy is likewise avoided if the building is merely in charge of one who boards at a neighbors,⁴ or who simply leaves his effects in the house and visits it occasionally.⁵ A similar interpretation has been given to the phrase "unoccupied and so remain,"⁶ though it was held in *Illinois* that a policy with this clause, insuring a summer residence, was not avoided by the fact that the insured spent the winter months mainly elsewhere, if she and her husband returned and used the premises at least once a week.⁷ Where the policy declared that the building should not "cease to be occupied," an instruction excepting vacancy incident to the exchange of tenants was held erroneous.⁸

The right to exact a forfeiture under the clause has generally been regarded as waived (though the policies required a written indorsement of consent), where the insurer's agent knew that the premises were unoccupied but continued to treat the contract as in force, as, for example, by requiring further proofs of loss,⁹ demanding the additional premiums charged for vacant buildings,¹⁰ or assenting orally to the vacancy.¹¹ In *Kentucky*, however, it has been held that disclosure of expected absence from the premises will not enable the insured to escape the consequences of this clause.¹²

b. "VACATED BY THE REMOVAL OF OWNER OR OCCUPANT."—Another of the earliest of these specific phrases to be used was one which merely forbade non-occupancy by particular persons. Thus, one of such clauses imposed forfeiture "when the occupant personally vacates the premises," and this was enforced

1. *Aetna Ins. Co. v. Meyers*, 63 Ind. 238; 8 Ins. L. J. 249. Compare *Wait v. Agricultural Ins. Co.*, 13 Hun (N. Y.) 371, where the question of non-occupancy was left to the jury.

2. *East Texas F. Ins. Co. v. Dyches*, 56 Tex. 565.

3. *Poss v. Western Assur. Co.*, 7 Lea (Tenn.) 704; 40 Am. Rep. 68. In this case the remarks of the court, however, are chiefly directed to the phrase "cease to be operated."

4. *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. L. 220; 43 Am. Rep. 365.

5. *Paine v. Agricultural Ins. Co.*, 5 Thomp. & C. (N. Y.) 619.

6. *Western Assur. Co. v. McPike*, 62 Miss. 740. Compare *Keith v. Quincy*

Mut. F. Ins. Co., 10 Allen (Mass.) 228; 5 Bennett F. Ins. Cas. 51; *Connecticut F. Ins. Co. v. Tilley*, 88 Va. 1024; 21 Ins. L. J. 558.

7. *Western Assur. Co. v. Mason*, 5 Ill. App. 141.

8. *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420; 12 Ins. L. J. 569. But compare *Wait v. Agricultural Ins. Co.*, 13 Hun (N. Y.) 371.

9. *Gans v. St. Paul F., etc., Ins. Co.*, 43 Wis. 108; 28 Am. Dec. 535; 7 Ins. L. J. 303.

10. *Haight v. Continental Ins. Co.*, 92 N. Y. 51.

11. *Palmer v. St. Paul F. Ins. Co.*, 44 Wis. 201; 12 Ins. L. J. 351.

12. *Aetna Ins. Co. v. Burns* (Ky. 1874), 5 Ins. L. J. 69.

where it was not expressly shown that the risk had thereby been increased,¹ and also where notice of vacancy was given to an agent not authorized to receive it.² So a provision forbidding the premises to "become vacated by the removal of owner or occupant," without consent, has been generally enforced,³ even though furniture had been left in the building, and the last occupant had a general intention of returning,⁴ though the insured was ignorant of the vacancy at the time it began, and at once sought to procure another tenant upon learning of it,⁵ and though the local agent knew at the time he issued the policy,⁶ or

1. In *Wustum v. City F. Ins. Co.*, 15 Wis. 138, the court, by Cole, J., said: "Whether the risk to the premises, in fact, became greater because they were vacant and unoccupied, it is not material now to inquire. The parties expressly stipulated in the policy, or in the above condition annexed to the policy and made a part of it, that if the insured premises should become vacant, immediate notice of that circumstance should be given to the company. If this were not done it avoided the policy. Such is the manifest agreement of the parties, and they must be bound by it."

2. *Harrison v. City Fire Ins. Co.*, 9 Allen (Mass.) 231; 85 Am. Dec. 751.

3. *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392.

4. *Sleeper v. New Hampshire F. Ins. Co.*, 56 N. H. 401; 5 Ins. L. J. 538. In this case the tenant left the premises in July, settling for the rent, however, until the next spring, and intending to return then, or, if business should be dull, earlier. The fire occurred in October. Smith, J., in delivering the opinion, said: "The contract is to have a reasonable interpretation according to the ordinary acceptance of the language used. It is apparent the insurers intended to guard against the increased risk which inevitably affects buildings where no one is living or carrying on any business. An unoccupied building invites a shelter to wanderers and evil disposed persons. No one interested is present to watch or care for the property, or to seasonably extinguish the flames in case of fire; and for various reasons that might be enumerated, an unoccupied building is more exposed to destruction, to say nothing of the inducement a dishonest owner would have to turn it, if unprofitable, into money, when insured, by becoming a party to its destruction by fire. If, then, the motive is to have some one present,

occupying and dwelling in the buildings, and interested to preserve the roof that shelters his family, or holds his household goods, that object would plainly be defeated by holding that he and his family may depart with all their possessions, save, perhaps, a few articles not needed for present use, and still the premises be considered occupied. It is true that often a person may vacate his home with his family, and a portion or all of his possessions, for a temporary purpose, and yet his residence or home be considered, for the purpose of voting or being taxed, to be in the place thus temporarily abandoned. But in law, whether a person has temporarily or permanently abandoned his home, is altogether a different question from the one whether buildings are vacant when abandoned even for a temporary purpose. I cannot say that I have any doubt that these buildings were vacant at the time they were burned, in the sense in which that term was used in the policy."

5. *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277; 35 Am. Rep. 656; 9 Ins. L. J. 504.

6. *Newmarket Sav. Bank v. Royal Ins. Co.*, 150 Mass. 374. Here there had been indorsed on the policy the words "Permission to remain vacant thirty days without prejudice," and above these were stamped in print the words "Occupied for dwelling purposes only." The court regarded these phrases as negating the presumption of waiver, and constituting an exception to the general provisions of the policy to operate for thirty days and no longer. Compare *Wheeler v. Phoenix Ins. Co.* (decided by the Kansas City court of appeals, May 27, 1893), 2 Mo. Legal News 496.

In *Franklin Sav. Inst. v. Central Mut. F. Ins. Co.*, 119 Mass. 240, the clause read, "if the assured shall va-

subsequently,¹ that the premises were vacant, or likely to become so.²

But the *New York* court of appeals, in construing this same clause, regarded the use of the words, "by the removal of owner or occupant," as significant, holding "that they refer to a permanent removal and entire abandonment of the house as a place of residence," and that the trial court should have submitted to the jury evidence that the insured, though absent from the premises "for a considerable period," left his goods there, and intended in time to return.³ And an agent who has implied power to waive the condition, may consent to vacancy, even after removal.⁴

cate," etc., and a breach of it was held to prevent recovery by the mortgagee, to whom the loss was payable.

1. *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; 7 Ins. L. J. 423. In this case the local agent was notified on the day the premises were vacated, consented to it, and made a memorandum of the fact in his register, informing the insured that nothing further was necessary. The policy, however, required a written indorsement of consent, and the court held that the insured's failure to obtain it avoided his policy, saying: "The company could itself dispense with this condition by oral consent as well as by writing (*First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305); and Carpenter, unless specially restricted, would have possessed, in this respect, the power of the principal. But the policy contains the provision that no agent of the company shall be deemed to have waived any of the terms and conditions of the policy, unless such waiver is indorsed on the policy in writing. This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. The provision was designed to protect the company against collusion and fraud, and the dangers and uncertainty of oral testimony. The case

seems to be a hard one for the plaintiff, but courts cannot make contracts for parties, nor can they dispense with their provisions."

2. In *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 608; 7 Ins. L. J. 228, the court said: "We are also of opinion that the plaintiffs below showed no right to sue upon the contract. The parties to this policy were Headley and the company. *Van Buren v. St. Joseph County Village F. Ins. Co.*, 28 Mich. 404; *Clay F. & M. Ins. Co. v. Huron Salt, etc.*, Mfg. Co., 31 Mich. 346. The policy was to insure his interest and not that of the mortgagees, and any money paid to them would inure to his benefit. They hold no assignment of the policy and sue as original parties."

3. *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; 23 Am. Rep. 111, reversing 5 Hun (N. Y.) 554. The doctrine of the case seems to be directly opposed to *Sleeper v. New Hampshire F. Ins. Co.*, 56 N. H. 401, as the facts were very similar. The two cases were decided the same year, but apparently each independent of the other.

4. *Wheeler v. Watertown F. Ins. Co.*, 131 Mass. 1, where the court thus discusses the power of the agents to waive the condition: "The evidence warranted a finding that the agent had authority to permit the policy to continue in force after the house became vacant. His commission as agent authorized him to issue policies, make surveys, consent to the assignment of policies, receive premiums, and 'attend to all other duties and business of the agency.' The policy provides that if, without the written consent of the company first obtained, the dwelling house becomes vacant by removal of the occupant, the policy shall become void. This provision anticipates as probable, a state of facts which will make it necessary, for the protection of

The words "owner or occupant" are held to preclude the application of the clause to buildings not intended for human habitation.¹

The "immediate notice," required by this clause, has been held to mean "notice within a reasonable time in view of the circumstances and position of the parties."² Indorsement of such notice on the policy is not essential unless required,³ and a provision therefor has been construed as referring, not to consent, but to the fact of notice.⁴ A notice stating that the household goods will not be removed, will not prevent forfeiture, if, in fact, they are substantially all carried away.⁵ And notice of vacancy

the insured, that the written consent of the company to the continuance of the policy, after the house became vacant, should be given. The agent who issued the policy would be the person to act for the company in the premises, and it would be one of the duties, and a part of the business of his agency, to attend to the matter, and give or refuse the consent of the company as circumstances should seem to him to warrant. The fact that the consent was not indorsed till after the removal of the tenant had occurred, is of no importance. It was within the power of the company, and of its agent in its behalf, to waive the condition, so far as it applied to the short period between the removal of the tenant and the indorsement of the consent. Otherwise, the provision would be of little value to the assured, in many instances, because he would be likely to learn that the house was vacant without having received notice that his tenant was about to leave it." See also *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; 6 Ins. L. J. 497.

1. In *Kimball v. Monarch Ins. Co.*, 70 Iowa 513, where the insurance covered a hog-house, the court said: "This condition is not against non-user of the dwelling, but against vacation 'by the removal of the owner or occupant.' It certainly does not intend to bind the assured to personal occupancy of the building, for it was not of a character that would permit it. It surely was intended to express nothing more than that, if the owner or occupant of the whole premises removed away, the policy should be void. It was intended to secure the attention and watchfulness of the owner and occupant to protect it from fire. The owner of the premises continued to reside thereon, but the hog-house was not used for some time prior to its destruction. The

cases cited by counsel involve conditions against vacancy found in policies covering dwellings and other buildings capable of being occupied by the owner or tenants. This clearly appears from the statements of counsel, and the citations from the cases made by him in his argument."

2. *Strunk v. Firemen's Ins. Co.*, (Pa. 1894), 28 Atl. Rep. 779; 23 Ins. L. J. 475. In this case the premises were vacated on April 4th, the insured on that day requesting her husband to give the notice. He notified the supposed agent two days afterward, and at the request of the latter another insurance agent wrote to the home office of the defendant, the letter reaching there on the 9th. The court said: "What would be reasonable time when the parties live in the same city or town, or have means of ready communication, might be very unreasonable if applied to the parties to this suit, one of whom lived on a farm six miles from a post office, twelve miles from a railroad, and thirteen miles from the town in which the agent of the company who had placed the insurance, and to whom she would naturally look for instruction, resided."

See, for a similar construction of a requirement of "immediate notice" of loss, *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149; *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 108; *State Ins. Co. v. Maackins*, 38 N. J. L. 579; *Continental Ins. Co. v. Lippold*, 3 Neb. 391; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506; *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507.

3. *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 167; 5 Am. Rep. 115; 5 Bennett F. Ins. Cas. 318.

4. *Wakefield v. Orient Ins. Co.*, 50 Wis. 532.

5. *Hill v. Equitable M. F. Ins. Co.*, 58 N. H. 82.

Fourth Stage: VACANCY AND NON-TENANCY. Prohibited, etc.

and consent thereto, during the original term of a policy, are not binding upon a renewal thereof.¹

c. "VACANT;" "VACATED."—Where the designation of persons causing the non-occupancy was omitted, the insurer has been less successful in defending than with the foregoing clause. A provision that the building should not become vacant was not enforced, where the agent retained the policy and informed the insured that vacancy "would not matter."² And a clause imposing forfeiture "if the premises shall be vacated," does not apply where personalty and fixtures alone are insured,³ or where there is a mere temporary absence of the occupant,⁴ or a vacancy incident to the change of tenants,⁵ or to the purposes for which the building is used.⁶ So a house and barn, insured under one policy for

1. Hartford F. Ins. Co. v. Walsh, 54 Ill. 164; 5 Am. Rep. 115; 5 Bennett F. Ins. Cas. 318.

2. St. Paul F. & M. Ins. Co. v. Wells, 89 Ill. 82. See also New Orleans Ins. Co. v. O'Brian, 8 Ky. Law Rep. 785.

3. Carr v. Roger Williams Ins. Co., 60 N. H. 513; 13 Ins. L. J. 443, where the court, after stating the rule that forfeiture conditions were to be construed most strongly against the insurer, said: "Neither the insured nor the plaintiff owned the building or had any interest therein except as a lessee, and the policy did not cover it. The insurance was upon 'the machinery, shafting, belting, tools, and fixtures contained in a two-story frame building and additions to same, known as the Kearsarge Paper Mill.' The mention of the building is merely descriptive of the location of the property. The property being movable, it was important to state its location to distinguish it from other property of the same kind. The description would not necessarily have been different if the property had been stored. The conditions, the breach of which the defendants claim avoids the policies, have no application to the facts of these cases. They relate to the building and nothing else. The term 'premises' does not include, and is never used to designate, personal property. It is used, both in law and in common speech, to indicate lands and tenements. Robinson v. Mercer County Mut. F. Ins. Co., 27 N. J. L. 134; Howard F., etc., Ins. Co. v. Cornick, 24 Ill. 455. The connection in which the term is used indicates no intention to use it in any but its natural and ordinary sense. But to defeat the plain-

tiff's recovery, we are compelled to find that there was such an intention, and to give to the word a strained and unusual signification. We have found no case in which it is even hinted that the word 'premises' is ever used in connection with personal property only. If the insured had owned the building, and the policy had covered the building as well as the machinery, it might with propriety be claimed that the condition relating to occupancy was applicable to both building and machinery and other property described in the policies; but the fact that the title to real and personal property is in different hands, coupled with the further fact that we are compelled to give to the word 'premises' an unusual and unnatural meaning, sustains the view that these conditions have no application to this case. And when we consider that the policies cover personal property and nothing else, because the insured had no insurable interest in the real estate, the inference fairly to be drawn is, that at least one of the parties to the contract did not understand that they were making a contract whereby they were bound to keep their machinery in motion if they would have it insured." But compare Reid v. Lancaster F. Ins. Co., 90 N. Y. 382, where the term "premises" appears to have applied to a ship.

4. Franklin F. Ins. Co. v. Kepler, 95 Pa. St. 492; 10 Ins. L. J. 784.

5. Doud v. Citizens' Ins. Co., 141 Pa. St. 47; Ins. Co. of N. A. v. Hannum, 1 Monaghan (Pa.) 369; Worley v. State Ins. Co. (Iowa, 1894), 59 N. W. Rep. 16; German Ins. Co. v. Davis (Neb. 1894), 59 N. W. Rep. 698.

6. Lebanon Mut. Ins. Co. v. Leathers (Pa. 1887), 8 Atl. Rep. 424.

a gross premium, do not "become vacant" if the barn continues to be put to its ordinary use.¹

d. "VACANT AND UNOCCUPIED."—The linking together, by the copulative conjunction, of the two words, each of which had formed the principal member of previous clauses, was the next change in phraseology. The cases construing this language are not numerous,² because it was retained by few insurers for more than a brief period. At first the conjoint term does not appear to have been given a different construction from that placed upon either word alone. Indeed, it has been expressly said that "the terms 'vacancy' and 'non-occupancy,' are used interchangeably, and as equivalent in meaning."³ In most of the early cases, also, the clause was enforced quite as literally as former ones had been. Its language was held to avoid the policy where tenant removed, though he left furniture in the house and retained the key,⁴ though the insured did not know of the vacancy until a few days before the fire, but was required to give notice thereof,⁵ and

1. *Worley v. State Ins. Co.* (Iowa, 1894), 59 N. W. Rep. 16.

2. "These precise words, in conjunction, have not often come under consideration in the reported cases." Earl, J., in *Hermann v. Merchant's Ins. Co.*, 81 N. Y. 188; 37 Am. Rep. 488.

3. *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 384; *Dohlantry v. Blue Mounds F., etc., Ins. Co.*, 83 Wis. 181.

4. In *American Ins. Co. v. Padfield*, 78 Ill. 167; 5 Bennett F. Ins. Cas. 764, the court said: "The evidence incontestably shows that no person was residing in this house, or had been for about two months prior to, or at the time of, the fire. The tenant in possession at the time the insurance was effected, testified that he had removed from the house that length of time before, and notified the assured of the fact, who requested him to lease it to some one else, but afterward countermanded the directions, and it had remained unoccupied until it was burnt. He says he did not consider that he had anything more to do with the house; that he was not occupying it or paying rent for it; he only had the key to deliver to Anderson when he came back from *Missouri*; that there was a table, a crib, and a straw tick in it, in the house when it burnt. A number of persons testified that the house was vacant. We think there cannot be the slightest room to doubt that the house was vacant and unoccupied when the fire occurred, and had been for two months previously. A fair and reason-

able construction of the language 'vacant and unoccupied,' is, that it should be without an occupant—without any person living in it. This is the popular meaning of the language, as appears from the evidence. Several witnesses, knowing that no one was residing in it, testified that it was vacant; and so would the great majority, if not all persons, say the same thing. The language is not used in a technical, but in a popular sense. If the house had been situated when insured as it was when it was burned, and the assured had answered that it was occupied by a tenant, would anyone doubt that such representation was false?"

5. "It is made an essential condition of the contract that the property should not be exposed to the perils of an unoccupied tenement without the fact being communicated to the insurer and the consent of the company obtained and indorsed by an entry on the policy. This is a just and reasonable precaution against an increased risk without an increased premium, and a substantial and important element of the contract. The danger to unoccupied buildings is certainly greater in the absence of anyone to protect them, or to extinguish the fire at the beginning, or to detect and punish the incendiary; and this is quite manifest from the facts of the present case. It may be that the attempt would not have been made if a vigilant and careful person had been present, interested in the preservation of his own property as well, or if made, would not have

though the building was insured as a schoolhouse, but was afterwards for a time occupied as a dwelling, and then left untenanted.¹ The phrase "vacated . . . and unoccupied" was held to apply to a vessel drawn upon the shore and emptied of its contents, but occasionally visited by workmen who came to make repairs.² This condition, in its usual form, was said to be "not in any way or manner dependent upon the diligence of the assured to keep the building occupied,"³ and when coupled with a clause forbidding increase of risk "by any other means within the control of the assured," it was held to require the latter to show that he could not have prevented vacancy.⁴

There were, of course, other early cases in which the insurers were not successful in escaping liability by virtue of this clause. Indeed, probably the earliest decision directly construing it⁵ was one in which the provision was held to be ineffectual, though non-tenancy appears to have been conceded; but this was founded upon a statute of *Maine* providing that certain stipulated grounds of forfeiture should not apply if there had been no material increase of the risk.⁶ The temporary suspension of a saw-mill⁷

been successful. And if this was not so, and it is an essential condition of the insurance that if the premises become vacant, the consent of the company must be obtained in the manner specified, or the policy become void. By this condition the plaintiffs must abide, and the consequences of their neglect must rest upon themselves. This proposition seems to be too plain for discussion." Smith, C. J., in *Alston v. Old North State Ins. Co.*, 80 N. Car. 326; 8 Ins. L. J. 428. Compare the following language in *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 384: "It does not alter the case that the plaintiff did not know of the vacancy and non-occupancy until the time of reoccupation. Reasonable care required that he should have known of the tenant's removal, and it was his duty to see that the terms of the contract were carried out."

1. In *American Ins. Co. v. Foster*, 92 Ill. 334; 34 Am. Rep. 134; 9 Ins. L. J. 268, the court said: "It is, however, contended that as the building was insured as a schoolhouse, and the company knew it was to be so used, it may be inferred that it was intended to be vacant and unoccupied as common public schoolhouses usually are in vacation; that all know that the common schoolhouses of the country are not continuously occupied, and it must be inferred that occupancy of that character was intended. If such had

been the intention of the parties they would, no doubt, have so written the condition. And the reading of the language repels such inference. The language requires a continuous and uninterrupted occupancy, at least of the character usual to houses occupied for schools. It may be and probably is true that there being no person in the building of nights and Saturdays and Sundays would not amount to a breach of the condition and avoid the policy, as such is the manner of occupying schoolhouses. But the most strained construction cannot go beyond that, so as to hold that it need not be occupied as a school or residence for several months. To so hold would be a perversion of the language the parties have employed to express their meaning."

2. *Reid v. Lancaster F. Ins. Co.*, 90 N.Y. 382.

3. *Niagara F. Ins. Co. v. Drda*, 19 Ill. App. 70; 15 Ins. L. J. 874.

4. *North American F. Ins. Co. v. Zaenger*, 63 Ill. 464; 5 Bennett F. Ins. Cas. 421.

5. *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; 5 Bennett F. Ins. Cas. 401.

6. *Maine Laws* 1861, ch. 34, §§ 3, 4.

7. *Whitney v. Black River Ins. Co.*, 72 N.Y. 117; 28 Am. Rep. 116, where the court said: "The saw-mill was not intended as a domicile, and the meaning of this condition, when used in a policy upon a dwelling house, may be quite

and a cotton factory,¹ the latter meanwhile being frequented by employés and watchmen, has been held not to avoid the policy under this clause. Where the premises were prohibited from becoming "vacant or unoccupied for more than thirty days," this was construed to mean continuous non-tenancy,² and issuance of the policy by the agent with full knowledge that it was, and would for a time remain, unoccupied, was held to waive the provision.³ Finally, the rule was announced in *New York*⁴ that the words "vacant" and "unoccupied" were not synonymous, but that the former was much the stronger term, meaning "empty,"⁵ and that unless

different from its meaning when applied to a saw-mill. The condition against vacancy, although designed mainly for cases where the building insured is used as a habitation, is, however, found in the policy, and effect is to be given to it. But it is to be construed in view of the situation and character of the property insured, and the contingencies affecting its use, to which this and other property of like character, similarly situated, is subject. The description in the policy shows that the defendant knew that the mill was operated by water power, and as it was a saw-mill, the insurer must be presumed to have known that saw-mills are, or may be, used as well for custom work as for sawing the logs of the owner; and as machinery was used for the operation of the mill, the fact that it was liable to break down and need repairs, must also have been within the contemplation of the parties when the policy was issued. The interruptions of the business and the discontinuance of the active use of the saw-mill, by reason of low water, diminished custom, or derangement of the machinery, if held to be a violation of the condition, and to create a vacancy and non-occupation of the building within the true meaning of the condition, would greatly impair the value of the contract as a contract of indemnity, and the result would be, that the contract would be deemed forfeited by the happening of events which might reasonably have been anticipated, and which were among the common incidents of the business carried on, on the insured premises.

1. *Brighton Mfg. Co. v. Reading F. Ins. Co.*, 33 Fed. Rep. 232; *American F. Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131; 17 Ins. L. J. 749.

2. *Hopkins Mfg. Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148; 37 Am. Rep. 488.

3. *Williams v. Niagara F. Ins. Co.*,

50 Iowa 561; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133.

4. *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; 37 Am. Rep. 488; *Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644. Earl, J., in delivering the opinion of the court in the former case, said: "We should have had a different question for consideration if the condition had been that the policy should become void if the house should become 'vacant or unoccupied,' or simply 'unoccupied.' Here we have the two words joined together, 'vacant and unoccupied;' and what do they mean? . . . A dwelling house is unoccupied when no one lives therein, but is not then necessarily vacant. A house filled with furniture throughout cannot be said to be 'vacant,' the primary and ordinary meaning of which is 'empty.' To avoid the policy, the premises must not only be unoccupied but also vacant. Force should be given to both words. This is not a casual contract drawn in haste, in which language has been carelessly used; but it is a form of contract used by the defendant in its business, probably adopted with great deliberation, every word of which, as we may suppose, has been carefully weighed. It was not intended that mere non-occupancy should avoid the policy; if it had been, it cannot be supposed that the word 'vacant' would have been superadded." See also *Limburg v. German F. Ins. Co.* (Iowa, 1894), 57 N. W. Rep. 626; 23 Ins. L. J. 321. *Contra*, *Moore v. Phoenix Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 384; *Dohlantry v. Blue Mounds F., etc., Ins. Co.*, 83 Wis. 181.

5. In *May on Insurance* (3d ed.), § 249a, it is said that vacant means "empty of all but air." This, however, is somewhat stronger language than that used in *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; 37 Am. Rep. 488, which is the only one cited in support of the text. And in *Dohlantry v.*

a building was both untenanted by human beings and devoid of contents, the clause would not apply.¹ This construction, of course, made the clause less effective than it had been when containing but one of the words alone (especially less so than the single word "unoccupied"), and led to a disuse of the copulative conjunction "and" in framing the vacancy clause.

e. "VACANT OR UNOCCUPIED."—The construction given by the *New York* courts, to the phrase last discussed, made it necessary once more to change the language of the vacancy clause. The new departure consisted merely in the substitution of the disjunctive for the copulative conjunction, and though this phraseology has been in use for a comparatively brief period, it seems to have been already more often before the courts than any single form of the clause.

(1) *When the Clause Is Valid and Enforcible*.—Where the

Blue Mounds F., etc., Ins. Co., 83 Wis. 181, the court, by Lyon, J., said: "We are satisfied that the term 'vacant,' as employed in the policy in suit, is the equivalent of 'unoccupied.' It is conceded that the latter term signifies only that the house is uninhabited. If the construction contended for by counsel for plaintiffs was to prevail, the by-law must be construed to mean that, although the company will not insure an unoccupied, that is, an uninhabited, dwelling house, yet if an insured dwelling house becomes and remains unoccupied or uninhabited after the policy is issued, no matter for how long a time, still the policy remains valid, unless the house becomes absolutely vacant for thirty days—that is to say, unless, in the language of some of the cases, it is empty of everything but air. If such is the meaning of the by-law, we should not expect to find a rule against insuring unoccupied dwelling houses. We think the construction contended for is contrary to the language and the plain intent and meaning of the by-law." See, to the same effect, *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 384.

1. It should be observed, however, that, although the language used in the first part of the opinion in the case of *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; 37 Am. Rep. 488, would seem to justify it, still, as applied to the facts before the court, it did not hold that actual emptiness was necessary before a breach of the clause could occur, for the opinion proceeds: "It is not necessary to hold that a house with a few articles of furniture in it, from which the owner or tenant has removed, with

no definite intention of returning, might not be regarded as vacant, or found to be so by a jury. It is sufficient to hold that a house thoroughly furnished, from which the owner has removed for a season, intending to return again and resume possession, is not, in any proper sense, a vacant house."

In the later case of *Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644, the distinction between the two words is perhaps more clearly shown. Folger, J., there says: "There are doubtless conditions of a dwelling house, or other like structure, when either word applied to it, or both words applied to it, will express a like state of it. There are, however, states of it when that will not be the case. It is so because the different things that are receptive of the epithets of vacant and unoccupied are different in their capability and susceptibility of being filled or occupied. Some cannot have one of those terms applicable to them, without the other at the same time being also applicable. Some, from the nature of the use which goes with the occupation of them, may not be vacant, and yet they will, in any just use of the term as applicable to them, be unoccupied. A dwelling house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it. So that, in the use of it, it is a place of deposit of things inanimate and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case, with all inani-

premises are actually unoccupied in violation of this clause, it is, of course, immaterial that the risk was not thereby increased.¹ Often, however, the clause is followed by others expressly forbidding increase of risk "by any means, whatever, within the control of the assured;" but this latter phrase modifies only the clauses immediately preceding it, and does not apply to the words "vacant or unoccupied."² If the building is in that condition, whether or not it became so by means without the assured's control, the policy is forfeited. The requisites of occupancy, as the term is used in this phrase, are not substantially different from those above noticed in discussing that form of the prohibitory clause

mate things taken out, but with those animate still remaining in it, it would not be unoccupied, for it would still be used for shelter and repose. And it is because, in our experience of the purpose and use of a dwelling house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it, that that word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the word 'vacant,' as applied to a dwelling, carries the notion that there is no dweller therein; and we should not be sure always to get or convey the idea of an empty house by the words 'vacant dwelling' applied to it. But when the phrase 'vacant or unoccupied' is applied to a dwelling house, plainly there is a purpose—an attempt to give a different statement of the condition thereof; by the first word, as an empty house, by the second word, as one in which there is not habitually the presence of human beings."

1. *Galveston Ins. Co. v. Long*, 51 Tex. 89; *East Texas F. Ins. Co. v. Kempner* (Tex. 1894), 27 N. W. Rep. 122.

Perhaps, however, the language used by the supreme court of *Illinois* in *Traders' Ins. Co. v. Race*, 142 Ill. 338, must be regarded as modifying this apparently axiomatic statement, at least so far as it applies to suits in equity. That was a bill to foreclose a trust deed, to which, and the debt secured thereby, the insurance company claimed to be subrogated by virtue of a violation of the clause forbidding the premises to "become vacant or unoccupied." In the opinion above referred to, which was on rehearing, the court said: "Since appellants seek relief in a court of equity rather than in a court of law, where appellee would be entitled to have the questions of fact

passed upon by a jury, the evidence to be considered, and the relief that shall thereupon be granted, must be such as are within the principles applied in courts of equity. One of those principles is, a court of equity will never enforce either a penalty or a forfeiture. 2 Story Eq. Jur., § 1319; 1 Pom. Eq. Jur., §§ 459, 460. And so it must follow here that, to entitle appellants to the relief they claim, they must prove, not merely that the premises were vacant or unoccupied at or before the time the fire occurred which destroyed the insured property, but that such vacancy or unoccupancy contributed, in some degree, to the causing of that fire or the prevention of its extinguishment; for, if the causation and the control of the fire were unaffected by the fact of vacancy or unoccupancy, to allow appellants to avoid liability, and recover what they have paid on account of the insurance, by a foreclosure of this mortgage, would, in effect, be to enforce a forfeiture—decree a recovery on a mere technical legal breach of a contract. The evidence wholly fails to show that the property would not have been destroyed precisely as it was, if a family had been residing in the house at the time."

2. *Dennison v. Phoenix Ins. Co.*, 52 Iowa 457; *Moriarty v. Home Ins. Co.*, 53 Minn. 549. In the case last cited Chief Justice Gilfillan, delivering the opinion, said: "The dwelling having become vacant, by a tenant leaving without notice, before the fire, the court below charged the jury that, if it became vacant by means not within his control, then plaintiff could recover. It raises the question whether the words, 'by any means whatever within the control of the assured,' qualify the words 'or become vacant or unoccupied.' It requires a very forced and unnatural construction to give the words that

containing only the descriptive words "unoccupied."¹ These requisites necessarily vary, however, according to the character of the structure insured,² for the same degree of strictness could hardly be exacted in the case of buildings not designed for human tenancy as is required of dwellings. Since the latter form probably the most important as well as numerous class of insured buildings, it will be proper to examine first the tests of occupancy as applied to them.

"For a dwelling house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage."³ It is not sufficient, therefore, that furniture,⁴

effect—a construction which would not occur to anyone reading the policy for the purpose of determining whether he would accept it. The part of the policy quoted specifies several cases or conditions, each following a disjunctive to show that it is a condition by itself. They are divided into two groups, each followed by words qualifying each case in the group. In the first group are the case of increase of risk by the manner of use or occupation, and the case of becoming vacant or unoccupied, and the qualifying words applicable to those cases are "without notice to or consent of this company in writing," those words completing the condition. In the second group are increase of risk first, by the erection or occupation of neighboring buildings; second, by any means whatever within the control of the assured. Then follow the words qualifying the cases in this group—"without the assent of this company indorsed hereon." It would be a forced and unnatural reading to jump the words 'or by any means whatever,' etc., over the words 'without notice,' etc., following the first group, and read them into each case in that group, and, if that could be done, in order to make sense it would be necessary to leave out a word. Try it thus: 'Become vacant or unoccupied, or by any means whatever within the control of the assured.' Strike out the word 'or' before the word 'by,' and there is some meaning, but leave that word in, and there is no sense to the words following it. A very slight change in the phraseology of conditions of this character in policies, will materially change the meaning."

1. See *supra*, this title, "*If the Premises Become Unoccupied*."

2. "It occurs to us that these words must also be construed in view of the uses and purposes for which the building is adapted; that is, as to whether it is so built and arranged as to be used as a dwelling house, or a store building, or a schoolhouse, or a structure fitted and adapted for use for some other purpose." Kinne, J., in *Limburg v. German F. Ins. Co.* (Iowa, 1894), 57 N. W. Rep. 626; 23 Ins. L. J. 321.

"The occupancy of a dwelling, of a mill, of a barn, is each essentially different in its scope and character, and the construction must have reference thereto." Berkshire, J., in *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77; 19 Ins. L. J. 720. See also *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. L. 220; 43 Am. Rep. 365; *Kimball v. Monarch Ins. Co.*, 70 Iowa 513; *German Ins. Co. v. Davis* (Neb. 1894), 59 N. W. Rep. 698; *Fritz v. Home Ins. Co.*, 78 Mich. 565.

3. Folger, C. J., in *Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644.

4. **Leaving Furniture.**—*Barry v. Prescott Ins. Co.*, 35 Hun (N. Y.) 601; *Corrigan v. Connecticut F. Ins. Co.*, 122 Mass. 298. In both these cases the owner of the furniture had possession of the key. *Bonenfant v. American F. Ins. Co.*, 76 Mich. 653; *Fitzgerald v. Connecticut F. Ins. Co.*, 64 Wis. 463. See also (though construing a different clause), *Cook v. Continental Ins. Co.*, 70 Mo. 610; 35 Am. Rep. 438; 9 Ins. L. J. 887; *Sleeper v. New Hampshire F. Ins. Co.*, 56 N. H. 401; 5 Ins. L. J. 538; *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 384.

In the following cases, however, the fact that furniture had been left in the building seems to have been re-

tools,¹ or other chattels,² are left in the building, or that it is occasionally visited and inspected by some one,³ or is used temporarily as a place of abode,⁴ or that unsuccessful efforts are made to procure an occupant.⁵ Corresponding tests have been applied to structures other than dwellings. A store building is "unoccupied," within the meaning of this clause, when the tenant has removed, although he has left a counter and permitted another party to store liquor there.⁶ So a structure insured as a "morocco factory" is not "occupied" after the tenant removes and business therein is suspended, though the machinery and fixtures remain and a watchman residing next door is in charge, and a key is in the possession of the insured's agent who visits the premises frequently.⁷

garded as a strong circumstance to establish occupancy: *Liverpool, etc., Ins. Co. v. Buckstaff*, 38 Neb. 146; 23 Ins. L. J. 648; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135; 23 Ins. L. J. 641; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; 34 Am. Rep. 106.

1. **Leaving Tools.**—*Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77; 19 Ins. L. J. 720; *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa 676. *Compare* (construing a different clause), *Keith v. Quincy Mut. F. Ins. Co.*, 10 Allen (Mass.) 228; 5 Bennett F. Ins. Cas. 51; *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117; 5 Bennett F. Ins. Cas. 497.

2. **Miscellaneous Effects.**—In *Litch v. North British, etc., Ins. Co.*, 136 Mass. 491, the prospective tenant left in the house "a pail, a scrubbing brush, and a mop, intending to go there on the following Monday and clean it." The court, by Morton, C. J., said: "There is no pretense for saying that this shows an occupancy by Davis, within the meaning of the condition of the policy above cited, the object of which was to insure that the house should be under the care and supervision of some one in the actual occupation and use of it. *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117." See also *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519; *Sexton v. Hawkeye Ins. Co.*, 69 Iowa 99; *Snyder v. Fireman's Fund Ins. Co.*, 78 Iowa 146; *Richards v. Continental Ins. Co.*, 83 Mich. 508; *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72; *Home Ins. Co. v. Scales* (Miss. 1894), 15 So. Rep. 134; 23 Ins. L. J. 712.

3. **Visitation Insufficient.**—*Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644; *Fitzgerald v. Connecticut F. Ins. Co.*, 64 Wis. 463; *Weidert v. State Ins. Co.*, 19 Oregon 261;

20 Am. St. Rep. 809; 19 Ins. L. J. 740.

4. **Fitzgerald v. Connecticut F. Ins. Co.**, 64 Wis. 463. See also (construing "unoccupied") *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117; 5 Bennett F. Ins. Cas. 497.

5. **Trying to Procure Tenant.**—*Ridge v. Scottish Commercial Ins. Co.*, 9 Lea (Tenn.) 507 (five days non-occupancy, but tenant actually procured and ready to move in). See also (construing another clause) *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277; 35 Am. Rep. 656; 9 Ins. L. J. 504. But *compare*, for a different view, the early case of *Gamwell v. Merchants', etc., Ins. Co.*, 12 Cush. (Mass.) 167; also *Kelley v. Home Ins. Co.*, 5 Ins. L. J. 134; 2 Cent. L. J. 478.

6. **Store Building.**—In *Limburg v. German F. Ins. Co.* (Iowa, 1894), 57 N. W. Rep. 626; 23 Ins. L. J. 321, the court said: "Mere use of a store building as a place in which a few articles may be left, no business being carried on therein, and the premises not being so used as to in any wise insure for them the care, watchfulness, and protection from danger to exposure to fire, which must have been in contemplation of the parties to the contract, in view of the adaptability of the building for certain uses only, cannot be deemed an occupancy. To prevent a policy from being avoided for vacancy or unoccupancy in such a case, the use and occupancy must be of such a character as ordinarily pertains to a building adapted for such purposes. A mere storage of property therein, which does not involve the care and watchfulness which the policy holder owes to the insurer, will not suffice to constitute occupancy."

7. **Factory.**—*Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165, reversing 42 Hun

(2) *When the Clause Is Not Enforced*—(a) **Temporary Absence.**—Notwithstanding the array of decisions in which the validity of this clause, forbidding the premises to be “vacant or unoccupied,” has been sustained, there are many others in which its provisions have not been so applied as to effect a forfeiture of the insurance. For the most part, however, these authorities fall within certain recognized and well defined exceptions to the conceded rule that the clause itself is valid and enforceable. Among the most important of these exceptions is the doctrine that the mere temporary absence of the occupant, *animo revertendi*, will not render the premises “vacant or unoccupied.” It has been well said that the insured “is not to become a prisoner on the property, . . . nor to be charged with laches when, in the pursuit of his business, health or pleasure, he temporarily leaves the property which still remains his home.”¹ Hence, the departure of an occupant for one night, during which the house was burned, is not fatal, though he was only sleeping there and taking his meals elsewhere.² So the absence of a family for twelve days to visit a sick relative, is not a vacation of their dwelling, especially where it is left in charge of one who visits it daily.³ And it was held in *Illinois* that the clause was not violated where the occupants, their effects having been removed, had departed from the premises, all save one finally, and that one visited them again only for the

(N. Y.) 655; 4 N. Y. St. Rep. 867. The opinions by the two courts should be read together for the entire facts.

1. *Springfield F., etc., Ins. Co. v. McLimans*, 28 Neb. 850. In this case it is further said: “A party, by effecting insurance upon his dwelling, does not thereby impliedly agree that he will remain on guard to watch for the possible outbreak of a fire. He insures his property as a precaution against possible loss. If he is indebted, his duty to his creditors requires this; and if not in debt, his duty to his family may induce him to procure the insurance. . . . The necessity of most persons for temporary absences, on business or family convenience, is known to everyone, and must have been in the contemplation of the insurer when the policy was issued.” Compare *O'Brien v. Commercial F. Ins. Co.*, 38 N. Y. Super. Ct. 517 (construing the phrase “vacant and unoccupied”); *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant’s Ch. (Ont.) 418.

2. In *Laselle v. Hoboken F. Ins. Co.*, 43 N. J. L. 468, Beasley, C. J. in delivering the opinion of the court, said: “It was insisted that this was a vacancy within the meaning of the condition in

question. If this be so, then the party insured, if the only occupant of the premises, could not put his foot off such premises without leaving his buildings in an uninsured condition. Such an interpretation of the clause is quite unreasonable. A dwelling house does not become vacant or unoccupied, in the usual acceptation of such terms, when a tenant leaves it, in the ordinary course of things, for a few hours. A furnished abode would not be called a vacant or unoccupied house on account of a temporary absence of the tenant. When there is a cessation to use it as a dwelling, then it is properly styled a vacant house. It is, in the utmost degree, improbable that it was the understanding of these contracting parties that this property was to lose its insurance the moment and as often as the occupant left it to visit a neighbor or to attend to business.” See also *Shackleton v. Sun Fire Office*, 55 Mich. 288.

3. *Stupetski v. Transatlantic F. Ins. Co.*, 43 Mich. 373; 38 Am. Rep. 195. See also (confirming the above) *Hill v. Ohio Ins. Co.* (Mich. 1894), 58 N. W. Rep. 359; 23 Ins. L. J. 559; *McMurray v. Capital Ins. Co.* (Iowa, 1893), 54 N. W. Rep. 354.

purpose of surrendering possession to a lessee, and was absent when the loss occurred.¹

(b) *Vacancy Incident to the Purpose for Which the Building Is Used*—(1) *TENEMENT HOUSES*.—Another important qualification affecting the enforceability of this clause, is the doctrine that it does not apply where non-tenancy occurs only in the usual course of, and incidental to, the business to which the insured structure is devoted. Thus, in the case of a tenement house, it seems, by the great weight² of authority, that no breach of the condition accrues merely on account of a vacancy incident to a change of tenants.³ In the language of a recent opinion: "It may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence, that the parties did not understand that the house should be considered vacant, and the policy forfeited, or suspended, according to its terms, immediately upon the tenant's leaving it."⁴ This statement is prefaced by language restricting its language to buildings expressly described as tenement houses,⁵ and not to dwellings occupied by the insured, yet the same rule has been applied to structures of which this was not true.⁶ And although in its inception this doctrine was doubtless intended to obtain only

1. *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; 34 Am. Rep. 106. But one authority is cited in discussing this branch of the case, and Justices Walker and Scholfeld dissent, saying: "We do not agree either in the reasoning or conclusion of this opinion. Unless the contract of the parties is affected by fraud or mistake, it should be enforced as written—and where it is thus affected, the remedy is in equity." The view of the majority of the court may perhaps be harmonized with other adjudications, however, on the ground that the vacancy which certainly did exist, was one incidental to the change of tenants. See also *Traders' Ins. Co. v. Race* (Ill. 1892), 29 N. E. Rep. 846; 21 Ins. L. J. 363, *affirming* 31 Ill. App. 625; *Liverpool, etc., Ins. Co. v. Buckstaff*, 38 Neb. 146; 23 Ins. L. J. 648; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135; 23 Ins. L. J. 641.

2. See, however, to the contrary, *Ridge v. Scottish Commercial Ins. Co.*, 9 Lea (Tenn.) 507; *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420; 12 Ins. L. J. 569; *Craig v. Springfield F. & M. Ins. Co.*, 34 Mo. App. 481.

3. *Change of Tenants Not a Vacancy*.—*Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469; 55 Am. Dec. 360; 3

Bennett F. Ins. Cas. 288; *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269; *Traders' Ins. Co. v. Race* (Ill. 1892), 29 N. E. Rep. 846; 21 Ins. L. J. 363; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; 34 Am. Rep. 106; *American Cent. Ins. Co. v. Clarey*, 28 Ill. App. 195; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa 472; 59 Am. Rep. 414; *Dennison v. Phoenix Ins. Co.*, 52 Iowa 457 (*recognizing* but not *applying* the doctrine); *Liverpool, etc., Ins. Co. v. Buckstaff*, 38 Neb. 146; 23 Ins. L. J. 648; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135; 23 Ins. L. J. 641; *Kelley v. Home Ins. Co.*, 5 Ins. L. J. 134; 2 Cent. L. J. 478; *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94 (where, however, the precise language of the clause does not appear). *Compare* *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; 7 Ins. L. J. 157 (where this seems to have been one of the points decided, though there is almost no discussion of it in the opinion); *Worley v. State Ins. Co.* (Iowa, 1894), 59 N. W. Rep. 16 (construing "vacant").

4. *Lyon, J.*, in *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269.

5. See the preceding portion of the opinion just cited in the text.

6. *Phoenix Ins. Co. v. Tucker*, 92 Ill.

where a prospective tenant was actually preparing to move in,¹ it has been extended farther in some decisions and held to apply where there had been a prolonged vacancy, and the insured was doing no more than "endeavoring to obtain a tenant,"² and even where no steps whatever appear to have been taken towards re-occupancy.³

(2) OTHER BUILDINGS.—The general doctrine, that temporary, incidental vacancy is not fatal, applies also to other buildings than tenements. A policy which describes the subject of insurance as occupied for the purposes of a "saddlery and printing office," is not avoided by vacancy for "only such time as was reasonably necessary for the outgoing tenant to remove his goods, and the incoming tenant to place his in the building."⁴ It has been held that a shingle mill does not "become vacant or unoccupied" or "cease to be operated," by a suspension for six weeks for want of running material.⁵ And the *New York* supreme court has recently decided that the provision of the clause did not apply to a church building, owned and insured by a priest as his individual property, and near which he resided, though no religious services had been held there for more than a year.⁶ What appears to be

64; 34 Am. Rep. 106; Traders' Ins. Co. v. Race (Ill. 1892), 29 N. E. Rep. 846; 21 Ins. L. J. 363.

1. See the earlier cases cited in note 3 on preceding page.

2. *Kelley v. Home Ins. Co.*, 5 Ins. L. J. 134; 2 Cent. L. J. 478, where the premises had been unoccupied for thirty-three days. Compare *Gamwell v. Merchants*, etc., Mut. F. Ins. Co., 12 Cush. (Mass.) 167, construing a different clause. See, *contra*, *Ridge v. Scottish Commercial Ins. Co.*, 9 Lea (Tenn.) 507; *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277; 35 Am. Rep. 656; 9 Ins. L. J. 504; the clauses construed in the latter case also being different.

3. *Liverpool, etc., Ins. Co. v. Buckstaff*, 38 Neb. 146; 23 Ins. L. J. 648; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135; 23 Ins. L. J. 641.

4. *Store Building*.—*East Texas F. Ins. Co. v. Kempner* (Tex. Civ. App. 1894), 25 S. W. Rep. 999; 23 Ins. L. J. 549.

5. *Mills and Factories*.—In *City Planning*, etc., *Mill Co. v. Merchants*, etc., Mut. F. Ins. Co., 72 Mich. 654, the court said: "The stoppage of the mill was occasioned solely by the want of logs to manufacture. The logs were expected daily, and their not being received was not the fault of plaintiff. It was a mere temporary suspension, which, in the first place, was supposed would only last a few days, and after that

from day to day. This clause cannot mean that a stoppage of this kind for a day, or even a week, for want of running material, an event quite likely to occur once or more in any season, would be considered 'ceasing to operate.' The policy speaks of premises becoming vacant or unoccupied 'or, if a mill or manufactory, it shall cease to be operated.' This must mean something more than a temporary suspension. It must mean a closing with the intention of ceasing operation, not a shutting down for a few days or weeks, because of the happening of events incident to the conducting of a mill in that locality and which might be reasonably expected, such as the want of logs because of low water, which caused the suspension in this case." See, to the same effect (but construing "vacant or unoccupied"), *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; 28 Am. Rep. 116; *Brighton Mfg. Co. v. Reading F. Ins. Co.*, 33 Fed. Rep. 232; *American F. Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131; 17 Ins. L. J. 749; *Lebanon Mut. Ins. Co. v. Leathers* (Pa. 1887), 8 Atl. Rep. 424, construing "vacated." But compare *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165, *reversing* 42 Hun (N. Y.) 655.

6. In *Caraher v. Royal Ins. Co.*, 63 Hun (N. Y.) 82, the court said: "The referee found, as matter of fact, that the building did not become vacant

an extreme application of the principle was made by the *Michigan* court where a barn, insured upon oral application, was used at the time only for the storage of tools and produce, and this use was known to the company's agent; but even these contents had been removed before the fire, yet the building was held not to be vacant or unoccupied.¹

(c) *Vacancy Preparatory to Occupation*.—Closely allied to the qualification last above discussed, is another in pursuance of which the courts have generally² held that no forfeiture occurs where the premises are being actually prepared for some definite occupant. Thus a policy on a dwelling in process of construction is not avoided because the structure is burned before being tenanted.³ And a building designated and insured as a store is not "vacant or unoccupied" while being placed in proper condition for a new tenant.⁴ So, generally, a building is sufficiently occupied, within the meaning of this clause, if it is being fitted for human habitation.⁵

(d) *Partial Non-Tenancy*.—Still another form of non-occupancy, which the courts generally hold to be excusable, is that which is partial as regards either space or time. The question in respect

or unoccupied. Mr. Caraher, from the time he purchased the property, held therein public religious service until October, 1888. Soon after that time another pastor was appointed for the congregation, and it worshipped at another place. No religious service was held in the church after October, 1888. There is evidence tending to show that Mr. Caraher quit holding services on account of ill health, and that this disability continued until after the fire; that during all the time service was not held, and down to the fire, the church was in the care of the sexton, who had been such for several years, and that he took substantially the same care of it that he did when service was held. Mr. Caraher continued all the time to reside in the dwelling in the same yard, and within fifteen feet of the church; and he testifies that he went frequently into the church; that the ornaments and vestments used in the service of the church remained there down to the fire, and that at the time of the fire, there was everything in the church necessary for services. It appears that some months before the fire the gas-meter was taken out of the church by the gas company. The question seems to be whether, within the contemplation of the contract, the building became unoccupied in October, 1888, by reason of the cessation therein of church services. There was

no warranty that church services should continue to be held there. The fact that the insurance was to Caraher as individual owner, rather rebuts the idea that the religious corporation and society that had previously owned and occupied were expected to continue to occupy for an indefinite period. A condition of this kind is to be construed in view of the situation and character of the property insured, and in view of contingencies as to its use within the reasonable contemplation of the parties."

1. *Fritz v. Home Ins. Co.*, 78 Mich. 565.

2. But see *Ridge v. Scottish Commercial Ins. Co.*, 9 Lea (Tenn.) 507; *Craig v. Springfield F. & M. Ins. Co.*, 34 Mo. App. 481.

3. *German Ins. Co. v. Penrod*, 35 Neb. 273. It does not appear from the opinion just what was the language of the vacancy clause here, but from the date and from what is known of the policy issued by the defendant company, the words were probably "vacant or unoccupied."

4. *Rockford Ins. Co. v. Wright*, 39 Ill. App. 574.

5. *Shackleton v. Sun Fire Office*, 55 Mich. 288; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa 472; 59 Am. Rep. 414; *Traders' Ins. Co. v. Race* (Ill. 1892), 29 N. E. Rep. 846; 21 Ins. L. J. 363, affirming 31 Ill. App. 625; *Kelley v. Home Ins.*

to space has often arisen in construing blanket policies covering either an apartment building or more than one structure, and the decided weight of authority is to the effect that the vacancy of one of the parts,¹ or one of such insured buildings,² would not effect a forfeiture of the policy. It was held, however, where sixteen houses were insured in one policy, that the non-occupancy of eight avoided the insurance as to them,³ and there are decisions to the effect that blanket insurance upon a house and outbuildings may be forfeited by vacating the latter.⁴ It is likewise true that

Co., 5 Ins. L. J. 134; 2 Cent. L. J. 478. In the case last cited, however, the chief "preparation" seems to have been efforts to obtain a new tenant.

1. *Vacancy of Part Not Fatal*.—Bryan v. Peabody Ins. Co., 8 W. Va. 605; Burlington Ins. Co. v. Brockway, 138 Ill. 644.

In Bryan v. Peabody Ins. Co., 8 W. Va. 605, the policy covered "a two-story frame building standing on leased ground." The court held that the vacancy of the second story did not avoid the policy, and said that the provision forbidding the building to be vacant or unoccupied "must be construed to mean and apply to the whole or entire premises as to its becoming vacant or unoccupied, and not merely to a part thereof. Had the company intended otherwise, it is reasonable to suppose it would have so declared. It would not have contented itself with the general and comprehensive expression 'above mentioned premises,' but would have manifested its meaning and intention in common and plain language, such as 'above mentioned premises or any part thereof.'"

2. *Vacating One of Several Buildings*.—McQueeny v. Phoenix Ins. Co., 52 Ark. 257; 20 Am. St. Rep. 179 (containing a full review of the authorities); Hartford F. Ins. Co. v. Walsh, 54 Ill. 164; 5 Bennett F. Ins. Cas. 318; Worley v. State Ins. Co. (Iowa, 1894), 59 N. W. Rep. 16; Kimball v. Monarch Ins. Co., 70 Iowa 513; Garver v. Hawkeye Ins. Co., 69 Iowa 202; Harrington v. Fitchburg Mut. F. Ins. Co., 124 Mass. 126; 7 Ins. L. J. 618. Most of these, however, construe other phrases than "vacant or unoccupied."

3. In Connecticut F. Ins. Co. v. Tilley, 88 Va. 1024; 21 Ins. L. J. 558, the court reasons as follows: "In this case the insurance was on sixteen tenement houses at \$187.50 a piece, aggregating \$3,000 on the whole. The policy provides that 'if the premises become un-

occupied,' etc., as already stated. What was meant by this? Was it that if one house which was insured should become and remain vacant, in violation of the condition, that then the whole insurance on the sixteen houses should be forfeited; or that if all the houses, on the other hand, except one, should become and remain unoccupied, in violation of the policy, then the policy was not to be forfeited; the circuit court, by its action in instructing the jury and refusing to set aside the verdict, held the latter, because, as we have already stated, eight of the said tenements were so vacant, eight occupied. But we think neither of these propositions is a reasonable construction of the policy. These houses were separate and distinct, with lanes running between, that is, the eight double houses. They are not insured as one house, but as sixteen different houses, which they might have been, and still contiguous, and a separate value is placed on each, for what purpose? Obviously to distribute the insurance among them. The case cited by the plaintiff in error of Merrill v. Agricultural Ins. Co. (73 N. Y. 464; 29 Am. Rep. 184), is very much in point, and the reasoning is satisfactory. Chief Justice Folger, in that case, said: 'It is plain, from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance, that they looked upon them as distinct matters of contract. The effect of the separate valuation was to make them so.'"

4. Hartshorne v. Agricultural Ins. Co., 50 N. J. L. 427; 18 Ins. L. J. 56; Bishop v. Norwich Union F. Ins. Co., 14 Can. L. Times (Nova Scotia) 311. Both of these cases construe "unoccupied." In the former case, the chancellor, says, in delivering the opinion of the court: "By the literal reading of the condition which is relied upon as a defense to the plaintiff's suit, it is apparent that it applies to all the sub-

occupancy need not, as regards time, be entire. Partial occupancy, such as the use of the building for sleeping purposes only, has often been held sufficient.¹

(e) *Waiver*.—The vacancy clause, like other provisions of the insurance contract, may, of course, be waived, and various are the acts of omission and commissions from which that result will follow. The most common ground for implying a waiver is the fact that the insurer has notice that the subject of insurance does not conform to the requirements of the clause. The issuance of a policy to insure a building known by both parties to be unoccupied, has been construed as a waiver of any breach at the time,² especially where there is another provision contradicting that against non-occupancy,³ or where there was no

jects of the insurance, and brings them all within its force and effect; and from the nature of the contract, whether it be divisible or not, we are constrained to infer that the existence of the condition had a potent influence in securing the assumption of the entire risk; for it is a matter of common knowledge that a farm, with its dwelling and outbuildings, constitutes a single establishment, generally remote from other habitations, and that the protection of the whole must, in a great measure, depend upon the occupants of the building. Almost without exception, the outbuildings of a farm are clustered about a place of abode, and for that reason are deemed to be more secure than the occasional outlying barn or crib, which, because of its isolation, becomes the bane of its apprehensive owner. It seems to be impossible not to assume, in this case, that the proximity of the outbuildings to the dwelling influenced the insurer to enter into the contract or contracts under the protection of the condition here questioned. It is natural and reasonable that it should be held to have intended that the continuance of the insurance, upon all the subjects thereof, was to depend upon the occupation of the dwelling. I fail to perceive anything, either in the language of the condition or in its reasonable application, that should lead to the determination that compliance with its terms was not requisite to the validity of the policy as to each item of property insured."

1. *Sleeping as Occupancy*.—Hartford F. Ins. Co. v. Smith, 3 Colo. 422; 7 Ins. L. J. 140; *Laselle v. Hoboken F. Ins. Co.*, 43 N. J. L. 468; *Johnson v. New York Bowery F. Ins. Co.*, 39 Hun (N. Y.) 410; *Stensgaard v. National F. Ins. Co.*, 36 Minn. 181; *Traders' Ins.*

Co. v. Race (Ill. 1892), 29 N. E. Rep. 846, *affirming* 31 Ill. App. 625; *Home Ins. Co. v. Wood*, 47 Kan. 521. But see, *contra*, *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. L. 427; 18 Ins. L. J. 56.

2. *Insuring Vacant Buildings*.—Commercial Ins. Co. v. Spankneble, 52 Ill. 53; 4 Am. Rep. 582; *Devine v. Home Ins. Co.*, 32 Wis. 471; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 143; *Aurora F., etc., Ins. Co. v. Kranich*, 36 Mich. 289; *Short v. Home Ins. Co.*, 90 N. Y. 16; 43 Am. Rep. 138. In the case last cited the court says: "It was a question of fact for the jury to determine, whether the defendant's agent knew the condition of the premises, or regarded it as of any consequence whether the premises were occupied or otherwise, and made the insurance, without any reference whatever to the subject of occupation. If he did so, then the condition as to the future vacancy or non-occupation was nugatory and may be regarded as waived. A contrary rule would be imputing a fraudulent intent to the defendant when the policy was delivered, not to give a valid and binding policy, although receiving pay for such a one, and although plaintiff should labor under the impression that he had one. Such an imputation can only be avoided upon the theory that this condition was overlooked, and the defendant forgot or neglected to express the fact in the policy, or that it waived the condition or held itself estopped from setting it up. (See *VanSchoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 140.)"

3. In *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, the court observes: "The policy contains a printed stipulation or condition that it shall be void if the premises shall become vacant of

application,¹ or in the case of structures other than dwellings, where the use continued the same as when first insured.² There are, however, many modifications of this doctrine. It has been held not to apply where, though the building was vacant when insured, it remained so in spite of promised occupancy.³ Knowledge of non-occupancy is not to be imputed to the insurer from the mere fact of issuing a policy on a building in that condition,⁴ nor is a waiver of the clause effected by knowledge alone of the subsequent vacancy of a building occupied when insured,⁵ nor by a demand for proofs of loss after obtaining such knowledge,⁶ nor by an offer to compromise.⁷ An agent's construction of the vacancy clause has been held to bind the company, though prejudicial to it.⁸

VACANT LANDS.—See note 9.

VACATION—(See also JUDGE, vol. 12, p. 14; TERM, vol. 25, p. 949).—The term "vacation" is applied to that period of time between the end of one term and the beginning of another, and

unoccupied. The premises were unoccupied when the policy issued, and during much of the term for which they were insured, and also at the time they were burned. But, under the circumstances of the case, we do not think the policy was thereby rendered void. The insured property consisted of distillery buildings and machinery. Presumably, the property was available for no other use; yet the policy prohibits that use of the property, and, but for the carpenter's risk which the defendant granted, would have compelled the assured to let his property stand idle or forfeit his insurance. In other words, it would have compelled him to leave the property practically unoccupied during the life of the policy. With such a provision in the policy, it seems to us that the company cannot be heard to allege a forfeiture of the contract because the premises were unoccupied."

1. See cases cited in last note but one, *supra*, particularly *Short v. Home Ins. Co.*, 90 N. Y. 16.

2. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582; *Rockford Ins. Co. v. Wright*, 39 Ill. App. 574; *Fritz v. Home Ins. Co.*, 78 Mich. 565. Compare *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291; 3 Am. Rep. 76.

3. *Hotchkiss v. Home Ins. Co.*, 58 Wis. 297; *Royal Ins. Co. v. Lubelsky*, 86 Ala. 530; 18 Ins. L. J. 868; *Connecticut F. Ins. Co. v. Tilley*, 88 Va. 1024; 21 Ins. L. J. 558.

4. *England v. Westchester F. Ins. Co.*, 81 Wis. 583; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212; 20 Ins. L. J. 652.

5. *Home Ins. Co. v. Scales* (Miss. 1894), 15 So. Rep. 134; 23 Ins. L. J. 712; *Ins. Co. of N. A. v. Garland*, 108 Ill. 220; *Commercial Union Assur. Co. v. Dunbar* (Tex. Civ. App. 1894), 26 S. W. Rep. 628.

6. *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa 335; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212; 20 Ins. L. J. 652.

7. *Richards v. Continental Ins. Co.*, 83 Mich. 508; 21 Am. St. Rep. 611.

8. *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 316; 42 Am. Rep. 297. But see, *contra*, *Rogers v. Phenix Ins. Co.*, 121 Ind. 570.

9. **Vacant Lands.**—The word "vacant," when applied to lands, means those which have not been appropriated by individuals. So held where lands conveyed were described as bounded by "vacant lands" on the north and south. *Marshall v. Bompert*, 18 Mo. 84.

Lands recently purchased by the state from a corporation, to which they had been originally granted by the state, are not "vacant lands," within the acts for granting lands; and a grant taken out for such lands vests no title in the grantee. *State v. Arledge*, 2 Bailey (S. Car.) 401; 23 Am. Dec. 143.

Lands once granted by the state to individual citizens, do not become "vacant lands" within the meaning of the statute, where the state subsequently

during which the court is closed for ordinary business. During vacation, however, certain urgent classes of business may be transacted by a judge at chambers.¹

acquires title to them but abandons the actual use to which they were put. *State v. Bevers*, 86 N. Car. 588.

1. **Such Time as the Court Is Not Actually in Session.**—In *Thompson v. Beneppe*, 67 Iowa 80, Seevers, J., said: "There cannot be, we think, a fixed and definite meaning given to the word 'vacation.' That it ordinarily means the time between terms is undoubtedly true. See *Bouv. Law Dict.* But whether this meaning should be given to the word in any particular instance, depends upon the subject-matter and the necessity which exists that some other meaning should be adopted. When the subject-matter is considered, as well as the usual purposes for which an injunction is sought as a protection against wrong or the invasion of legal rights, we think the word 'vacation,' as used in the statute, should be construed to mean such time as the court is not actually in session." And in this case the word, as used in a statute authorizing judges to grant injunctions in "vacation," was so construed. See also *INJUNCTIONS*, vol. 10, p. 1007.

But in *Brayman v. Whitcomb*, 134 Mass. 525, the contrary was held, where a statute authorized the clerk of court to take a recognizance in vacation. The court said: "In the statute, the word 'vacation' is used in contradistinction to 'term time'; indicating an intention to use it in its legal sense. The English legal year was divided into four terms of different lengths, separated by the vacations, which were the seasons of the court festivals or fasts, or were deemed necessary on account of the avocations of rural business. And in this country courts have their terms and vacations. *Bronson v. Schulten*, 104 U. S. 415. The legal definition of the word 'vacation' is that period of time between the end of one term and the beginning of another. *Bouv. Law Dict.* We are to consider the legislature, when dealing with subjects relating to courts and legal process, as speaking technically, unless from the statute itself it appears that they made use of words in a more popular sense. *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 411. The intervals of time between the actual sessions of court, when conducting the business

of a term, cannot be called vacations, and, as there was a present existing term of the superior court, no authority existed to take the recognizance in question."

And so in *State v. Derkum*, 27 Mo. App. 629, the court construed the word "vacation" as having reference "to the vacation between courts—between a term and the next term thereafter," and to adjournments for more than a day.

Where a circuit court adjourned over for thirty-two days, it was held that the period intervening, in which the court did not sit and transact business, was to be regarded as a "vacation," within the meaning of that word in *Illinois Practice Act*, section 66, authorizing judgments by confession in "vacation." But the word is not to be understood as embracing all the time the court is not actually in session, or as embracing adjournments from day to day. *Conkling v. Ridgely*, 112 Ill. 36; 54 Am. Rep. 204. In this case the court said: "No doubt an application of the strict common-law definition which we find of the term 'vacation,' to wit, 'a vacation is all the time between the end of one term and the beginning of another' (6 *Jacobs' Law Dict.* 323), would make the time of the entering of this judgment not to be in vacation. . . . The inquiry is, whether we must adopt this as the meaning of the word 'vacation,' in the construction of the 66th section of the *Practice Act*, authorizing the confession of judgments in vacation. We think that under this act the term 'vacation' may well be given a different meaning from what it had at common law, as above given. Under the earlier organization of courts in *England*, 'terms' of the courts were four periods in each year. They commenced on fixed days, and had a fixed time of termination, and they aggregated ninety-one days. The vacations embraced all the days in the year not included in the 'terms.' Any such a period of recess of a court of more than a month's duration, as we find in this case, was unknown in that system. . . . We would not be understood as holding that, under this act, vacation means all the time the court is not in actual

VADIUM MORTUUM—(See also MORTGAGES, vol. 15, p. 725; PLEDGE AND COLLATERAL SECURITY, vol. 18, p. 590).—A mortgage or dead pledge. It is a security given by the borrower of a sum of money, by which he grants to the lender an estate in fee, on condition that if the money be not repaid at the time appointed, the estate so put in pledge shall continue to the lender as dead, or gone from the mortgagor.¹

VADIUM VIVUM—(See also ANTICHRISIS, vol. 1, p. 610; MORTGAGES, vol. 15, p. 725).—A species of security by which the borrower of a sum of money made over his estate to the lender, until he had received that sum out of the issues and profits of the land. It was so called because neither the money nor the lands were lost, and were not left in dead pledge. It was termed a living pledge, for the profits of the land were constantly paying off the debt.² The ancient *vadium vivum* differs from the modern Welsh mortgage principally in this, that in the latter the issues and profits were not applied to the discharge of the principal, but only to the interest upon the debt.³ One form of Welsh mortgage, however, required the rents and profits to be applied to the principal as well as the interest.⁴

VAGABOND—(See also VAGRANCY, vol. 28). See note 5.

VAGRANCY.—(See also HOUSE OF REFUGE AND CORRECTION, vol. 9, p. 784; POOR AND POOR LAWS, vol. 18, p. 766.)

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I. DEFINITION.—Vagrancy is the state or condition of a vagrant. The terms "vagrant," "vagabond," and "tramp" have practically the same signification; that is, a person, who, being able to work, refuses to do so, but lives idly, or roams from place to place, begging, or living without labor or visible means of support.⁶

session, or that it embraces the time of adjournment from day to day; but we are clearly of opinion that, where there is the adjournment of court for any such period of time as is found in the present case, the true construction of this 66th section of the Practice Act requires that the broader definition which we find of the term 'vacation' should be adopted, and that the time of recess should be considered as in vacation, for the purpose of admitting the taking of judgments by confession."

1. Bouv. Law Dict.
2. Bouv. Law Dict.
3. 1 Jones on Mortg. (4th ed.), § 3.
4. Coote on Mortg. 208. See also Angier v. Masterson, 6 Cal. 61; Rantert v. Clow, 16 Tex. 9.

5. In *Johnson v. State*, 28 Tex. App. 562, it was held, where a statute prohibited the keeping of a house "as a common resort for prostitutes or vagrants," and the indictment charged the defendant with keeping a house "as a common resort for prostitutes and vagabonds," that the words "vagrant" and "vagabond" were not equivalent or convertible terms, and that the court should have stricken out the word "vagabond" from the indictment as surplusage, and confined the proof to the charge that the house was kept as a common resort for prostitutes.

6. 2 Bouv. Law Dict. 777; 2 Abb. Law Dict. 625; Black Law Dict.

Such a person is described in old English law as "one who wakes on the

II. STATUTES.—Statutes have dealt with the subject of vagrancy,¹ treating it as a misdemeanor, and conferring jurisdiction upon justices of the peace and police magistrates,² who are authorized to convict summarily and inflict the punishment prescribed by law.³ Proceedings of this character, however, being in derogation of the

night and sleeps on the day, and haunts customable taverns and ale-houses and routs about, and no man wot from whence they come nor whither they go." 4 Bl. Com. 169.

In an old English case it is said that before a hawker, peddler, or the like, can be deemed a vagrant, he must be wandering abroad and out of his own parish. Anonymous, 11 Mod. 3.

Tramps.—The *Pennsylvania* act of April 30, 1879, entitled "An Act to Define and Punish Tramps," does not repeal the act of May, 1876, entitled "An Act to Punish and Define Vagrants." *Cumberland County v. Boyd*, 113 Pa. St. 52.

1. In 1 Bish. Crim. L. (8th ed.), § 515, it is said: "Men may ordinarily dispose of their time as they will. And it is not clear that the ancient common law of *England* took notice of mere idleness and vagrancy as criminal; indeed, one case lays it down that a vagrant, as such, is not indictable. But we find, from early times, statutes authorizing summary proceedings against idlers, vagabonds, and rogues; to be regarded, perhaps, by us as regulations concerning paupers, not, therefore, belonging to our common law." Generally, in our state, vagrancy has been legislated against to such an extent as to leave it unimportant what is the anterior or common law on the subject."

Where there is no statutory definition of vagrancy, it must be considered as such vagabondage as fairly comes within the common-law meaning of the word. *In re Jordan*, 90 Mich. 3.

The common council of a city cannot enlarge the term "vagrancy," or include in it anything that is not vagrancy under the statute. Where the offense is not defined by statute, it can only reach such cases of vagabondage as come fairly within the common-law meaning of the word, which was possibly designed to protect the public from expense, quite as much as from disorder. *Sarah Way's Case*, 41 Mich. 299.

2. *Wolcott v. Bachman*, 3 Wyoming 335; *People v. Phillips*, Edm. Sel. Cas. (N. Y.) 386; *State v. Glenn*, 54 Md. 572, and other cases cited throughout

this article. See also *JUSTICE OF THE PEACE*, vol. 12, p. 391.

In *Wisconsin*, where tramps are liable to a more severe punishment than vagrants, and the statute provides for the trial of the former by the county, circuit, or municipal courts, if proceedings have been commenced against a person as a vagrant, before a justice of the peace, it is in his discretion whether he will proceed with the trial, or bind the accused over to answer to the court having jurisdiction of the greater offense. *Johnson v. Waukesha County*, 64 Wis. 281.

Arrest Without a Warrant.—In *Illinois*, to justify a police officer in arresting a person without a warrant, for the violation of an ordinance declaring all persons vagrants who, not having visible means to maintain themselves, are found without employment, loitering or rambling about, or staying in drinking saloons, etc., there must be made to appear a want of visible means of support, as well as the other facts. *Shanley v. Wells*, 71 Ill. 78.

3. **Punishment.**—The modes of punishing vagrants in the several states differ widely, and the reader is referred to the statutes themselves.

A statute which punishes vagrancy by fine and imprisonment, and security for good behavior, is repealed by one which provides that, upon conviction, the court may fine or imprison, or both, or sentence the party to the workhouse. *State v. Custer*, 65 N. C. ar. 339.

The *New York* Crim. Code, § 892, providing for the commitment to the county jail of those vagrants who are improper persons to be sent to the poorhouse, does not repeal by implication the Laws of 1846, ch. 77, § 10, nor other statutes, for particular counties, to confine them in other places. *People v. Baker*, 10 Abb. N. Cas. (N. Y. Super. Ct.) 210.

A justice of the peace of the city or county of Philadelphia, may commit any vagrant to jail at hard labor for one month, after legal conviction before him, *Com. v. Holloway*, 5 Binn. (Pa.) 516; but he cannot commit him

common law, must be strictly confined to the statute.¹ The statutes concerning vagrancy, coming as they do within the scope of the police power of the several states, are, as a rule, constitutional.²

until trial and conviction. *Com. v. Kehoe*, 11 Pa. Co. Ct. Rep. 516.

Appeal.—One convicted of a first offense of vagrancy before a justice, under the *Mississippi* Code, 1892, § 1323, has the right to appeal from such judgment. *Jones v. State*, 70 Miss. 398.

1. In *People v. Phillips*, 1 Edm. Sel. Cas. (N. Y.) 386, it was said that proceedings under statutes of this nature must be as near as possible according to the course of trials before juries at common law; the party accused must be summoned; there must be a specific charge against him; and he must have time and opportunity to be heard in his defense. *Compare Wynehamer v. People*, 13 N. Y. 426. And see *People v. Forbes*, 4 Park. Cr. Rep. (N. Y.) 611.

Support of Family Under New Jersey Statute.—The due and proper effect of an order, made under the supplement to the vagrant act, upon the defendant, to pay a certain sum for the support of his family for the space of one year, is not to absolve him from all liability under the vagrant act to maintain his wife after the expiration of a year from the date of the first order, and the first order cannot be set up as a bar to subsequent proceedings. *Clifford v. Overseer of the Poor*, 37 N. J. L. 152.

2. Thus, in *People v. Forbes*, 4 Park. Cr. Rep. (N. Y.) 611; 11 Abb. Pr. (N. Y. Supreme Ct.) 52, Sutherland, J., said: "His [the vagrant's] individual liberty must yield to the public necessity or the public good; but nothing but public necessity or the public good can justify these statutes and the summary conviction without a jury, in derogation of the common law authorized by them. They are constitutional, but should be construed strictly, and executed carefully in favor of the liberty of the citizen." See *State v. Maxcy*, 1 McMull. (S. Car.) 501.

A statute which declares that two or more overseers of the poor of any town or city may, by a writing under their hands, commit to the work-house "all persons able of body to work, and not having estate or means otherwise to maintain themselves, who refuse or neglect so to do, and all such as live a dissolute, vagrant life . . ." without trial, is unconstitutional, as violating the fourteenth amendment of the

federal constitution. *Portland v. Bangor*, 65 Me. 120; 20 Am. Rep. 681.

Massachusetts Stat. 1882, ch. 181, § 3, which authorizes a district court to commit a child to the custody of the overseers of the poor of a city, upon finding that such child was, through the neglect of its parent, growing up without education and in circumstances exposing it to lead an idle and dissolute life, is constitutional. *Farnham v. Pierce*, 141 Mass. 203; 55 Am. Rep. 452. See also, as to the validity of such statutes under a state constitution, *Prescott v. State*, 19 Ohio St. 184; 2 Am. Rep. 388; *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197; and as to confining in industrial schools children found begging in public and having no parental care, *McLean County v. Humphrey*, 104 Ill. 378; *Ferrier's Petition*, 103 Ill. 367; 43 Am. Rep. 10; *Roth v. House of Refuge*, 31 Md. 329; *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328; 22 Am. Rep. 702.

In *Illinois*, it was held that the state had no power to imprison a child who had committed no crime, on the mere allegation that he was "destitute of proper parental care and is growing up in mendicancy, ignorance, idleness, and vice." *People v. Turner*, 55 Ill. 280; 8 Am. Rep. 645.

The first section of the *New York* act of April 12th, 1853, prescribing and authorizing a general form for a record of conviction in case of vagrancy, was not unconstitutional. *Morris v. People*, 1 Park. Cr. Rep. (N. Y.) 441. Nor in *Louisiana* was the act of 1855, authorizing recorders of the city of New Orleans to try vagrants without a jury, or indictment, or information. *State v. Noble*, 20 La. Ann. 325.

In *State v. Glenn*, 54 Md. 572, the opinion of Alvey, J., is a full and instructive review of the law concerning the trial and commitment of vagrants. Among other points, it is held that the *Maryland* Act of 1878, ch. 415, § 10, conferring jurisdiction upon justices of the peace to try, convict, and commit to the house of correction vagrant and habitually disorderly persons, is constitutional.

The ordinance of the city of St. Louis, in regard to vagrancy, is not unconsti-

III. THE OFFENSE.—Usually, the statutes relating to vagrancy do not define it further than to designate the acts which, under the statute, constitute vagrancy.¹

tutional; but, to convict under it, the association with the persons of bad repute named must be shown to have been for the purpose of promoting some breach of the law. *St. Louis v. Lee*, 8 Mo. App. 599.

Involuntary Servitude.—*Missouri Rev. Stats.*, § 8849, authorizing a vagrant, though not accused or convicted of any crime, to be hired out to the highest bidder for a period of six months, has been held to contravene both the state and federal constitutions, declaring against "slavery or involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted." *Thompson v. Bunton* (Mo. 1893), 22 S. W. Rep. 363.

1. For example, see *New York Code Civ. Proc.*, § 887; *California Pen. Code*, § 647.

Where the statute does not define "vagrancy," and resort must be had to the common-law definition, which is "a person who goes about begging and refusing to work," a charge that the accused slept one night in the barn of the complainant and for the eight days preceding went about from place to place without any visible means of support, states no offense. There must be something more than a mere going about from place to place without visible means of support, and the mere fact of sleeping in a barn one night, is not sufficient with the going about to constitute vagrancy. *In re Jordan*, 90 Mich. 3.

In *Monck v. Hilton*, 2 Ex. Div. 268, it was held that an exhibition of "spiritualistic phenomena" was within the statute 5 Geo. IV, ch. 83, § 4, making punishable, as a "rogue and vagabond," persons "using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of his majesty's subjects."

An incorrigible son who disobeys the lawful commands of his mother, and absents himself from home without her consent, cannot be deemed a vagrant. *Matter of Conroy*, 54 How. Pr. (N. Y. Supreme Ct.) 432. Nor is a common prostitute a vagrant within the *New York* act of Jan. 23, 1833, because she is an idle person merely; to be such she must have no lawful means of support. *People v. Forbes*, 4 Park. Cr.

Rep. (N. Y.) 611. So, a minor, although she be a lewd woman, cannot be convicted of vagrancy if she be supported by her parents. *Taylor v. State*, 59 Ala. 19.

But evidence that, for a certain period prior to the trial, the defendant was an idle person without visible means of support, living without lawful employment in a house of ill-fame, and doing nothing but walking on the street with other girls from such house, will authorize a conviction of vagrancy under *Massachusetts Stat.* of 1866, ch. 235, §§ 1, 3; *Com. v. Carter*, 108 Mass. 17.

A licensed cabman loitering about the entrance of a hotel in the attempt to solicit passengers, is not a loose, idle, or disorderly person or vagrant, especially where such loitering does not obstruct or incommode the passers by, or the guests of the hotel. *Smith v. Reg.*, Q. B., 4 Mont. L. R. 325.

Again, the mere testimony of several witnesses, that a man "looked as if he were able to work" but was idle and had no property to live on, was held not to be sufficient to support a verdict that he was guilty of vagrancy, the statute making ability to work a necessary fact to be averred and proved. *Walters v. State*, 52 Ga. 574.

But where the evidence showed that for two years the defendant had been able to work, but had not worked, and that he had no property to support him, a judgment of guilty was sustained. *Price v. State*, 67 Ga. 723.

In *Hicks v. State*, 76 Ga. 326, the appellant had been indicted for vagrancy on and before the 1st day of March. The evidence against him consisted of the testimony of two witnesses that he was a licensed preacher, but had no church, and received no pay except voluntary contributions, and that for two months and a half they did not see the accused work. It was also stated that he had been of good standing in the Baptist Church. It was held that this was insufficient to support a conviction.

When it was shown that a girl under the age of sixteen was found improperly exposed and neglected, and wandering in a park without proper guardianship, and in the company of a reputed prostitute, but that she was not

IV. PROCEDURE—1. The Complaint.—The complaint of vagrancy must be set out in plain intelligible and definite terms, as to the time when the offense was committed,¹ and the particular acts

destitute of means of support, having a comfortable home, and did not know the reputed character of her companion, such facts did not warrant her arrest, since it was not alleged that she was so exposed or neglected by her parents, and the charge that she was wandering in the park without proper guardianship, did not bring her within the description of children "not having any home or other place of abode or proper guardianship," as these words are used in the *New York Pen. Code*, § 291, and the fact that she was found in the company of a reputed prostitute did not, under the circumstances, bring her within the description of those "frequenting or being in the company of reputed thieves or prostitutes" as used in the same section. *People v. House of the Good Shepherd*, 44 Hun (N. Y.) 526.

Where it was shown that two children, under the age of fourteen, were found at a late hour engaged in begging under the pretext of peddling, and were in the company of prostitutes, frequenting concert saloons, dance houses, and places of entertainment where spirituous liquors were sold, it was not necessary to show that they were wandering abroad and begging, as it would have been, if they had been arrested under the provisions of § 887 of the *New York Code of Crim. Proc.*, which provides that "any child between the ages of five and fourteen, having insufficient bodily health and mental capacity to attend public schools, found wandering in the streets of any city or incorporated village a truant without lawful occupation, shall be deemed a vagrant;" but the complaint being made under § 291 of the Penal Code, the fact that they were begging or receiving alms, or frequenting the company of prostitutes or reputed thieves, was sufficient to make them vagrants. *Matter of Moses*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 189; 66 How. Pr. (N. Y.) 296.

In *Com. v. McVeaghy*, 1 Ashm. (Pa.) 248, it was held that where a child under fourteen years of age is adjudged a vagrant, the circumstances of the case ought to be urgent, unequivocal, and decisive.

Desertion of Wife or Family.—The

mere refusal of a man to live with his wife, or a failure to support her, does not constitute vagrancy, but there must be something more. *Boulo v. State*, 49 Ala. 22. And so in *Dwyer v. Durer*, 26 Mo. App. 647, it was held that the vagrancy of a husband which will entitle the wife to a divorce is failure to support his whole family and not one member thereof.

The provision of the English vagrant act, making it an act of vagrancy in a parent to desert a child, applies to legitimate and not to illegitimate children. *Reg. v. Maude*, 2 Dowl. N. S. 58; 11 L. J. M. C. 120.

But a wife who has been deserted by her husband, and having no means of maintaining her children, leaves them, so that they become chargeable to the parish, cannot be convicted under the vagrancy act. *Peters v. Cowie*, 2 Q. B. Div. 131; 36 L. T. N. S. 107.

Promise to Leave the City.—Under a city ordinance of St. Louis, a man was arrested as a vagrant and confined in the calaboose; but he was liberated upon his promise to leave the city within a stipulated time, which promise he did not fulfill, and his rearrest was ordered. It was held that the breach of his promise did not constitute legal ground for his rearrest, and it was necessary to show that he was guilty of the violation of the city ordinance, or that he was a vagrant within the purview of the same. *State v. Roberts*, 15 Mo. 28.

1. A complaint, under the *Massachusetts* statute, sets forth the time of committing the offense with sufficient precision, which alleges that the defendant, "on the 29th day of November, in the year of our Lord 1861, on divers other days and times between that day and the 29th day of May, in the year of our Lord 1862, at said Boston, was and is an idle and disorderly person, and at said Boston, on said days and times, has neglected all lawful business and habitually misspent his time by frequenting houses of ill-fame, gaming houses and tippling shops." *Com. v. Sullivan*, 5 Allen (Mass.) 511.

Again, where the complaint charged that the defendant, "on the 1st day of January, 1886, at M., and from thence continually to the 6th day of June, 1887, was an idle person, etc.," it was

done or omitted which are alleged to constitute the offense.¹ It is sufficient, of course, if the offense be charged substantially in the language of the statute,² but a charge that a person is "a vagrant within the meaning of the law" is insufficient.³

held not necessary to prove that the defendant was guilty of the charge of vagrancy on the 1st day of January, 1886, or that he was guilty of the offense continually from that time to June the 6th, 1887, but that if he were guilty of the offense during some substantial portion of the time it was sufficient, and the word "continually" was unnecessary, and could be rejected as surplusage. *Com. v. Lord*, 147 Mass. 399. Compare *Com. v. Kerrissey*, 141 Mass. 110.

1. *Walton v. State*, 12 Tex. App. 117. Compare *Hunt v. State*, 9 Tex. App. 404.

Under the *North Carolina* vagrancy act of 1866, the indictment must charge specifically that the defendant is able to work and neglects to do so, and in case he is charged with endeavoring to support himself by unlawful means, such unlawful means must be described in the indictment. *State v. Custer*, 65 N. Car. 339.

Under the *Georgia* code, which recognizes several distinct classes of vagrants, among which are "all professional gamblers living in idleness," if the written accusation fails to charge the defendant with being a vagrant because he is a professional gambler living in idleness, it is error to allow testimony showing such fact. *Allen v. State*, 51 Ga. 264.

An affidavit charging that "J. C., an able-bodied male person, who has arrived at years of discretion, was then and there unlawfully found loitering and idling in, and about, the saloon of F., and the saloon of W., which said saloons were then and there tippling houses, . . . without being there engaged in some useful employment," is a sufficient charge of vagrancy, in a prosecution before a justice under the *Indiana* act of 1877 (*Acts 1877 Spec. Sess.*, p. 80). *State v. Cummins*, 78 Ind. 251.

The allegation in a complaint, that a person is "an idle, ungovernable boy and an habitual truant," describes no offense under any statute. *Lewiston v. Fairfield*, 47 Me. 481.

A complaint that a person is "an idle and disorderly person, and on said days and times has neglected all lawful business and habitually misspent her

time, by frequenting houses of ill-fame, gaming houses and tippling shops," is sufficient, and there need be no averment that the defendant was under any necessity or duty of laboring or supporting herself or following any vocation or business. *Com. v. Brown*, 141 Mass. 78; or that she refused opportunities to work which were offered her. *Com. v. Doherty*, 137 Mass. 245; it is sufficient if she did not seek such opportunities. *Com. v. Hart*, 137 Mass. 247, n.

2. *Brown v. State*, 2 Lea (Tenn.) 158; *Com. v. Brown*, 141 Mass. 78. And see *Com. v. Doherty*, 137 Mass. 245; *Com. v. Hart*, 137 Mass. 247, n.; *Grattan v. State*, 71 Ala. 344; *Danner v. State*, 54 Ala. 127; 25 Am. Rep. 662.

A complaint alleging that the affiant believes that the defendant, "having no visible means of support, or being dependent on his living, lives without employment," is sufficient under the *Alabama* Code, § 4047, and it is unnecessary to aver in addition that he is unable to work. *Traylor v. State* (Ala. 1894), 14 So. Rep. 634, *overruling* *Boulo v. State*, 49 Ala. 22.

Thus, in *Ex p. McCarthy*, 72 Cal. 384, the complaint set out that A, on and from the 26th day of April to the 26th day of May, 1887, at the city and county of San Francisco, committed a misdemeanor, and, during said period, "willfully and unlawfully was, has been and during said time continued to be, and still is, an idle and dissolute person, who wanders and roams, and has, during said time, wandered and roamed about the streets of said city and county, at late and unusual hours of the night." The *California* Pen. Code, § 647, enumerates in several groups certain acts which shall constitute vagrancy, and he or she who is guilty of the acts thus enumerated in any one of these groups, is liable to the penalty of the statute. The complaint charging all of the acts specified in any one of these groups, as in this case, is sufficient, and the fact that it states in addition some of the acts specified in other and independent groups, does not invalidate it. Compare *People v. Frank*, 28 Cal. 508.

3. *Walton v. State*, 12 Tex. App. 117.

2. The Commitment.—It is not necessary that the commitment should state all the particulars necessary to make out the offense. The offense is being a vagrant, and it is sufficient if the commitment states that the person was charged with vagrancy, and convicted upon competent proof.¹ But if it does assume to set out all the particulars upon which the prisoner was convicted, it must state such facts as to establish a clear case of vagrancy.²

1. *Gray's Case*, 11 Abb. Pr. (N. Y. Supreme Ct.) 56; 4 Park. Cr. Rep. (N. Y.) 616. In this case the offense of which the prisoner was convicted was stated as follows, viz.: "Who stands charged before me with being a vagrant, viz., an idle person, who, not having visible means to support him, and is an habitual drunkard." This was sufficient, since it showed that the prisoner was convicted of being a vagrant. See *Matter of Moses*, 66 How. Pr. (N. Y. Supreme Ct.) 296.

"The sole inquiry is, whether the justice making the commitment had jurisdiction of the offense recited and of the party accused; and whether the judgment or sentence recited in the commitment be such as the justice was authorized by law to render or impose. . . . That conviction must be presumed to be lawful and proper until the contrary is made to appear." *Alvey, J.*, in *State v. Glenn*, 54 Md. 572.

2. Thus, where a commitment stated that the prisoner was convicted of "being a vagrant, in this, that she is a common prostitute and idle person," it was held that such commitment was void, and the prisoner entitled to discharge, since proof that she was a common prostitute and idle person was not enough to sustain a charge of vagrancy, but proof that she was without any lawful employment whereby to maintain herself was also necessary. *Forbe's Case*, 11 Abb. Pr. (N. Y. Supreme Ct.) 52; *People v. House of the Good Shepherd*, 44 Hun (N. Y.) 526; *supra*, this title, *What Constitutes*.

In *People v. Mount Magdalen School* (Supreme Ct.), 7 N. Y. Supp. 737, the action arose out of a question as to the validity of a warrant of commitment of a child on a charge of "being a disorderly person." The Penal Code, § 291, originally provided for the arrest of a child coming within any of the descriptions therein mentioned, "as a vagrant, disorderly or destitute child," but in 1886 by amendment these words were omitted. Being a disorderly child is not one of the causes enumerated in the sec-

tion, and, therefore, a commitment on such charge was illegal. In the same case it was held that another magistrate is not authorized, two years after the first commitment, and after a writ of *habeas corpus* issued, to commit the child for a different offense named in the section, because such first commitment was defective, unless the child is brought before him and a new examination had or legal evidence taken of what occurred at the former examination. Such action is not warranted by the provision of said section that "whenever any commitment of a child shall be adjudged or found defective, a new commitment may be made or directed by the court or magistrate, as the welfare of the child may require."

Record.—Prerequisite to commitment, a record of the proceeding must, in some states, be made up by the magistrate and filed in the office of the county clerk, and trespass will lie against a magistrate who commits without doing so. *People v. Phillips*, 1 Edm. Sel. Cas. (N. Y.) 386. And see *People v. Forbes*, 4 Park. Cr. Rep. (N. Y.) 611.

The filing of such record may now be in the office of the clerk of general sessions under Acts 1882, ch. 110. *Matter of Waters*, 66 How. Pr. (N. Y. Supreme Ct.) 173.

But a failure to file the record of a conviction of vagrancy will not entitle the prisoner to his discharge, because such failure is amendable, and it is expressly provided by New York City Consolidation Act, § 1601, to be no ground for a discharge. *Matter of Dorfmann*, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 296.

In the *Matter of Moses*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 196, the court said: "It is the duty of the magistrate to observe with great care the provisions of the several statutes in such cases, and to see that their records are properly made and the certificate of conviction duly filed, and that their warrants of commitments are in due form."

Conclusiveness.—Where a child is

3. Notice to Parent or Guardian.—Where a child is to be committed for vagrancy under the *New York* statute, which, in one section, includes children, under certain circumstances, in the list of those who are vagrants, it is necessary, in order to ascertain whether the circumstances are usual or unusual, to give notice of the proceeding to the parent, guardian, or custodian of such child, if there be one.¹

4. Evidence.—The same rules of evidence apply here as in other criminal proceedings.²

VAGUE.—See note 3.

committed to the overseers of the poor by the district court, upon finding that, by reason of the neglect of its parent, the child is growing up without education or salutary control, under the *Massachusetts* Stat. of 1882, ch. 181, § 3, such commitment is not conclusive upon the parent as an adjudication on his right to the custody of the child; and, upon showing that the cause stated for the commitment no longer exists, and that he is competent and fit to have the care of the child, and that its welfare will permit of its removal to the parent's custody, he may obtain such custody. *Farnham v. Pierce*, 141 Mass. 203; 55 Am. Rep. 452.

Costs.—The costs by justices of the peace, for commitments under the vagrant act, are proper charges against the county. *Cumberland County v. Boyd*, 113 Pa. St. 52.

1. *In re Maloney*, 4 N. Y. Supp. 428; 51 Hun (N. Y.) 372; *People v. New York Catholic Protectory*, 101 N. Y. 195.

In *People v. New York Catholic Protectory*, 106 N. Y. 604, it was held that under the provisions of this statute, as amended by the Laws of 1886, ch. 31, where both parents were living, the notice must be to, or the appearance by, the father. But in *Carpenter v. People* (N. Y. 1890), 25 N. E. Rep. 1044, reversing 11 N. Y. Supp. 852, it was held that under Laws 1888, ch. 145, § 6, amending section 295 of the Penal Code, notice to, or the presence of, either parent at the examination was sufficient.

In *People v. Catholic Protectory*, 61 How. Pr. (N. Y. Supreme Ct.) 445, it was held that children found picking rags on the streets of the city of New York might be committed to the Catholic Protectory, without any notice to parent or guardian; but in this case

the children were committed under Laws of 1877, ch. 428, as amended by Laws of 1881, ch. 496, which contains no provision for notice to parents.

In *Ohio*, it seems that there is no provision for the notification of parent or guardian. *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197.

2. Thus, in a prosecution for vagrancy under the *Alabama* Code, § 4218, the wife of the defendant is not a competent witness. *Merriwether v. State*, 81 Ala. 74.

Evidence of the use of profane language is competent, upon the trial of a complaint charging one with being an idle and disorderly person, although the use of such language is punishable as a distinct offense. *Com. v. Murray*, 14 Gray (Mass.) 397.

But evidence that one is "a professional gambler, living in idleness," unless specifically charged in the written complaint of vagrancy, is not admissible, under the *Georgia* Code, § 4560, which enumerates five classes of vagrants. *Allen v. State*, 51 Ga. 264.

3. An assignment or contract is not "vague" merely because it is indefinite or uncertain. "Vague," in this connection, means that which is incapable of being ascertained when the instrument comes to be enforced. Language has been used with regard to assignments of, and contracts relating to, future property, which tends to confuse the idea of vagueness in the contract itself, with that sort of necessary uncertainty which, at the time when the contract is made, is more or less involved in the idea of futurity. "Vagueness" is a misleading term. A contract may be too vague in itself to be understood; and on that ground it is enforceable neither at law nor in equity. But in the case of a contract to assign future property when the

VALIDITY.—Legal strength or force—that quality of a thing which renders it supportable in law or equity, as the validity of a grant, the validity of a will, or the validity of a claim of title.¹

VALUABLE.—See note 2.

money has been paid, if, when at the time of the contract coming to be enforced, the property has fallen into the possession of the assignor, and is of such a character and is sufficiently ascertained to admit of the contract being enforced in equity, there is no necessary vagueness. Bowen, L. J., in *Re Clarke, Coombe v. Carter*, 36 Ch. Div. 348. See also *Tailby v. Official Receiver*, 13 App. Cas. 523.

1: Webster's Dict., *followed* in *Sharpleigh v. Surdam*, 1. Flipp. (U. S.) 489. This case turned upon the meaning of the term as used in a statute providing that the validity of a tax sale should be questioned in but three ways. The court said: "Validity" has a well understood technical, as well as popular, acceptance, and must receive such meaning in the courts if its use in the statute does not suggest a different one. In the general nomenclature of the law, no word is so frequently used to signify legal sufficiency, in contradistinction to mere regularity, as this one. We say a deed is regular, but invalid for want of power in the attorney or officer. When a lawyer says he concedes the regularity of a sale, but objects to its validity, it is known the conditions are questioned upon which the power to make it depended. Elementary books, in treating of questions of both business and official agency, employ it as a commendous word, as always including every incident of complete legality. Regularity, on the other hand, never does so. An official sale, an order, judgment or decree may be regular. The whole practice, in reference to its entry, may be correct, but still invalid for reasons going behind the regularity of its forms. But, when we say a judgment, decree, or sale is valid, it fully excludes the idea that it is void for any reason."

The "validity of a statute of the United States," as the term is used in the Act of March 3, 1885, ch. 355, § 2, 23 Stat. 443, "regulating appeals from the supreme court of the *District of Columbia* to the supreme court of the *United States*," refers only to the power of Congress to enact the particular statute

drawn in question, and not a judicial construction of it which does not question that power. *Baltimore, etc., R. Co. v. Hopkins*, 130 U. S. 210.

Validity Equivalent to Legality.—As to when the term "validity" has been held equivalent to "legality," in reference to an act of donation, see *Larrendon's Succession*, 39 La. Ann. 957.

2. **Valuable Thing—Valuable Security**—(See also FALSE PRETENSES, vol. 7, p. 710).—The *New Jersey* statute against false pretenses is directed against the obtaining of any "valuable thing" through such pretenses. In *State v. Thatcher*, 35 N. J. L. 452, the court distinguishes the words "valuable thing" from "valuable security," used in the English statute, thus: "Our legislators, who framed our act in view of the early English statute, were not content with the language there used, but, with the design of amplifying its operation, employed the words 'money, wares, merchandise, or other valuable thing.' Our statute having been passed prior to 7 and 8 George IV., and our law-makers having adopted more comprehensive terms than that act contains, no argument can be drawn from the fact that the English Parliament, by subsequent enactment, declared it indictable to obtain by false pretense the signature of any person to a written instrument. 'Valuable thing' is more comprehensive than 'valuable security.' Every valuable security is a valuable thing, but many valuable things are not valuable securities. Meretangible things were not alone meant, for the words prior to valuable thing described them. The legislature intended to denounce as a crime the obtaining, by deceit, of every valuable thing of a personal nature. 'Other valuable thing' includes everything of value. That it embraces the promissory note of a third person, is settled in *State v. Tomlin*, 29 N. J. L. 13." And in this same case of *State v. Thatcher*, 35 N. J. L. 452, it was held to include the prosecutor's own note or contract of suretyship.

Valuable Article.—Ice has been held a "valuable article," within a statute providing that any person removing,

VALUABLE CONSIDERATION—(See also *CONTRACT*, vol. 3, p. 831; *DEEDS*, vol. 5, p. 435; *FRAUDULENT CONVEYANCES*, vol. 8, p. 759; *FRAUDULENT SALES*, vol. 8, pp. 806, 843, 849, 860; *NATURAL LOVE AND AFFECTION*, vol. 16, p. 234; *SALES*, vol. 21, p. 463; *VALUE RECEIVED*).—The distinction between a good and a valuable consideration is that the former consists of blood, or natural love and affection, as when a man grants an estate to a near relation from motives of generosity, prudence, or natural duty, and the latter consists of such a consideration as money, marriage which is to follow, or the like, which the law esteems an equivalent given for the grant.¹

without a license, "any trees, stone, timber, or other valuable article," shall be guilty of a trespass. *State v. Pottmeyer*, 33 Ind. 402; 5 Am. Rep. 224.

Valuable Papers.—A *Tennessee* statute provided that to give validity to a paper (not witnessed) as a will, it must be found among the "valuable papers" of the deceased. In *Reagan v. Stanley*, 11 Lea (Tenn.) 323, the trial judge found in favor of the will, and the decision was affirmed on appeal. The court said: "Valuable papers, within the meaning of the statute, are not papers having a money value, but only such as 'are kept and considered worthy of being taken care of by the particular person.' *Marr v. Marr*, 2 Head (Tenn.) 306. Entries of daily transactions, whether on separate sheets of paper or in book form, preserved by the writer, and which the proof shows he directed his servant to deliver to the person selected by him to manage his estate after his death, would be valuable papers. If the testamentary papers in controversy had been written on separate sheets of paper, and deposited by the writer within the leaves of the book in which his diary was kept, it would scarcely be contended that they would not be found among his valuable papers. For a stronger reason they must be so considered if actually written in the book itself and as parts of its entries. Moreover, the proof shows that this book was in the hands of the deceased on the night before his death, and was found with other manuscript books of account, in which the deceased kept his accounts as treasurer of the town of La Grange, and of certain secret lodges. These books were all lying upon a shelf of the washstand, within a step of the bed of the deceased, and where he seems to have been in the habit of keeping them.

On the second day before his death, he had called his servant's attention to this book, and directed her to hand it to Dr. Pulliam in the event of his own death, which his diary shows he was daily anticipating. The proof is sufficient to sustain the finding of the trial judge on the contested point."

The deposit must have been made by the testator, or with his consent, among his papers which he regarded as valuable and desired to preserve, or in the hands of another for safe keeping, with the intent that it should operate as his will. *Hooper v. McQuary*, 5 Coldw. (Tenn.) 129. In this case the court said: "No better definition of the meaning of the words 'valuable papers' can, perhaps, be given, than that they consist of such as are regarded by the testator as worthy of preservation; in his estimation of some value. It is not confined to deeds for lands or slaves, obligations for money, or certificates for stock. Any others, which are kept and considered worthy of being taken care of by the particular person, must be regarded as embraced in that description. This requirement is only intended as an indication, on the part of the writer, that it is his intention to preserve and perpetuate the paper in question, as a disposition of his property; that he regards it as valuable." See also *Marr v. Marr*, 2 Head (Tenn.) 303.

1. 2 Bl. Com. 297; *Black's Law Dict.*, p. 1210.

In *Tillinghast v. Banks*, 14 Ga. 649, *Starnes, J.*, quoting *Story on Promissory Notes*, § 186, said: "A valuable consideration consists in some right, interest, profit, or benefit, accruing to the party who makes the contract; or some forbearance, detriment, loss, responsibility or act, labor or service, on the other side."

VALUATION—(See also **VALUE**).—See note 1.

VALUE.—The word “value,” when applied without qualification to property of any description, necessarily means the price which it will command in the market.²

Marriage as a Consideration.—See **MARRIAGE SETTLEMENTS**, vol. 14, p. 554.

1. In *Sergeant v. Dwyer*, 44 Minn. 309, the plaintiff and defendant entered into an agreement in reference to the purchase of a stock of merchandise; soiled and damaged goods were to be taken at a “valuation.” In regard to the use of the term “valuation,” in this connection, the court said: “The remaining question, and the only one of importance, in the case, is as to the construction which must be put on the words ‘at valuation,’ as used in regard to the soiled and damaged articles. It is not a case where the parties have omitted to fix and mention the value or price of the property sold and purchased, but one in which it was expressly agreed that one kind or class of goods should be taken and received at their valuation. It is the intention of the parties, when using the word ‘valuation,’ which we are called upon to discover, and this from an examination of the entire paper. They had specified definite means for determining the purchase price of all goods in fair condition, and as to the balance, it must be held that they intended to sell and buy at real value and actual worth. The word used is susceptible of the same meaning as ‘value,’ and hence, we should adopt such meaning for it, thus giving validity to the writing, and rendering it just what the parties undoubtedly intended it should be—a completed contract for the sale and purchase of the merchandise. Therefore, the value of the soiled and damaged goods would have to be ascertained and determined as any other fact in issue, and for this purpose the best evidence attainable was admissible.”

Fair Valuation.—Where, in answer to a tax suit, the defense was fraud in the assessment, and it was alleged that in a certain statement furnished the assessor (but which was informal), the property was “set down as of the value of \$6,000 per mile, which was a fair valuation thereof, and so known and believed by the assessor,” it was held that this amounted to an allegation that

\$6,000 per mile was a just and fair value, and, consequently, that an assessment of \$15,000 per mile was excessive. *State v. Central Pac. R. Co.*, 7 Nev. 99. Here the court said: “Is the allegation equivalent to an allegation that \$6,000 was the fair value of the road; that is, would there have been any substantial difference in the allegation had the word ‘value’ been used instead of ‘valuation?’ Evidently not. The word valuation as here employed signifies value. Valuation is defined as the price set upon anything—the estimated or rated worth of anything; value. The words, as defined, seem to be synonymous. Value is generally but an estimate of the worth of a thing; there is not an exact standard whereby it can always be determined, and valuation, when used in its passive signification, as in this allegation, means the estimated value or worth placed on the thing.”

2. *Fox v. Phelps*, 17 Wend. (N. Y.) 399. This case was upon the provision of a will that the property should be “valued.”

Market Value.—See **MARKET VALUE**, vol. 14, p. 467, where there is a numerous collection of cases.

Exchangeable Value.—See **EXCHANGE**, vol. 7, p. 116.

Forgery.—The word “value,” as used in the *Ohio* Code of Criminal Procedure, § 93, which provides, “that in an indictment for falsely making, altering, forging, printing, photographing, uttering, disposing of, or putting off any instrument, it shall be sufficient to set forth the purport and value thereof,” is not used in the sense of the “worth of the instrument in money,” but in the sense “of the effect which the instrument is intended to accomplish,” and hence, is the synonym of “effect” or “import.” *Chidester v. State*, 25 Ohio St. 438. See **FORGERY**, vol. 8, p. 478.

Distinguished from Income.—“There is a distinction between ‘value’ and ‘income,’ when taken separately and alone. Property may have an annual value without any income.” *Miller, J.*, in *Troy Iron, etc., Factory v. Corning*, 45 Barb. (N. Y.) 247.

Fair Cash Value—Actual Cash Value.

—In estimating the damage to property destroyed by fire, in an action against an insurance company, it was held that "actual cash value" of property and "fair cash value" were synonymous. *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 337; 9 Am. St. Rep. 598.

Eminent Domain.—*Minnesota Laws* 1857, § 13, ch. 1 (Ex. Sess.), in providing for the appraisal of the "value" of lands taken by the M. & P. R. Co., for right of way, employs the word "value" as embracing not only the value of the strip of land taken, as an isolated parcel of land, but such additional value as attaches to it by reason of its connection with adjacent land of the same owner. *Scott v. St. Paul, etc., R. Co.*, 21 Minn. 322. See generally *EMINENT DOMAIN*, vol. 6, p. 563.

The word "value" is itself a relative term, and in ascertaining what is the value of the land it is extremely common, indeed it is inevitable, to go into a great number of circumstances, by which that which is proper compensation to be paid for the transfer of one man's property to another may be ascertained. *Com'r's v. Glasgow, etc., R. Co.*, 57 L. T. 571.

Thing of Value — Larceny — Burglary.

—A dog is a "thing of value" and may be stolen, and burglary may be committed by breaking and entering with intent to steal a dog. *State v. Yates*, 37 Alb. L. J. 232. In that case the court said: "As to the meaning of the words 'any thing,' there is no trouble. But as to the meaning of the word 'value' the matter is not so plain. Much labor and learning have been expended upon the question of the meaning of the word 'value.' 'Value' is defined by Bouvier as: '(1) The utility of an object. (2) The worth of an object in purchasing other goods.' These definitions are pretty evidently obtained by Bouvier from Adam Smith. 'The word "value," it is to be observed, has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods which the possession of that object conveys. The one may be called value in use; the other value in exchange.' *Wealth of Nations*, ch. 4. By these definitions value has two meanings. But later learned writers, straining for the last analysis, reject one of these. 'Value is the relation of two services.

The idea of value entered into the world for the first time when a man said to his brother, "Do this for me and I will do that for you." They had come to an agreement. Then we could say the two services were worth each other.' *Harmonies of Political Economy*, Bastiat. 'Value is the exchange power which one commodity or service has in relation to another.' *Science of Wealth*. Walker. Tested by the definitions of these philosophers, a dog has or may have a value. Tested by the common sense of men, and even by the common law, can there be any question that dogs come within the meaning of the phrase 'any thing of value?' By the common law dogs were property, and 'although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury, and be redressed by a civil action.' The above case was decided by the court of common pleas in *Ohio* under the Revised Larceny Act of the state, which, in describing property that may be stolen, uses the words "anything of value," the earlier act, under which it was held in *State v. Lymus*, 26 Ohio St. 400; 20 Am. Rep. 772, that a dog cannot be stolen, having used the words "goods and chattels" merely.

An indictment, under the *West Virginia Code*, ch. 145, § 14, which charges the accused with the larceny of "one gelding horse of the price of \$100," instead of one gelding horse of the "value" of \$100, according to the words of the statute, is sufficient. The word "price," as used here, is equivalent to the word "value," used in that statute. The court said: "In 3 Chit. Crim. Law, pp. 977, 979, 980, 981, precedents for indictments for the larceny of live animals are given, in which the word 'price' is used instead of the word 'value,' and in form No. 8, warrant for horse stealing, given in Mayo's Guide, the word 'price' is used for 'value.' All the lexicographers, both law and general, so far as I have been able to discover, in certain instances, give the words 'value' and 'price' as convertible and synonymous. In the sense used in the indictment before us, I think these words, if not synonymous, are certainly the equivalent of each other." *State v. Sparks*, 30 W. Va. 102. See, generally, *LARCENY*, vol. 12, pp. 781, 786; *BURGLARY*, vol. 2, p. 695.

Gaming.—Chips and checks, redeemable in money, are "things of value"

VALUE RECEIVED—(See also **BILLS AND NOTES**, vol. 2, p. 339).—A phrase usually employed in a bill of exchange or promissory note, to denote that a consideration has been given for it.¹

within the statute of gaming. *Porter v. State*, 51 Ga. 300.

"Value"—**"Cost Price."**—A referee, after finding that the defendant had agreed to pay the cost price of certain articles, found what their "value" was according to a certain exhibit not set forth in the record. It was held that all reasonable intendments must be made in support of the finding and judgment, and that, in the absence of a demand for a more specific finding, it might be properly assumed that he used the word "value" to signify "cost price." *Neib v. Hinderer*, 42 Mich. 451. See also *State v. Sparks*, 30 W. Va. 101.

Taxation, "Full Cash Value."—A statute provided that property was to be assessed at its full cash value. In *Ballerino v. Mason*, 83 Cal. 449, the court said: "The words 'actual value for agricultural purposes' are not equivalent to 'full cash value.' This is evident, for the reason that the value of property for the purposes named may be, and often is, less than its value for other purposes, and less than it would be taken for in payment of a just debt from a solvent debtor. The averment as to the value of plaintiff's property was, therefore, insufficient to sustain the contention."

The phrases "salable value," "actual value," "cash value," and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. *Burroughs on Taxation*, p. 227, § 99. But it is a matter of common observation that, in the valuation of real estate, this rule is habitually disregarded. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 162.

Article of Great Intrinsic Value.—A family portrait is not an "article of great intrinsic or representative value," within the exemption clause of a carrier's receipt, when coupled with "specie, drafts, and bankbills," although it "represents" the owner's deceased father, and is the only one extant. *Green v. Boston, etc., R. Co.*, 128 Mass. 221; 35 Am. Rep. 370.

The "intrinsic value" of a thing is its true, inherent, essential value, not dependent upon accident, place, or person, but the same everywhere and

to everyone. *Bank of the State v. Ford*, 5 Ired. (N. Car.) 698, where it was held that bank notes have no intrinsic value.

Replevin.—"Value consists in the estimate, or opinion of those influencing the market, attachable to certain intrinsic qualities belonging to the article to be valued. The opinion of such persons can only be presented, in most cases, by hearsay." *Washington Ice Co. v. Webster*, 68 Me. 463. This was an action of replevin, the question being to determine the value of the property (ice) taken.

1. Value Received.—The words "value received," when used in an instrument, do not necessarily import a consideration in money. A promise to pay in the future may be shown to have been the consideration. *Osgood v. Bringolf*, 32 Iowa 265.

Prima Facie Import a Valuable Consideration.—The words "for value received," forming a part of the contract of assignment, must be held to furnish sufficient evidence, *prima facie* at least, of a consideration for the assignment. *Brooks v. Page*, 1 D. Ch. (Vt.) 340; *Whitney v. Stearns*, 16 Me. 394; *Parish v. Stone*, 14 Pick. (Mass.) 198; 25 Am. Dec. 378; *Thrall v. Newell*, 19 Vt. 206; 47 Am. Dec. 682.

In *Mandeville v. Welch*, 5 Wheat. (U. S.) 282, Story, J., said: "Upon the first point, we are of opinion that the law was correctly laid down by the court below. The argument of the defendant's counsel admits, that, where a bill imports on its face to be for 'value received,' it is *prima facie* evidence of that fact between the original parties; but it is stated that it is not evidence of the fact against third persons. We know of no such distinction. In all cases where the bill can be used as evidence, either against the parties or against third persons, the same legal presumption arises of its having been given for value received, as exists in relation to a deed expressed to be given for a valuable consideration."

"Value received" imparts a valid consideration for a bill or note. See **BILLS AND NOTES**, vol. 2, p. 339; *Lap- ham v. Barrett*, 1 Vt. 247; *Averett v.*

VARIANCE.—(See also AMENDMENT, vol. 1, p. 546; CRIMINAL PROCEDURE, vol. 4, p. 829; DECLARATION, vol. 5, p. 349; EQUITY, vol. 6, p. 683; EVIDENCE, vol. 7, p. 42; INDICTMENT, vol. 10, p. 450; NAME, vol. 16, p. 112; PLEADING, vol. 18, p. 467; and all the recognized forms of action, both civil and criminal, under their respective heads.)

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I. DEFINITION.—A variance is a difference, inconsistency, or variation between the evidence adduced, and the allegation in pleading in support of which the evidence is offered, or between the intimation of the cause of action given in a writ and the cause as shown in the declaration.¹

Booker, 15 Gratt. (Va.) 169; 76 Am. Dec. 203; Whitney v. Stearns, 16 Me. 394; Brewster v. Silence, 8 N. Y. 207; Haydock v. Lynch, 2 Ld. Raym. 1563; Hoyt v. Jaffray, 29 Ill. 104; Hubbard v. Moseley, 11 Gray (Mass.) 170; 71 Am. Dec. 698; Miller v. Cook, 23 N. Y. 495; Douglass v. Howland, 24 Wend. (N. Y.) 35; Cooper v. Derick, 22 Barb. (N. Y.) 516; Bayly on Bills, ch. 1, § 13, p. 40; Macleod v. Snee, 2 Stra. 762; Pappellenn v. Wilson, 1 Stra. 496; Philliskirk v. Pluckwell, 2 M. & S. 395; Wilson v. Codman, 3 Cranch (U. S.) 207; Hatch v. Traves, 11 Ad. & El. 702; 39 E. C. L. 207; Jones v. Jones, 6 M. & W. 84; Bayly on Bills, ch. 9, p. 390; Coombe v. Ingraham, 4 Dowl. & R. 211.

But it is only *prima facie* proof. Wheelwright v. Moore, 1 Hall (N. Y.) 201; Frank v. Irgens, 27 Minn. 43; Green v. Shepherd, 5 Allen (Mass.) 589. See also Bristol v. Warner, 19 Conn. 18.

Whether Necessary.—The words "value received" are a sufficient expression of the consideration for an undertaking to pay the debt of another, if indeed it be at all necessary that the consideration should be expressed in writing. McMorris v. Herndon, 2 Bailey (S. Car.) 56.

A bill of exchange is good without the words "for value received," and in declaring thereon, it is not necessary to allege or prove a consideration.

Hubble v. Fogartie, 3 Rich. (S. Car.) 413; 45 Am. Dec. 775.

The words are not necessary in a bill or note. Coursin v. Ledlie, 31 Pa. St. 508; Grant v. Da Costa, 3 M. & S. 352; Hatch v. Thayer, 11 Ad. & El. 708; 39 E. C. L. 207; Claxton v. Swift, 2 Shaw. 496; Macleod v. Snee, Ld. Raym. 1481; Benjamin v. Tillman, 2 McLean (U. S.) 215; Pappellenn v. Wilson, 1 Stra. 496.

1. 2 Abb. Law Dict.

A discrepancy or disagreement between two instruments or two steps in the same cause, which ought, by law, to be entirely consonant. Thus, if the evidence adduced by the plaintiff does not agree with the allegations of his declaration, it is a variance; and so if the statement of the cause of action in the declaration does not coincide with that given in the writ. Black's Law Dict.

A disagreement or difference between two parts of the same legal proceeding which ought to agree together. Variances are between the writ and the declaration, and between the declaration or bill in equity, and the evidence. Bouv. Law Dict.

A discrepancy: (a) Between pleadings and proof, as where a complaint mentions a wrong date, or the facts prove to be different from what was alleged. (b) Between the form of the writ or process by which the action was commenced and the form of the

II. AT COMMON LAW.—The doctrine of variance at the common law was carried to extremes. The question whether the variance was material or immaterial to the opposite side, was not considered. An immaterial variance was as fatal as a material one.¹

declaration or complaint. Formerly, when variances were deemed more important than now, variance was often defined as a fatal discrepancy or disagreement, etc.; but in civil cases such variances between pleading and proof as do not actually mislead the adverse party are now disregarded as immaterial, and many others are amendable. Under what is known in the *United States* as Code Practice, variance is used to designate a discrepancy in some particulars only, and is amendable if it has not misled, while a failure of proof as to the entire scope and meaning of an allegation is not regarded as a mere variance, but fatal. Cent. Dict.

Departure.—Care must be taken to distinguish "variance" from "departure." In pleading, departure "is said to be when the second plea containeth matter not pursuant to the party's former plea, and which fortifieth not the same, and thereupon it is called 'decessus,' because he departeth from his former plea." Co. Litt. 304 a. Thus, if the plaintiff suing as the executor of A B alleges in his declaration that the cause of action accrued to A B in his lifetime, and in his replication alleges that it accrued to him as executor after A B's death, this is a departure. Departure was forbidden by the rules of the common-law pleading and is so still by the modern practice. Rap. & L. Law Dict. See also Hickman v. Walker, Willes 27; Stephen on Pleading 410; 2 Wm. Saunders, 84n; Bouv. Law Dict.

1. Common-Law Doctrine.—Perhaps no portion of the old forms of judicial procedure in *England* was more fraught with injustice to suitors, than the abrogated doctrine of variances. The British Parliament, in the preamble to their enactment on the subject, expressed themselves in very strong terms of the practice that had been so long obtained in the common-law courts. They speak of a "failure of justice" having taken place in those courts, in cases wherein the variance was "not material to the merits," and by which "the opposite party could not have been prejudiced." Some not-

able instances of this failure of justice may be readily found by a reference to the head of variances in any of the treatises on pleading and evidence. In *Jones v. Mars*, 2 Camp. 305, Lord Ellenborough was puzzled to decide whether the letter *s* too much, at the end of a word, did not constitute a variance; and in *Bayley on Bills* 310, it is laid down, that it is no variance in setting out a bill, according to its tenor, to put "Messrs." A, B, and C, without the *r*, instead of "Messrs.," with it.

The learned editor of *Yelverton's Reports* (p. 195b), after stating the doctrine that averments which, though unnecessary, describe a constituent part of the plaintiff's title, must be proved as made, or the plaintiff will fail on the ground of a variance, and that this doctrine is confined to records and contracts, proceeds: "From an expression of Buller, J., in this case (*Gwinnet v. Phillips*, 3 T. R. 645), and another of Marshall, C. J., in 3 Cranch 209, it might be inferred that it is confined to records and written contracts. But though the instances, in which this rule has been applied, may all have been of that description, yet no good reason is perceived for a distinction in this respect, between contracts written and unwritten. A variance in other cases is equally fatal in describing either." See, on this subject, *Bristow v. Wright*, Doug. 667; *Peppin v. Solomons*, 5 T. R. 496; *Turner v. Eyles*, 3 B. & P. 456; *Winn v. White*, 2 W. Bl. 842; *Savage v. Smith*, 2 W. Bl. 1102; *Rex v. Pippet*, 1 T. R. 125; *Williamson v. Allison*, 2 East 452; *Wigley v. Jones*, 5 East 440; *Purcell v. MacNamara*, 9 East 160; *Rhind v. Wilkinson*, 2 Taunt. 237; *Jerome v. Whitney*, 7 Johns. (N. Y.) 321; *Wilson v. Codman*, 3 Cranch (U. S.) 193; *U. S. v. Porter*, 3 Day (Conn.) 283. It may be collected from the above authorities, that whenever a contract is described, a variance will be equally fatal, whether the action be upon the contract itself, or upon some collateral matter, or in form *ex delicto*. 1 Chit. Pl. 307; *Ditchburn v. Spracklin*, 5 Esp. 31.

So much injustice resulted from this

III. MODERN ENGLISH PRACTICE.—Under the modern English practice the right to amend is so extensive that the question of variance seldom arises.¹

broad construction of variance that the English Parliament, and the several legislative bodies of the *United States*, have passed laws on the subject, whereby the old doctrine has been very much curtailed; such, for instance, are the laws permitting amendments when the opposite party is not injured or taken by surprise.

1. Modern English Practice.—A party may now, in almost every case, avoid the consequences of a variance between the allegation in the pleadings and the state of facts proved, by amendment of the record. The power was given by Lord Tenderden's act (9 Geo. IV., ch. 15), in regard to variances between matters in writing or in print, produced in evidence, and the recital thereof upon the record; and it was afterward extended (Stat. 3 and 4 Wm. IV., ch. 42, § 23) to all other matters, in the judgment of the court or judge not material to the merits of the case, upon such terms as to costs and postponement as the court or judge may deem reasonable. *Hanbury v. Ella*, 1 Ad. & El. 61; 28 E. C. L. 39; *Parry v. Fairhurst*, 2 C. M. & R. 196; *Doe v. Edwards*, 6 C. & P. 208; 25 E. C. L. 359; *Hemming v. Parry*, 6 C. & P. 580; 25 E. C. L. 550; *Mash v. Densham*, 1 M. & R. 442; *Cox v. Painter*, 1 Nev. & P. 581; *Doe v. Long*, 9 C. & P. 773; 38 E. C. L. 331; *Whitwill v. Scheer*, 8 Ad. & El. 301; 35 E. C. L. 395; *Carmarthen v. Lewis*, 6 C. & P. 608; 25 E. C. L. 560; *Storr v. Watson*, 2 Scott 842; 30 E. C. L. 492; *Smith v. Brandram*, 9 Dowl. Pr. Cas. 441; *Read v. Dunsmore*, 9 C. & P. 588; 38 E. C. L. 238; *Smith v. Knowelden*, 8 Dowl. 40; *Norcutt v. Mottram*, 7 Scott 176.

For amendment in criminal cases, see Act 9, Geo. IV., ch. 15; 11 & 12 Vict., ch. 46, § 4; 14 & 15 Vict., ch. 100, § 1.

In *Tildesley v. Harper*, 10 Ch. Div. 393, *Bramwell, L. J.*, said: "My practice has always been to give leave to amend unless I have been satisfied that the party applying has been acting *mala fide*, or, by his blunder, has done some injury to the other side which cannot be compensated by costs or otherwise."

In *Clarapede v. Commercial Union*

Assoc., 32 W. R. 262, *Brett, M. R.*, said: "However negligent or careless may have been the first omission, however late the proposed amendment, it should be allowed if it can be made without injustice to the other side, and there is none if they can be compensated by costs." See also *Australian Steam Nav. Co. v. Smith*, 14 App. Cas. 320; *Eaton v. Storer*, 22 Ch. Div. 91; *Steward v. North Metropolitan Tramways Co.*, 16 Q. B. Div. 556; *In re Trufort*, 34 W. R. 56; *In re Gaulard*, etc., Patent, 57 L. J. Ch. 209.

An amendment is a matter of right and not of grace, but it must be asked for. *Collette v. Goode*, 7 Ch. Div. 847; *Cropper v. Smith*, 26 Ch. Div. 700; *Hipgrave v. Case*, 28 Ch. Div. 360; *Clarke v. York*, 31 W. R. 62; *Kurtz v. Spence*, 36 Ch. Div. 774; *Griffiths v. London, etc., Docks Co.*, 13 Q. B. Div. 259. See remarks of *North, J.*, in *Edvain v. Cohen*, 41 Ch. Div. 566; *Laird v. Briggs*, 16 Ch. Div. 445.

"At the trial of a cause, a material variance between the allegations in the pleadings and the state of the facts proved is a fatal objection, and decides the suit in favor of the objecting party; and a variance is often (it might have been said too often) considered in this technical sense as material, though to common sense it may appear to be very trifling and though it may be wholly irrelevant to the merits of the case. But let it be constantly remembered, that the intention of the legislature in passing the 3 & 4 Wm. IV., ch. 42, §§ 23, 24, expressly was to annul the disastrous consequences of such technicalities, and to empower, and indeed, require, the judges to amend in all cases where it did not appear that the opponent had been misled by the variance and prejudiced, not by being deprived of a technical objection, but in the just and meritorious conduct of his action or defense. If this principle be kept in view and acted upon, few indeed will be the variances that will not be amended by the judge who tries the case, or by the court above, when he reserves any difficult point, etc. The inclination should ever be to permit an amendment; because, if erroneously refused, there will be no

IV. UNDER CODES OF CIVIL PROCEDURE—1. In General.—There are embraced in the codes of civil procedure three sections which distinguish the discrepancies between the *allegata* and *probata* into three classes: namely, Material Variances, Immaterial Variances, and Failure of Proof.

The provisions which are set out in succeeding sections of this article, clearly indicate the difference in effect between the variances just mentioned. In the case of a material variance, the court may allow an amendment on such terms as it may deem just. Where the variance is immaterial, there being no injury whatever done to the adverse party, costs are not imposed in allowing an amendment. If there is a failure of proof, there is no room for amendment, and dismissal of the action is the proper course.¹ These are beneficent provisions and should be, as they generally are, liberally construed and carried out. They were designed to correct a great evil and wrong in the old system; namely, the turning of a party out of court upon slight and non-essential mistakes in pleadings, or variances between the pleadings and the proof.

The power of the court to allow amendments under the codes is very great. The real limitation to it seems to be that the amendment shall not change substantially the claim or defense.² To illustrate: If the plaintiffs in an action for conversion sue as tenants in common, and the proof shows that they are surviving partners, the trial court may allow them to amend by inserting an allegation correctly describing the right and character in which they sue.³ But where the plaintiff claims to recover for fraud and deceit, he cannot, on the trial, change the nature of his action and recover on contract.⁴ And the power of a referee to allow amendments is subject to the same restrictions as that of a judge at the trial.⁵

redress, when, if mistakenly granted, the party prejudiced has an express power of appeal. By uniformly acting on this principle, the aspersion so frequently cast upon the administration of justice will be effectually removed, and it may in time be forgotten that a judge once judicially declared that he would nonsuit a plaintiff for an error in half a letter." Heard's *Stephen's Pleading*, p. CXXXVII.

1. See, *infra*, this title, *Material Variance; Immaterial Variance; Failure of Proof*.

2. **Power as to Amendments Under Codes.**—*Carpenter v. Huffsteller*, 87 N. Car. 273; *Grant v. Burgwyn*, 88 N. Car. 95; *Kron v. Smith*, 96 N. Car. 389; *Whitcomb v. Hungerford*, 42 Barb. (N. Y.) 177; *Egert v. Wicker*, 10 How. Pr. (N. Y. Supreme Ct.) 193; *Neudecker*

v. Kohlberg, 81 N. Y. 296; *Hackett v. Bank of California*, 57 Cal. 335. While the code is liberal in disregarding technical defects and omissions in pleadings, and in allowing amendments, it does not permit a cause of action to be changed, either because the plaintiff fails to prove the facts necessary to sustain it, or because he has mistaken his remedy and the force and effect of the allegations of his complaint. *Barnes v. Quigley*, 59 N. Y. 265.

3. *Reeder v. Sayre*, 70 N. Y. 180; 26 Am. Rep. 567.

4. *Barnes v. Quigley*, 59 N. Y. 265.

5. *Dougherty v. Vallotton*, 38 N. Y. Super. Ct. 455. In this case it was further held that the exercise of this power is so far within the discretion of the referee, that, although it may be reviewed on appeal, the court will not

An application for leave to amend a pleading, on the trial, is always addressed to the discretion of the court, and, if denied, is not the subject of appeal or review.¹ But where the refusal of the judge to allow an amendment is placed on the ground of want of power, it may be reviewed.²

2. Kinds of Variance—*a. MATERIAL VARIANCE.*—The usual provision in regard to material variances is this: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice,³ in maintaining his action or defense upon the merits.⁴ Whenever it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just."⁵

The words "or defense," in the above provision, are not found in some of the codes, but they are supplied by the courts, as they are clearly necessary to complete the sense, since there can be no reason why a defendant, who has been misled, shall not have the like liberty of amending as the plaintiff.⁶

To constitute a variance between the allegations and the proofs, the difference must be as to the substantial elements of the case, and not as to the legal conclusions from the facts drawn by the pleader.⁷ Ordinarily, the fact that the party has been

disturb the decision unless the power has manifestly been unwisely exercised.

1. *Dennis v. Snell*, 50 Barb. (N. Y.) 95; 34 How. Pr. (N. Y.) 467.

2. *Russell v. Com.*, 20 N. Y. 80.

3. **Material Variance.**—*Lilly v. Baker*, 88 N. Car. 151; *Patrick v. Richmond*, etc., R. Co., 93 N. Car. 422; *Lawrence v. Hester*, 93 N. Car. 79; *Usry v. Suit*, 91 N. Car. 406; *Gibbs v. Fuller*, 66 N. Car. 119; *Knowles v. Norfolk Southern R. Co.*, 102 N. Car. 66; *Kopplekom v. Huffman*, 12 Neb. 95; *Buhl v. Trowbridge*, 42 Mich. 44; *Hunt v. Middleworth*, 44 Mich. 448; *Hedrick v. Osborne*, 99 Ind. 143; *Braden v. Lemmon*, 127 Ind. 9; *Huntington v. Mendenhall*, 73 Ind. 460; *Benninger v. Hess*, 41 Ohio St. 69.

Variance in Justices' Courts.—Some of the codes provide that in justices' courts a variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby. See *New York Code Civ. Proc.*, § 2943; *Washington Code*, § 1738; *Montana Comp. Stat.* 1887, § 777.

4. Proof by the defendants that they knew the plaintiff held the note produced at the trial; that they had given no other note of that date and amount, and no note of that amount payable generally, does not tend to show that they were misled by the variance, no defense upon the merits being pretended. *Chapman v. Carolin*, 3 Bosw. (N. Y.) 456.

5. **Effect of Want of Proof of Prejudice.**—Without proof to the satisfaction of the court that the adverse party has been so misled, the variance will be deemed immaterial and treated accordingly. *Place v. Minster*, 65 N. Y. 89; *Catlin v. Gunter*, 11 N. Y. 368, reversing 1 Duer (N. Y.) 253; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Fowler v. Martin*, 1 Thomp. & C. (N. Y.) 377; *Dunn v. Durant*, 9 Daly (N. Y.) 389; *Chapman v. Carolin*, 3 Bosw. (N. Y.) 456; *Boynton v. Boynton*, 43 How. Pr. (N. Y. Supreme Ct.) 380; *Blackman v. Wheaton*, 13 Minn. 326; *Hill v. Mellon*, 3 Oregon 543; *Farley v. Eller*, 29 Ind. 322; *Reddick v. Keesling*, 129 Ind. 128; *Wells v. Sharp*, 57 Mo. 56.

6. *Pegram v. Stoltz*, 67 N. Car. 147.

7. *Piatt v. Longworth*, 27 Ohio St. 159.

misled to his prejudice by a variance must be made to appear by affidavit.¹ And if he fails to file his affidavit setting forth in what respect he has been misled, the objection is not available to him in the appellate court.² Proof of necessary prejudice to the opposite party may, however, in some cases, appear on the face of the pleadings themselves.³

There is found in some of the codes a provision that where the plaintiff, in an action to recover the possession of personal property, on a claim of being the owner thereof, shall fail to establish on trial such ownership, but shall prove that he is entitled to the possession thereof by virtue of a special property therein, he shall not thereby be defeated of his action, but shall be permitted to amend his complaint on reasonable terms, and be entitled to judgment according to the proof in the case.⁴

5. IMMATERIAL VARIANCE. — In reference to immaterial variances, it is provided that where the variance is not material, as prescribed in the preceding section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.⁵ Generally speaking, mere misnomers, slight errors in amounts, and in the description of property, are immaterial, and are to be disregarded or amended without

1. Meyer v. Chambers, 68 Mo. 626; Fischer v. Max, 49 Mo. 404; Turner v. Chillicothe, etc., R. Co., 51 Mo. 509; Shelton v. Durham, 76 Mo. 435; Bank of Pleasant Hill v. Wills, 79 Mo. 275; Wells v. Sharp, 57 Mo. 56; Waldheir v. Hannibal, etc., R. Co., 71 Mo. 514; Baylie's Pleading 329.

2. Clements v. Maloney, 55 Mo. 352. See also *infra*, this title, *When Objection to Be Made*.

3. Lyon v. Blossom, 4 Duer (N. Y.) 318.

4. See Washington Code, § 242.

In Silsby v. Aldridge, 1 Wash. 117, an action for certain personal property, the plaintiffs alleged ownership, and produced a chattel mortgage of the property in question, given to them by third persons to secure a debt not yet due, containing the usual provisions against removal and disposition. The property had never been in the plaintiffs' possession, but had been delivered to the defendant by the mortgagors a short time before the action. It was held that there was a fatal variance, not to be cured by amendment under the section of the code above mentioned. To the same effect is Kerron v. North Pac. Lumbering, etc., Mfg. Co., 1 Wash. 241.

5. Immaterial Variance.—Disregarding the variance is tantamount to an amendment of the complaint. Coleman

v. Playsted, 36 Barb. (N. Y.) 26. And where the amendment could have been made on the trial, the appellate court will treat it as having been made, or allow the amendment *nunc pro tunc*. Hamilton v. Winterrowd, 43 Ind. 394; Krutz v. Howard, 70 Ind. 174; Davis v. Doherty, 69 Ind. 11; Coleman v. Playsted, 36 Barb. (N. Y.) 26; Chamblee v. McKenzie, 31 Ark. 155; Lake Shore, etc., R. Co. v. Lavalley, 36 Ohio St. 22; Hoffman v. Gordon, 15 Ohio St. 211; Insurance Co. v. Bonnell, 35 Ohio St. 367.

Where an issue not presented by the pleadings is fully litigated on the trial, the complaint may be amended at any time to conform to the facts, or the variance may be wholly disregarded. Flanders v. Cottrell, 36 Wis. 564; Weston v. McMillan, 42 Wis. 567; Russell v. Loomis, 43 Wis. 545.

In New York, this power to amend and conform the pleadings to the proof is not confined to the court at trial nor at special term, but may be exercised by the court at general term, or by the court of appeals. Dougherty v. Valotton, 38 N. Y. Super. Ct. 455; Pratt v. Hudson River R. Co., 21 N. Y. 305.

In Zeigler v. Wells, 28 Cal. 264, an action against a common carrier for not complying with a contract to carry and deliver a draft, the petition alleged

terms.¹ And a variance as to dates will, as a rule, be considered immaterial, unless the dates are of the gist of the action.²

Where the petition alleges an express agreement, and the evidence shows an implied one only, the variance is immaterial.³ And

that the draft was signed by "John Q. Jackson." The proof showed that it was signed, "John Q. Jackson, agent." The court, in holding this variance to be immaterial, said: "The variance goes merely to the identity of the paper or document which it is alleged the defendants undertook to carry. The draft alleged, and the draft proved, are identical in legal effect; and they were also circumstantially identical, except in the matter of the word 'agent.' We cannot consider that the absence of that particle in the allegations and its presence in the proof, could have affected any substantial rights of the defendants."

In a suit on a judgment of another state, the judgment was described as having been rendered for \$19.30 costs, whereas the judgment offered in evidence was for \$18.30 costs. The variance was deemed immaterial. *Carpenter v. Ritchie* (Wash. 1891), 28 Pac. Rep. 380.

Where a subscription to a railroad was described in the complaint as a contract to pay \$100.00, and the contract produced at the trial and given in evidence was an agreement to pay \$1.00, it was held that the variance was immaterial, and the supreme court would consider the complaint as amended so as to conform to the proof. *Lucas v. Smith*, 42 Ind. 103.

In *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696, the policy of insurance described the real estate upon which the insured property was situated as the "N. E. quarter of sec. 2, tp. 30, range 16, County of Holt, State of Nebraska." The evidence showed that the property was on the northwest quarter of the section named at the time of insurance, and had so remained until the loss, the mistake being in the policy. It was held that the variance was immaterial, and it was unnecessary to reform the policy before the trial.

In *Roe v. Cutter*, 4 Wash. 611, the complaint alleged the conversion of a city warrant, "A. 896," drawn on a certain fund, for a certain amount. The evidence showed that the defendant never had such a warrant, but that he did receive from the plaintiff a warrant drawn

on the same fund, and for the same amount, but numbered "893." The variance was considered immaterial.

In *Newstadt v. Adams*, 5 Duer (N. Y.) 43, the petition averred a delivery to carriers at 59 Broadway. The proof was of a delivery at an office in Canal Street. The variance was considered immaterial.

1. *People v. Eaton*, 41 Cal. 657; *Wolcott v. Meech*, 22 Barb. (N. Y.) 321; *Bank of Cooperstown v. Woods*, 28 N. Y. 545; *Bank of Hanava v. Magee*, 20 N. Y. 335, *affirming* 7 Abb. Pr. (N. Y.) 134.

2. **Variance in Dates.**—*Beach v. Tooker*, 10 How. Pr. (N. Y. Supreme Ct.) 297; *U. S. v. LeBaron*, 4 Wall. (U. S.) 642.

In *Willer v. Bergenthal*, 50 Wis. 474, the complaint alleged that the petition for a lien was filed July 6, 1878, and within six months after the last charge for work and materials. The proof was that such last charge was made November 27, 1877, and the petition filed May 6, 1878. The variance was held to be immaterial.

Where the complaint showed an agreement for extension of time from April 7th "until next spring," and the evidence was that the agreement was for an extension for one year, the variance was considered immaterial. *Banta v. Martin*, 38 Ohio St. 534.

3. **Alleging Express Agreement—Proving Implied One.**—*Smith v. Lippincott*, 49 Barb. (N. Y.) 398; *affirmed* on appeal, see 6 Alb. L. J. 199.

Where the allegations were that certain work and services were to be performed at an agreed compensation, and the proof was that they were to be at what they were reasonably worth, the variance was considered immaterial. *Sussdorff v. Schmidt*, 55 N. Y. 319; *Scott v. Lilienthal*, 9 Bosw. (N. Y.) 224.

In *Giffert v. West*, 33 Wis. 617, the complaint averred an express warranty, which was not proven, but the facts put in evidence, without objection, showed an implied warranty to the same effect. It was held that the variance should be disregarded, or an immediate amendment allowed.

where the complaint is based upon an implied promise to repay money paid out by the plaintiff for the defendant's benefit, and the proof shows an express promise to repay, the variance is immaterial.¹

Where the copy of the note spread on the pleadings contained trifling departures from the original, as in abbreviations, and in stating the amount in words as well as in figures, the variance was adjudged immaterial.²

Where the averment is of a sale in writing, and the proof shows a sale by parol, the variance is immaterial.³

A variance between the complaint and proofs in the degree of force used in expelling the plaintiff from the defendant's cars, is immaterial.⁴

Where the plaintiff declared upon an unconditional contract, and proved a conditional one, the conditions, however, playing no part in the pending suit, the variance was held to be immaterial.⁵ And similarly, where it was shown that before the action was instituted the conditions were fulfilled.⁶

In an action for causing, by wrongful act, the death of a person, where the allegations were that the defendants owned, as tenants in common, the entire block in front of which the accident occurred, and the proof was that they owned it in distinct parcels in severalty, the variance was held to be immaterial.⁷

Where, in an action for conversion, it was averred that the property belonged to the plaintiff, and the evidence showed that it was consigned to him as a factor, he being chargeable with its

In *Farrell v. Palmer*, 36 Cal. 187, the plaintiff declared on an express promise barred by the Statute of Limitations. He proved an acknowledgment from which a promise would be implied. The variance was adjudged immaterial.

1. Alleging Implied Promise—Proving Express One.—*Ashton v. Shepherd*, 120 Ind. 69.

In *Ludlow v. Dole*, 62 N. Y. 617, affirming 1 Hun (N. Y.) 715, the complaint was on a *quantum meruit*. The proof showed a specific contract fixing the price. The variance was held to be immaterial. See also *Fells v. Vestvali*, 2 Keyes (N. Y.) 152.

2. Corcoran v. Doll, 32 Cal. 83.

Where the note upon which the action was founded was described in the complaint as payable "three months after date," and that produced at the trial, although corresponding in all other particulars with that set forth in the complaint, was payable four months after date, the variance was held to be immaterial. *Trowbridge v. Didier*, 4 Duer (N. Y.) 448.

Where a note which, by its terms, is payable eight months after date, is described in the complaint correctly, except that the time when it is payable is not stated, so that, in effect, it is stated to be payable generally and absolutely, the variance is immaterial. *Chapman v. Carolin*, 3 Bosw. (N. Y.) 456.

3. Patterson v. Keystone Min. Co., 30 Cal. 364.

4. Kline v. Central Pac., etc., R. Co., 39 Cal. 591.

5. Pencil v. Home Ins. Co., 3 Wash. 485; *Clark v. Phoenix Ins. Co.*, 36 Cal. 168.

6. Hart v. Hudson, 6 Duer (N. Y.) 294. In this case it was said by the court, speaking by Duer, J., that, at any rate, when the evidence showing the variance has been received upon the trial without objection, the referee ought to disregard it, leaving to the court, in the exercise of the discretion given it by the code, to amend the complaint by conforming the allegations thereof to the proof.

7. Gay v. Winter, 34 Cal. 153.

value, whether sold, lost, or destroyed, the variance was considered an immaterial one.¹

Where, on the trial, the defendant's counsel alleged that there was a variance, but made no answer when asked by the judge if he had been misled thereby, it was ruled that if there was a variance, it must, under the circumstances, be considered immaterial.²

Other examples of immaterial variances will be found in the notes.³

1. *Gorum v. Carey*, 1 Abb. Pr. (N. Y. C. Pl.) 285.

2. *Morgan v. First Nat. Bank*, 93 N. Car. 352.

3. Where, in an action upon a contract, the complaint alleged that the plaintiff refused to enter into the contract unless one of the defendants should indorse such contract and become responsible for its performance, and upon the trial it appeared that the agreement was that the defendant should join in and sign the same, it was held that the variance was immaterial and should have been disregarded. *Hauck v. Craighead*, 4 Hun (N. Y.) 561.

In *Nash v. Towne*, 5 Wall. (U. S.) 689, the averment was "a cash consideration in hand paid," and the proof was that the consideration was a sight draft which was paid. This was held to be an amendable variance.

In an action on a fire insurance policy, the complaint alleged a written application made and signed by the assured, in which certain material false representations were made, and that these thereby became warranties. The jury found that the questions were asked and answered as stated in the written application, but that the assured did not sign it; and the evidence of that fact was admitted and submitted to the jury without objection, and the finding was not excepted to. It was held that the variance was immaterial, and the answer might be treated as amended according to the evidence and finding. *Ryan v. Springfield F., etc., Ins. Co.*, 46 Wis. 671.

In pleading usury, the transaction should be correctly set out in substance, but where, on the trial, the evidence tends to prove a usurious agreement differing from the one alleged in the answer, in several particulars, but not in its entire scope and meaning, and the plaintiff is not misled thereby, the variance will be deemed immaterial. *Clayes v. Hooker*, 4 (Hun N. Y.) 231.

In *Cody v. Bemis*, 40 Wis. 666, the

complaint alleged that the plaintiff paid the defendant for a certain chattel, and the proof was that a third person, his debtor, delivered goods for the plaintiff to the defendant to the amount of the price of the chattel, for which the defendant gave the plaintiff credit. It was held that this, if a variance at all, was one which could not mislead the defendant, and for which the judgment should not be reversed.

In an action of slander, where a contract is referred to in the petition, simply by way of preliminary inducement, the contract is not rendered inadmissible in evidence on account of a technical variance between the instrument and the allegations of the petition, where the effect of such variance is not to surprise or mislead to his prejudice the adverse party. *Clements v. Maloney*, 55 Mo. 352.

In *Barnett v. Ward*, 36 Ohio St. 107; 38 Am. Rep. 561, the defendant, in an action of slander, was charged with saying that the plaintiff "slept with" a man not her husband. The proof showed the statement to have been that such person "was in bed" with her. The variance was adjudged immaterial, the court observing: "In the present case, it not only was not shown that the defendant below was misled to his prejudice by the supposed variance, but that he was so misled was not even suggested. Indeed, it is not easily seen how he could have been misled by a variance so slight. The words proved, as well as those in which the charge was laid, imputed to the plaintiff below a want of chastity. The words proved were slightly variant from those alleged, but they were clearly of the same import and meaning. That the defendant below could have been misled by a difference in phraseology, apparently so immaterial, is hardly to be believed."

In an action by a servant, for injuries received through the negligence of the master, the complaint alleged that the

c. FAILURE OF PROOF.—The codes provide that “where the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, but a failure of proof.”

In cases of failure of proof, there can be no amendment; dismissal of the action is the proper course.¹

When the plaintiff proves a contract essentially different from the one declared on, there is a failure of proof, and the defendant is entitled to a nonsuit.² Thus, if an action is brought upon an account stated, and the proof fails to show such an account, though it may indicate a liability on a special contract, or for

plaintiff left his work to go to the water closet and was injured while on the way; the proof showed that he was on his way to his work, but had not at the time begun work for the day. The variance was considered immaterial. *Sayward v. Carlson*, 1 Wash. 29.

It is not a variance to aver a sale and delivery and prove a sale and readiness to deliver. *Carter v. Carter*, 101 Ind. 450.

Other Instances of Immaterial Variance.—For other instances of immaterial variances see the following cases: *Sacramento County v. Bird*, 31 Cal. 73; *Peters v. Foss*, 20 Cal. 590; *Plate v. Vega*, 31 Cal. 383; *Robinet v. McDonald*, 65 Cal. 611; *Rosebrooks v. Dinsmore*, 5 Abb. Pr. N. S. (N. Y. Ct. of App.) 59; *Cruger v. McLaury*, 41 N. Y. 219, *affirming* 51 Barb. (N. Y.) 642; *Byxbie v. Wood*, 24 N. Y. 607, *affirming* 2 Bosw. (N. Y.) 267; *Phelps v. Van Dusen*, 3 Abb. App. Dec. (N. Y.) 604; *Walbridge v. Ocean Nat. Bank*, 59 N. Y. 642; *Purchase v. Matteson*, 6 Duer (N. Y.) 587; *Schoop v. Clarke*, 1 Keyes (N. Y.) 181; *Hosley v. Black*, 28 N. Y. 438; *Harpending v. Shoemaker*, 37 Barb. (N. Y.) 270; *Robinson v. Wheeler*, 25 N. Y. 252; *Bedford v. Terhune*, 30 N. Y. 453; *Thomas v. Nelson*, 69 N. Y. 118; *Union India Rubber Co. v. Tomlinson*, 1 E. D. Smith (N. Y.) 364; *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247, *affirming* 4 Robt. (N. Y.) 313; 8 Am. Rep. 549; *Lobdell v. Lobdell*, 36 N. Y. 327; *Chatfield v. Frost*, 3 Thomp. & C. (N. Y.) 357; *Bate v. Graham*, 11 N. Y. 237; *Macomber v. Granite Ins. Co.*, 15 N. Y. 495; *Rose v. Bell*, 38 Barb. (N. Y.) 25; *Cornell v. Masten*, 35 Barb. (N. Y.) 157; *Paton v. Lent*, 4 Duer (N. Y.) 231; *Polard v. New York, etc., R. Co.*, 7 Bosw. (N. Y.) 437; *Carter v. Hope*, 10 Barb.

(N. Y.) 180; *Lefler v. Sherwood*, 21 Hun (N. Y.) 573; *Brown v. Moore*, 3 Oregon 438; *Peasley v. Hart*, 3 West Coast Rep. 623; *Johnston Harvester Co. v. Clark*, 30 Minn. 308; *Pape v. Capital Bank*, 20 Kan. 440; 27 Am. St. Rep. 183; *McMahan v. Miller*, 82 N. Car. 317; *Wilson v. Moore*, 72 N. Car. 558; *Brown v. Morris*, 83 N. Car. 251; *Walker v. Duncan*, 68 Wis. 624; *Engel v. Hardt*, 56 Wis. 456; *Delaplaine v. Turnley*, 44 Wis. 31; *Harper v. Milwaukee*, 30 Wis. 365; *Robbins v. Diggins*, 78 Iowa 521; *Thalheimer v. Crow*, 13 Colo. 397; *McAdams v. Sutton*, 24 Ohio St. 333.

1. *Cincinnati, etc., R. Co. v. Bunnell*, 61 Ind. 183.

2. **Failure of Proof.**—In *Johnson v. Moss*, 45 Cal. 515, the contract, as set out in the complaint, did not require the defendant to give to the plaintiff any written guaranty that he would not reestablish a ferry, that being a question in the case; and the plaintiff proved, by his own testimony, that he bought the right of way of the defendant's ferry, and that the defendant was to give him a written guaranty that “there should be no more ferry there.” The court held that there was proved a contract essentially different from the one declared on, and a motion for a nonsuit should be granted.

In *Boardman v. Griffin*, 52 Ind. 101, it was said that parties to an action must recover, if at all, upon the allegations of the pleadings therein; and when the trial is by the court, it may not, any more than a jury, go outside of the case made by the pleadings and find for a party upon facts different in their general scope and meaning from those pleaded. It would be folly to require the plaintiff to state his cause of action had the defendant to disclose his grounds of defense, if, on the trial, either

fraud, there is a failure of proof.¹ And where suit was brought on a contract alleged to have been made with a person since deceased, and for the benefit of his estate, but the evidence showed that he was not a party to the contract in its origin, and had never acquired an interest in it by assignment, this was held to be a failure of proof.²

Where the note declared on does not mention any place of payment, and that offered in evidence is made payable at a certain bank, the variance is fatal.³

A failure of proof also occurs where the plaintiffs sue in their separate capacities, and prove a contract with the partnership of which they are members.⁴

In an action for negligence, it is not proper for the plaintiff to allege in his complaint one thing as the proximate cause of his injury, and upon the trial prove another as the proximate cause.⁵

In an action on an account for work and labor performed, the plaintiff may not recover on facts showing a guaranty by the defendant that other parties would pay for the work.⁶

If, however, the proof sustains a cause of action which can be found in the complaint, it is sufficient, although the language used in stating it may be inappropriate and lacking in precision and technical accuracy.⁷ And a failure of proof, or a variance between the allegations and proof, as to such provisions of the contract as are not essential to a recovery, will not defeat the plaintiff's action.⁸

or both might abandon such grounds and recover upon others which are substantially different from those alleged.

1. *Volkening v. DeGraaff*, 81 N. Y. 268, *affirming* 44 N. Y. Super. Ct. 424. See also *Whitney v. Purrington*, 59 Cal. 36.

2. *Pendleton v. Dalton*, 96 N. Car. 507.

3. *Faulkner v. Faulkner*, 73 Mo. 327.

4. *McCord v. Seale*, 56 Cal. 262.

5. *Alleging One Thing as Proximate Cause—Proving Another.*—*Woolsey v. Ellenville* (Supreme Ct.), 23 N. Y. Supp. 410.

A right to recover on a complaint alleging negligence in the use of defective machinery, cannot be supported by proof of negligence in employing unskillful men to operate the machinery. *Long v. Doxey*, 50 Ind. 385.

Where the petition alleged that the plaintiff was injured through the negligence of the defendant, in having and using defective machinery, and in running and managing its railroad and cars, and the proof was that the injury was occasioned by a broken frog, there was held to be a failure of proof.

Waldhier v. Hannibal, etc., R. Co., 71 Mo. 514. See also *Buffington v. Atlantic*, etc., R. Co., 64 Mo. 246.

In *Parker v. Rensselaer*, etc., R. Co., 16 Barb. (N. Y.) 315, the plaintiff alleged that the injury to his property was occasioned by the neglect of the defendant to construct "cattle guards," and the proof was that it was due to the omission to build "fences." This was considered a failure of proof.

6. *Packard v. Snell*, 35 Iowa 80.

7. *Knapp v. Roche*, 37 N. Y. Super. Ct. 395; *Ralston v. Kohl*, 30 Ohio St. 92.

8. *Gaines v. Union Transp.*, etc., Co., 28 Ohio St. 418; *Nolte v. Hill*, 36 Ohio St. 186.

In *Miller v. Kendig*, 55 Iowa 177, it was said, by way of illustration, that if one should sue for goods sold at an alleged contract price, and the evidence should show that the contract price was less than alleged, and a verdict should be rendered accordingly, there would evidently not be such failure of proof as would justify setting aside the verdict. The claim would not be unproved in its general meaning—the

The most familiar applications of the rule first stated above, in regard to failure of proof, are that if the complaint alleges a cause of action *ex delicto*, and the proof establishes a breach of contract, express or implied,¹ or if a cause of action *ex contractu* be alleged, and one *ex delicto* be proved,² no recovery can be had, and the action must be dismissed. And on a complaint demanding only equitable relief, there can be no recovery as for a conversion.³ Where, however, the averments of the petition are sufficiently sustained by the evidence, if a cause of action *ex contractu* be otherwise set forth, it is not enough to authorize a nonsuit that the petition contains an averment suited to an action *ex delicto*.⁴

Other examples of failure of proof are given in the notes.⁵

claim in its general meaning being for the price of the goods sold.

1. **Alleging Cause of Action Ex Delicto—Proving One Ex Contractu.**—Hackett v. Bank of California, 57 Cal. 335; Rothe v. Rothe, 31 Wis. 570; Walter v. Bennett, 16 N. Y. 253; De Graw v. Elmore, 50 N. Y. 1. Where fraud is the basis of the complaint, there can be no recovery for a breach of contract. Ross v. Mather, 51 N. Y. 108, *reversing* 47 Barb. (N. Y.) 582; 10 Am. Rep. 562; People v. Dennison, 84 N. Y. 272; Watts v. McAllister, 33 Ind. 264; Johannesson v. Borschenius, 35 Wis. 131.

2. Ramirez v. Murray, 5 Cal. 222; Beard v. Yates, 2 Hun (N. Y.) 466.

In an action for goods sold and delivered, there can be no recovery on a state of facts which constitute a trespass *de bonis asportatis*. Link v. Vaughn, 17 Mo. 585.

3. Lewis v. Mott, 36 N. Y. 395.

4. Veeder v. Cooley, 2 Hun (N. Y.) 74.

5. In Beck v. Ferrara, 19 Mo. 30, the petition stated that the defendant was indebted to the plaintiff for stall No. 20 in the North Market, which was purchased by the plaintiff from a third party for the defendant, at his special instance and request. The proof was that the plaintiff bought the stall for himself and subsequently sold it to the defendant. This was held to be a failure of proof.

Where the petition alleged that the defendant, by means of fraud, obtained the goods of the plaintiff and converted them to his own use, and the only evidence in support of the allegation showed the defendant to be a *bona fide* purchaser from one in possession of the goods, but without title, there was held

to be a failure of proof. Dean v. Yates, 22 Ohio St. 388.

In People v. Cushman, 1 Hun (N. Y.) 73, in proceedings instituted by the respondent, under the Landlord and Tenant Act, to have the relator removed from a certain portion of a pier in New York, described in the complaint by metes and bounds, and at the trial there was no proof of any lease of the particular premises described, this was held to be a fatal variance.

Averment of Ownership in Fee—Proof of Equitable Ownership.—Where the petition avers that the plaintiffs are the owners in fee of the land, and the proof is that they are the equitable owners, and, as such, have the right to have the deed from the trustees set aside, for a failure to comply with the conditions of the power, there is a failure of proof. Rowe v. Beckett, 30 Ind. 161; 95 Am. Dec. 676.

In Christian College v. Hendley, 49 Cal. 347, there was an allegation of a promise to pay money to a corporation, and the promise proved was made to a committee to be thereafter selected by a church. This was held to be a failure of proof.

Where the complaint seeks to set aside conveyances and other instruments affecting real property, on the ground of fraud, and the proof is that they constitute a mortgage from which the plaintiff has the right to redeem, there is a failure of proof. Patterson v. Patterson, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 262.

Where the plaintiff declared upon a note made by one McKinley and one Campbell, and the note given in evidence was signed by H. C. McKinley

3. When Objection to Be Made.—An objection on the ground of variance between the *allegata* and *probata* must be made at the trial, and it is too late to raise it for the first time on appeal,¹ or

and *C. Campbell & Co.*, the variance was held to be a substantial one. *Cotes v. Campbell*, 3 Cal. 192. See also *Morrison v. Bradley*, 5 Cal. 503; *Farmer v. Cram*, 7 Cal. 136.

In *Smith v. McGregor*, 96 N. Car. 101, the answer alleged as a counterclaim, that the note sued on was indorsed to the plaintiff after maturity, and that the indorser was indebted to the defendant, before the transfer of the note, for money paid by him as surety, and the evidence offered to support it was of a joint and several note executed by the defendant and another party who, it was alleged, was the agent of the indorser of the plaintiff, but nothing in the note offered in evidence showed any agency. It was held that this was a failure of proof, and the court below properly charged the jury that there was no evidence to support the allegation of the counterclaim.

If the alleged cause of action is for services for having found a purchaser who agreed to buy the defendant's land at a certain price, evidence that the plaintiff found a party who would agree to purchase if the defendant would first take a lease for three years and give security for the rent, and that the defendant did not take the lease, but merely agreed to do so, and give security, and that the purchaser did not accept such agreement, does not show that the plaintiff found a purchaser who agreed to buy at any price, and there is a failure of proof. *Masten v. Griffing*, 33 Cal. 111.

In *Cowles v. Warner*, 22 Minn. 449, the complaint disclosed a contract terminable at the pleasure of either party. On the trial, the contract proved by the plaintiff was one that, by its terms, was to continue in force for a period of time longer than one year from the making thereof. There was held to be a fatal variance.

Under a complaint for money loaned, it is not competent for the plaintiff to prove a cause of action for money paid out for the defendant, under such circumstances as do not constitute a loan. *Cummings v. Long*, 25 Minn. 337.

Other Instances of Failure of Proof.—For other illustrations of failure of

proof see the following cases: *Batterson v. Chicago, etc., R. Co.*, 49 Mich. 184; *Jones v. Kemp*, 49 Mich. 9; *Marsh v. Wade*, 1 Wash. 538; *Faulkner v. Faulkner*, 73 Mo. 327; *Lawrence v. McBready*, 6 Bosw. (N. Y.) 329; *Coan v. Osgood*, 15 Barb. (N. Y.) 583; *Decker v. Saltzman*, 59 N. Y. 275, *affirming* 1 Hun (N. Y.) 421; *Tolano v. National Steam Nav. Co.*, 4 Abb. Pr. N. S. (N. Y. Super. Ct.) 316; *Bernhard v. Seligman*, 54 N. Y. 661; *Dudley v. Scranton*, 57 N. Y. 424; *Codd v. Rathbone*, 19 N. Y. 37; *Salters v. Genin*, 7 Abb. Pr. (N. Y. Super. Ct.) 193; *McMichael v. Kilmer*, 76 N. Y. 36; *Texier v. Ganin*, 5 Duer (N. Y.) 389; *Klien v. Wolfsohn*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 134; *Stearns v. Tappin*, 5 Duer (N. Y.) 303; *Egert v. Wicker*, 10 How. Pr. (N. Y. Supreme Ct.) 193; *Coleman v. Playsted*, 36 Barb. (N. Y.) 26; *Arnold v. Angell*, 62 N. Y. 508; *Harris v. Kasson*, 79 N. Y. 381; *Abernathy v. Seagle*, 98 N. Car. 553; *Willis v. Brouch*, 94 N. Car. 142; *McKee v. Lineberger*, 69 N. Car. 239; *Hudson v. McCartney*, 33 Wis. 331; *Dolph v. Rice*, 18 Wis. 397; 86 Am. Dec. 778; *Gaston v. Owen*, 43 Wis. 103; *Stowell v. Eldred*, 39 Wis. 614; *Eilert v. Oshkosh*, 14 Wis. 586; *Goldsmith v. Boersch*, 28 Iowa 35; *Phillips v. Van Schaick*, 37 Iowa 237; *York v. Wallace*, 48 Iowa 305; *Procton v. Reif*, 52 Iowa 592; *O'Brien v. St. Paul*, 18 Minn. 176; *Hawkins v. Roberts*, 45 Cal. 38; *Evans v. Bailey*, 66 Cal. 112; *Hinkle v. San Francisco, etc., R. Co.*, 55 Cal. 627; *Tomlinson v. Monroe*, 41 Cal. 94; *Clark v. Sherman*, 5 Wash. 681; *Distler v. Dabney*, 3 Wash. 200; *Jeffersonville, etc., R. Co. v. Worland*, 50 Ind. 339; *Huntington v. Mendenhall*, 73 Ind. 460; *Hill v. Road Dist.*, 10 Ohio St. 621; *Thatcher v. Heisey*, 21 Ohio St. 668.

1. When Objection To Be Taken—Too Late on Appeal.—*Doyle v. Mulren*, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 258; *Rosebrooks v. Dinsmore*, 36 How. Pr. (N. Y. Ct. of App.) 138; *Coates v. First Nat. Bank*, 91 N. Y. 31; *Fitch v. Rathbun*, 61 N. Y. 579; *Newstadt v. Adams*, 5 Duer (N. Y.) 43; *Tyng v. Commercial Warehouse Co.*, 58 N. Y.

on a motion for a new trial.¹ If not reasonably made it will not be considered.

VAULT.—See note 2.

VEGETABLE.—See note 3.

308; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Bell v. Knowles*, 45 Cal. 193; *Dikeman v. Norril*, 36 Cal. 94; *Marshall v. Ferguson*, 23 Cal. 65; *Newhall-House Stock Co. v. Flint, etc.*, R. Co., 47 Wis. 516; *Davidson v. Oregon, etc.*, R. Co., 11 Oregon 136; *Missouri Valley R. Co. v. Caldwell*, 8 Kan. 244; *Mitchell v. Milhoan*, 11 Kan. 617; *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84; *Cummings v. Petsch*, 41 Minn. 115; *Nelson v. Thompson*, 23 Minn. 508; *Speer v. Given*, 61 Iowa 93; *Spear v. Bishop*, 24 Ohio St. 598; *Sibila v. Bahnay*, 34 Ohio St. 399; *Krewson v. Cloud*, 45 Ind. 273; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Matthews v. Baraboo*, 39 Wis. 674.

As the practice allows a variance between the proof and pleadings to be cured by amending the latter when the opposite party is not misled, if, in an action on a policy of insurance, evidence is offered without objection, establishing or intending to establish a defense under the policy which has not been properly pleaded, and on the defendant's request for instructions founded on that evidence, no objection is made that the defense was not within the issues, it is competent for the defendant to rely upon the defense after the opportunity for amending the pleadings has passed. *Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113. See also *Williams v. Mechanics', etc., F. Ins. Co.*, 54 N. Y. 577; *Williams v. Peoples' F. Ins. Co.*, 57 N. Y. 274.

1. Objection Cannot Be Taken on Motion for New Trial.—*Bell v. Knowles*, 45 Cal. 193. In *Giffert v. West*, 33 Wis. 617, objection was not taken to the variance until after verdict, and a motion for a new trial was denied, when it was taken on a motion in arrest of judgment. This was held to be too late to be available.

2. Burglary.—A structure above ground, arranged and intended for the interment of the dead, built of granite and called a vault, was held not to be a building, within a statute against burglary, in *People v. Richards*, 108 N. Y. 137. The court said: "Taking the

law in regard to burglary, from the earliest period of the common law where that crime is referred to, down to the present time, we feel quite confident that not one case can be found where breaking and entering such a structure as the one in question has been held to come within that crime. We simply intend to decide this case and no other; and when we come to examine the indictment, and the proof giving a description of the structure, we come to the belief that it is really nothing more than a grave above ground. The witness speaks of these various compartments as graves. They are intended solely for the interment of dead bodies, and the structure itself can be put to no other possible use without altering its nature and purpose. The small room, as it is termed, in the front portion of the structure, between the outside wall and the place for the deposit of the coffins, is used for nothing. No services of a religious nature could be carried on there, and language could not be tortured into calling that place a church, or a place for religious worship. If instead of being placed above ground, this structure had been placed in a foundation deep enough to receive it, and then used for the purpose of burying the dead, and that only, could there be any question that it was not the subject of burglary, even although sufficient of the structure were above ground to enable one to reach it through a door and steps? We think not; and we do not think it becomes a building within the statute in regard to burglary, any more because it is placed above the ground when its sole purpose is that it shall be used as furnishing graves for the burial of the dead."

3. Revenue Law.—"Beans" have been held to fall within the term vegetables. *Salomon v. Robertson*, 41 Fed. Rep. 519. In this case the court said: "Looking further along in the act, we find the word 'vegetables,' and these articles, when they are used as food by man or by beast, would be referred to in everyday speech as 'vegetables.' There are, then, two words in the act which, when interpreted according to their common

VEHICLE.—See note 1.

everyday use, are each of them sufficiently broad to cover the particular article here. The next question is whether the everyday use of the term has been modified by any commercial usage. The proof here, even on the part of the plaintiffs, is—I refer particularly to the testimony of Messrs. Wakeman & Ahles—that there is no difference between the commercial and the ordinary meaning of the words ‘seeds’ and ‘vegetables.’ A seed is a seed, and a vegetable is a vegetable, say the witnesses, whether in commercial language or in everyday life. Now the supreme court have held, over and over again, that where words are not used technically, or have not been wrenched from their ordinary meaning by commercial usage, their interpretation is for the court. That same tribunal has, moreover, in this very case, interpreted both those terms, ‘seeds’ and ‘vegetables.’ *Robertson v. Salmon*, 130 U. S. 412. As there are two words in the tariff act, each broad enough to cover the article, it only remains to determine under which it shall be classified for duty, whether as a seed or as a vegetable. Turning to the decision of the supreme court, I cannot escape the conviction that whatever the phraseology of the statute may now be, or whatever it may have been before the amendment of 1883, it was the clear understanding of the supreme court that such determination must be according to the use of the article. This seems to be quite sharply indicated by the phraseology of the opinion. Thus in one place it is said that ‘as an article of food on our tables . . . they are used as a vegetable.’ Elsewhere in the opinion it is held error in the circuit court not to allow the defendant to prove ‘the designation of beans as an article of food,’ the supreme court saying that ‘the common designation, as used in everyday life, when beans are used as food (which is the great purpose of their production), would have been very proper.’ Why it would have been proper to introduce testimony as to how the beans were called when they were used as food, I fail to see, unless it was on the principle that the use of the article was to determine its classification. The use of an article is a question of fact, and I should send this case to

the jury, were it not for the testimony of the plaintiff, which is that, as to this particular importation, the affidavit which he made upon the back of the entry is a true statement; that affidavit stating that the beans are to be used exclusively as food. For that reason I shall direct a verdict for the defendant.” To the same effect is *Windmuller v. Robertson*, 23 Blatchf. (U. S.) 233.

1. A bicycle is a vehicle, and is entitled to the rights of the road equally with a carriage or other vehicle. *Holland v. Bartch*, 120 Ind. 46; 16 Am. St. Rep. 307. In this case the court, by Olds, J., said: “In the case of *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76, it is held that a bicycle is a vehicle, and is entitled to the rights of the road, and has no lawful right to the use of the sidewalk. In the case of *State v. Collins*, 16 R. I. 371, decided by the supreme court of *Rhode Island*, the court says: ‘The question raised by the exceptions is whether a bicycle is a carriage or vehicle, within the meaning of *Rhode Island Pub. Stat.*, ch. 66, § 1, which enacts that ‘every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or bridge, shall seasonably drive his carriage or vehicle to the right of the center of the traveled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption.’ We are of the opinion that it is a carriage or vehicle which carries a person mounted upon it, and which is propelled and driven by him. The word ‘vehicle’ is certainly broad enough to include any machine which is used and driven on the traveled part of the highway, for the purpose of conveyance upon the highway. The purpose of the section is to prevent accident or collision, and such accident or collision may happen from a bicycle and other carriage meeting ‘unless the rule laid down in the section is observed.’ In the case of *Taylor v. Goodwin*, 4 Q. B. Div. 228; 27 W. R. 489, a bicycle was held to be a carriage. Although but few courts have passed upon and defined the rights of persons riding upon and propelling or driving bicycles, yet such as have, unanimously place them upon an equality and governed by the same rule as persons riding or driving any other vehicle or carriage, and

we think this is the proper rule to adopt. Although the use of the bicycle, for the purpose of locomotion and travel, is quite modern, yet it is a vehicle of great convenience, and its use is becoming quite common; while traveling upon the highways by means of horses has been in vogue much longer, and is more universal at present than by means of bicycles, yet persons traveling by means of horses have no superior rights to those traveling upon the highway by improved methods of travel, which are adapted to and consistent with the proper use of the highway."

Dray.—A city ordinance taxing "every owner of a wagon or other vehicle, kept or used for free delivery of goods to customers or others in the city," imposes the tax on drays belonging to an iron works situated outside of the city limits, but used for the delivery of their wares within the city. *Memphis v. Battaille*, 8 Heisk. (Tenn.) 537. Here the court said: "We are next to consider whether the words 'other vehicles,' used in the ordinance, include the vehicle commonly called a dray. It seems to us that the common sense of the proposition must be the law of it, and, without further discussion, we hold that a dray, being a vehicle other than the vehicle named in the ordinance, is necessarily embraced within its provisions and meaning, and that there is nothing in the section in question, or in the phraseology of the other sections referred to, which forbids this reasonable and material construction of unambiguous words."

Street Sprinkler—Public Vehicle.—A city ordinance imposed a license tax on all "public vehicles using the streets of the city for trade or traffic or other purposes." One A was engaged in the business of sprinkling the streets with water, for compensation paid by the owners of property fronting on the streets, and for this purpose used tanks which were mounted on wheels and driven through the streets, and were known as sprinkling carts. It was held that these carts were "public vehicles" within the meaning of the ordinance, and as such were subject to taxation. *St. Louis v. Woodruff*, 71 Mo. 93. The court, in this case, said: "Was the sprinkling cart a public vehicle which was used by defendant for trade or traffic? It was not owned by the public, nor are the vehicles of any class named in the ordinance so owned. They are all

private property used in public employments, and this is what is meant in the ordinance by 'public vehicles using the streets of the city for trade or traffic,' etc. The sprinkling cart was not used exclusively for the purpose of hauling and sprinkling water upon the street in front of the premises of its owner, but to haul and sprinkle water on the streets for other persons who would employ and pay them for it, and was as much a public vehicle as omnibuses and hackney carriages used in the city in the business of transporting persons for pay. The one is equally with the other, a public business."

Ferryboat.—A ferryboat was held not to be a vehicle within the meaning of a statute empowering a municipality to levy a tax on "vehicles." *Duckwall v. New Albany*, 25 Ind. 286. The court said, in this case: "Webster states that the word vehicle is rarely applied to water craft, and our statute requires us to give the word, as used in the act, its 'ordinary and usual sense.' A former section refers also to the same objects, describing them as 'vehicles for the transportation of passengers, freight, or other articles, to or from points within the city, for hire or pay.'"

Street Car.—A statute declared that carriages, wagons, and other wheeled vehicles, should be subject to toll. It was held that "other wheeled vehicles" did not include street cars. *Monongahela Bridge Co. v. Pittsburgh, etc., R. Co.*, 114 Pa. St. 484. The court said, in this case: "It is contended, however, that the phrase, 'or other wheeled vehicles of whatever description,' used in the act of 1871, is broad enough to embrace street cars, and that the company has a right to charge tolls upon them accordingly. It is a conceded fact that, in 1871, street cars in the cities of the commonwealth were a well-known instrument of conveyance; for twelve years and upwards they had been extensively used for passenger travel over the Monongahela bridge, and, if the framers of the act of 1871 intended to embrace them within its provisions, it is very remarkable indeed that they were not specifically mentioned. A street car certainly is a wheeled vehicle in the general sense of that term; it is a vehicle in the same sense that an ordinary railroad car is a vehicle, but both are vehicles of a somewhat extraordinary character, in this respect, that they can only be used as a means of conveyance or transportation upon a

VEIN—(See also MINES AND MINING CLAIMS, vol. 15, p. 501).—See note 1.

VEND.—See note 2.

permanent, continuous, and connected track. To pass the railway company's cars over this bridge, their railway track must be permanently laid upon it, so as to connect with their tracks at either end. In other words, the bridge must form part or parcel of the route of the railway. The vehicles which are specified in the act of 1871, 'carriages, wagons, buggies, sleighs and sleds,' are all of that class which requires no such special appliance to promote their passage, and it is reasonable to suppose that the general phrase, 'other wheeled vehicles of whatever description,' used in immediate connection therewith, may refer to vehicles of the same general class or kind as those particularly specified. In view, then, of the fact that special provision had already been made in the act of 1859, for the regulation of the rate of tolls which the railway company should pay for the passage of their street cars over the Monongahela bridge; that the railway company for twelve years and upwards had occupied the bridge with their track, and had paid, and the bridge company had received, tolls according to rates from time to time amicably agreed upon, in apparent conformity to the provisions of that act; that notwithstanding the extraordinary character of street cars as a means of conveyance, and of the unusual appliances required in order to facilitate their passage over the bridge, no particular reference was made to them in the designation of the tolls which might be charged under the act of 1871. We are of the opinion that it was not the legislative intention to embrace the railway company's cars in the provision of that act, and that the general designation 'other wheeled vehicles of whatever description,' must be restrained to the same kind or general class of vehicles with those particularized."

1. **Vein Matter**.—In *Bullion Min. Co. v. Cræsus Gold, etc., Min. Co.*, 2 Nev. 687; 90 Am. Dec. 526, Beatty, J., said: "Vein matter may certainly be removed from between its original walls either by artificial or natural means, and after such removal it does not cease to be vein matter. When we say that certain substances are vein matter, we may mean

that those substances are now a component part of some mineral vein, or that at some past time they did constitute a part of the substance of some vein. It is well known that what miners call vein matter frequently rolls down a mountain side to a great distance from its original location in the vein, and by the action of water it is carried to still greater distances."

2. In a declaration for infringing a patent which granted that the plaintiff, and no others, should "make, use, exercise, and vend" his invention, and forbade all persons to "make, use, or put in practice" the same, or counterfeit or imitate it, without the plaintiff's license, the plaintiff alleged that the defendant, without his license, exposed to sale articles intended to imitate his invention. It was held, on general demurrer, that the count was bad, as not stating anything which was necessarily an infringement of the patent. *Minter v. Williams*, 4 Ad. & El. 251; 31 E. C. L. 63. Here the court, by Coleridge, J., said: "The granting part of the patent authorizes the plaintiff exclusively to 'make, use, exercise, and vend' his invention. The prohibitory part forbids all persons to 'make, use, or put in practice the said invention,' or 'counterfeit, imitate, or resemble the same,' or to make any addition thereto, or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, without license from the plaintiff. Then the count alleges that the defendant, without the plaintiff's license, exposed to sale divers chairs intended to imitate and resemble his invention. Do those words necessarily import the vending spoken of in the granting part of the patent? I certainly think not; because, even assuming that to vend may mean both a selling and an exposing to sale (though I rather think that it means the habit of selling and offering for sale), still those two meanings are not co-extensive, the former may include the latter, but a mere exposure to sell, *i. e.*, with intent to sell, or for the purpose of selling, is not only not equivalent to a sale, but, as regards the patentee, may be attended with wholly different consequences. If we read the word 'vend' as expressly inserted in

VENDITIONI EXPONAS.—A judicial writ directed to the sheriff, commanding him to sell goods which he has taken into his hands by virtue of a former writ (but to which writ he had returned that he had taken the goods, but that they remained in his hands for want of buyers), in order to satisfy judgment against the defendant.¹

the prohibitory part of the patent, we ought only to give it there the meaning which would effectuate the purpose of the patent, the prevention of acts injurious to the patentee, with as little restraint on the public as possible. It must be taken here that the defendant has only exposed to sale; that whatever may have been his original purpose in so doing, or whatever motive has supervened, he has abstained from selling. Now, I cannot say that such a mere exposure to sale is necessarily injurious to the patentee; it may on the contrary be very beneficial; it is not, therefore, necessarily the vending which is exclusively granted to him."

1. 1 Chitty's Practice 678; Reg. Jud. 33.

A writ of *venditioni exponas* is a writ of execution, and confers upon the officer authority to sell, pursuant to the levy, advertisement, and command of the writ, without re-advertising the property. *Young v. Smith*, 23 Tex. 598; 76 Am. Dec. 81.

In *Frisch v. Miller*, 5 Pa. St. 315, the court, by Coulter, J., said: "The peculiar office of a *venditioni exponas*, as it regards personal property, is to enforce the sheriff to sell when he has returned a levy unsold for want of buyers, and to bring him into contempt for not selling; 2 Saund. 71b, n.; 11 S. & R. (Pa.) 304; and when it is supposed the property returned levied will not satisfy the debt, the plaintiff may have a clause of *fi. fa.* added, to justify the levy and sale of property beyond what is described in the *venditioni exponas*."

In *Clark v. Sawyer*, 48 Cal. 138, Rhodes, J., delivering the opinion of the court, said: "The authorities make a distinction between cases where the *venditioni* is issued for the sale of personal property, and where it is issued for the sale of land. In cases of the former class, the *venditioni* must go to the officer who made the seizure; for by the seizure he acquired a special property in the chattels, and a right to their possession, by virtue of which, it is said, he might sell them without any new command, after the return of the writ, and even after his term of office

had expired: (*Tarkinton v. Alexander*, 2 Dev. & B. (N. Car.) 87; *Rogers v. Darnoby*, 4 B. Mon. (Ky.) 238.) In *England*, the *venditioni* goes only for the sale of personal property, and consequently the authorities there are all of this class. But when an execution is levied on land, the officer making the levy acquires no interest in the land, and is not entitled to its possession. The levy creates a lien only, which may be enforced by a sale, but until sale and deed, the title and right of possession remain in the execution debtor. When a *venditioni exponas* is issued for the enforcement of this lien, no reason is perceived why it must necessarily be executed by the sheriff who made the levy, and who has gone out of office, and not by his successor. It is accordingly held by some of the American authorities that the *venditioni* must be executed by the new sheriff, (*Bank of Tennessee v. Beatty*, 3 Sneed (Tenn.) 305; *Lesley v. Gardner*, 3 W. & S. (Pa.) 314); and by others, that it may be executed by either the old or new sheriff. (*Holmes v. McIndor*, 20 Wis. 657; *Sumner v. Moore*, 2 McLean (U. S.) 59; *Tarkinton v. Alexander*, 2 Dev. & B. (N. Car.) 87.)"

In *Leavitt v. Smith*, 7 Ala. 175, it was held that a sheriff who has begun to do execution, should proceed therein, and having levied it, the common law requires that he should sell the goods, even after the return day, although he may have been superseded by his successor; and he is not excused for a non-performance of his duty by delivering the execution and goods to his successor, but he must sell them, or otherwise legally dispose of them. If, by statute, a *venditioni exponas* is made necessary to sell the goods after the return day of the *fi. fa.*, he should at least accept it, when it is tendered him by the sheriff.

The intention of the *Missouri* execution law of 1855, and that of 1865 (§§ 59, 63), was to require executions not completely executed to be handed over to, and completed by, the sheriff in office at the time of the sales. *Kane v. McCoan*, 55 Mo. 181.

VENDOR AND PURCHASER.—(See also **CONTRACT**, vol. 3, p. 823; **DEEDS OF CONVEYANCE**, vol. 5, p. 423; **ESTATES**, vol. 6, p. 875; **FRAUDS**, **STATUTE OF**, vol. 8, p. 657; **POWERS**, vol. 18, p. 877; **REAL COVENANTS**, vol. 19, p. 973; **REAL PROPERTY**, vol. 19, p. 1028; **RECORDING ACTS**, vol. 20, p. 527; **SHERIFF'S SALES**, vol. 22, p. 570; **SPECIFIC PERFORMANCE**, vol. 22, p. 908; **TITLE (REAL PROPERTY)**, vol. 26, p. 20; **UNDUE INFLUENCE**, vol. 27, p. 452; **VENDOR'S LIEN**, vol. 28; and the other titles specifically referred to in the following analysis.)

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I. THE SUBJECT GENERALLY; ITS SCOPE AND DEFINITIONS.—While a vendor is strictly any person by whom a sale is made,¹ and a purchaser anyone who acquires property for a consideration,² whether the subject-matter of the contract be real or personal, the words are often used in a more restricted sense, and the subject of "Vendor and Purchaser" is made the complement of that of "Sales." The former is made to embrace contracts relating to real property and the latter to embrace those having to do with personal property exclusively.³ This is the usual division of the

1. Anderson's L. Dict.
2. Webster's Dict.

3. Anderson's L. Dict. SALES, vol. 21, p. 444; Century Dict.

text-books, and is the one to be here followed. We may accordingly define a vendor as one who sells, and a purchaser as one who buys, real property.¹

II. THE SUBJECT-MATTER.—The law of vendor and purchaser has to do with the transfer of estates in real property. The consideration of the thing sold naturally subdivides itself into three heads; the property, the estate, and the title of the vendor.

1. The Property.—Real property includes land, tenements, and hereditaments.²

The great majority of questions occurring in the law of vendor and purchaser arise under contracts for the transfer of land.³

2. The Estate.—The estate to be conveyed is always an essential part of a contract to sell land. If a certain estate be expressly named, the words of the contract will, of course, prevail; but if none be mentioned, the person contracting to sell may be

1. The subject of Vendor and Purchaser is in one way broader than that of Sales, which includes only contracts founded on money considerations. *SALES*, vol. 21, p. 446.

As used in the books, the terms vendor and purchaser are applied to persons who take title under a contract supported by any valuable consideration. *Goward v. Waters*, 98 Mass. 596.

A purchaser, in the sense in which the word is here used, is not to be confused, however, with one who takes by purchase, as the latter word is employed in conveyancing; *i. e.*, as comprising all modes of acquiring real property other than by descent. 2 Bl. Com. 241.

2. See *REAL PROPERTY*, vol. 19, p. 1029.

3. For the significance of the term land, and an enumeration of the different species of property embraced in its meaning, see *CEMETERIES*, vol. 3, p. 49; *CROPS*, vol. 4, p. 887; *FIXTURES*, vol. 8, pp. 41, 55; *FRAUDS (STATUTE OF)*, vol. 8, p. 657; *ICE AND ICE COMPANIES*, vol. 9, p. 852; *LAND*, vol. 12, p. 655; *LOGS AND LUMBER*, vol. 13, p. 1020; *MANURE*, vol. 14, p. 315; *MINES AND MINING CLAIMS*, vol. 15, pp. 508, 578; *NATURAL GAS*, vol. 16, p. 221; *PEWS*, vol. 18, p. 413; *REAL PROPERTY*, vol. 19, p. 1032; *TREES*, vol. 26, p. 557.

Water.—As land includes everything above and below the surface of the earth, it embraces water upon the earth. The right of the land-owner to it is "identified with the realty, and is

a real or corporeal hereditament, and not an easement." *Cary v. Daniels*, 5 Met. (Mass.) 236.

On account of its peculiar nature, however, it cannot be entirely appropriated, if running in a defined channel, but only a reasonable use may be made of it. The title may be in the land owner, but it is held subject to the rights of others. *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72; *Wadsworth v. Tillotson*, 15 Conn. 373; 39 Am. Dec. 391; *Kennedy, etc., Mfg. Co., v. Union Mfg. Co.*, 39 Conn. 576. In the case of percolating or standing water, there are no such rights, and the title of the owner is absolute. *Hanson v. McCue*, 42 Cal. 303; *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 352. Water upon an owner's land may be disposed of, not only as an incident to the land, but independent of the soil upon which it stands, or over which it flows. *Avon Mfg. Co. v. Andrews*, 30 Conn. 476; *Bullen v. Runnels*, 2 N. H. 255; 9 Am. Dec. 55. See also *LAKES AND PONDS*, vol. 12, p. 610; *WATER AND WATERCOURSES*.

Oil.—Oil, when in the earth, is governed by the same rules of property as water. *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732.

Timber.—Standing timber is an interest in land that may be acquired by deed, and the fact that it must be removed within a definite period does not prevent the title to the timber from vesting in the grantee. *Mee v. Benedict* (Mich. 1893), 57 N. W. Rep. 175.

compelled to convey the fee.¹ In any event, he must convey all the estate that he has, unless the contract provides otherwise.²

Most of the estates known to the law are assignable, and may be the subject of a contract to sell.³

If the vendor does not own the estate which he undertakes to sell, he can pass no title, and but merely subjects himself to a suit for damages.⁴ As, in such case, it would not be in his power to comply with the order of the court, a decree of specific performance will not be granted to his vendee.⁵

3. The Title—(See also SPECIFIC PERFORMANCE, vol. 22, p. 908; TITLE (REAL PROPERTY), vol. 26, p. 20)—*a.* IN ABSENCE OF EXPRESS STIPULATIONS.—The title to an estate is the means whereby it is acquired.⁶ While the subject of a sale of land is the estate, that estate always implies a title, and the question under discussion is in every case an important one. If nothing is said about the title, the law raises, from the fact that one assumes to sell, an implied promise to give a good title to the vendee—one that will assure him of the quiet and peaceable enjoyment of the property sold.⁷ Such a title is denominated a "marketable

1. Boone on Real Property, § 383; Hughes v. Parker, 8 M. & W. 244; Witter v. Biscoe, 13 Ark. 422; Tremaine v. Liming, Wright (Ohio) 644; Vardeman v. Lawson, 17 Tex. 10; Goddin v. Vaughn, 14 Gratt. (Va.) 102.

2. Bower v. Cooper, 2 Hare 408.

3. See CURTESY, vol. 4, p. 962; DOWER, vol. 5, p. 904; ESTATES, vol. 6, p. 875; HOMESTEAD, vol. 9, p. 475; JOINT TENANTS, vol. 11, p. 1090.

4. But he may create by his deed a title by estoppel. See ESTOPPEL, vol. 7, p. 9.

5. Bispham's Principles of Equity (4th. ed.), § 380; Chartier v. Marshall, 51 N. H. 400.

6. Robinson's Elementary Law, § 123. See generally, TITLE, (Real Property), vol. 26, p. 20.

7. Every purchaser of real estate is entitled to a marketable title free from incumbrances and defects, unless he expressly stipulates to accept a defective title. Vought v. Williams, 120 N. Y. 253; 17 Am. St. Rep. 634. And see to the same effect Warvelle on Vendor and Purchaser, pp. 47, 303; Moulton v. Chaffee, 22 Fed. Rep. 26; Cullum v. Branch Bank, 4 Ala. 21; 37 Am. Dec. 725; Flinn v. Barber, 64 Ala. 193; Abendroth v. Greenwich, 29 Conn. 356; Holland v. Holmes, 14 Fla. 390; Woodruff v. Thorne, 49 Ill. 88; Shreck v. Pierce, 3 Iowa 350; Allen v. Atkinson, 21 Mich. 360; Delavan v. Duncan, 49 N. Y. 485; Freely v. Barnhart, 51

Pa. St. 279; Swain v. Fidelity Ins., etc., Co., 54 Pa. St. 455; Prothro v. Smith, 6 Rich. Eq. (S. Car.) 324; Linkons v. Cooper, 2 W. Va. 67.

There is an implied undertaking on the part of the vendor in every executory contract for the sale of lands, to make a good title, unless such an obligation is expressly excluded by the terms of the agreement, and such implied warranty exists so long as the contract remains executory. Burwell v. Jackson, 9 N. Y. 535.

The vendee has the right to have conveyed to him an indubitable title, Swayney v. Lyon, 67 Pa. St. 436, and a court will not decree specific performance of a contract when the agreement is for a good title, and all reasonable doubt as to the title is not removed. Hymers v. Branch, 6 Mo. App. 511.

But the right to demand a good title exists in the purchaser, only so long as the contract remains executory. When the conveyance has been duly executed by all necessary parties, he must look to his covenants only. Culum v. Branch Bank, 4 Ala. 29; 37 Am. Dec. 725; Hunter v. O'Neil, 12 Ala. 37; Thompson v. Christian, 28 Ala. 399; Peay v. Wright, 22 Ark. 198; Brown v. Manning, 3 Minn. 35; Walsh v. Hall, 66 N. Car. 233. But it devolves upon the vendee, if he questions the title, to show the defect. Allen v. Atkinson, 21 Mich. 351.

title."¹ The parties to the contract may stipulate for other than such a title, but, in the absence of an agreement, the law always presumes it as a part of the contract, and the purchaser can be compelled to accept no other.²

In order to be marketable, a title must either be free from incumbrances, or subject to such only as are easily removed.³

Where a contract for the sale of property provided that it should "be free from all liens and incumbrances," and that the "land money" should "be refunded if title should not prove good on examination of records or cannot be made good," it was held equivalent to a covenant to convey a marketable title. *Herman v. Somers*, 158 Pa. St. 424.

1. As to a marketable title, see *MARKETABLE TITLE*, vol. 14, p. 458; *SPECIFIC PERFORMANCE*, vol. 22, p. 948.

Where a contract provided that the title should be "first class," it was held to mean simply that it should be marketable. *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 634.

The title of a *bona fide* purchaser, or those claiming under him, is not rendered unmarketable by a prior deed from his grantor to a third person, of which he did not have notice, and which was not recorded until after the record of his deed. *Abraham v. Mayer* (City Ct.), 27 N. Y. Supp. 264.

Where, under a devise to A, B, and C, and if any of them should die leaving no lawful issue, then to the survivors, A and B conveyed and released the real estate so devised to C, by deed with full covenants, including a general warranty, C has a good and indefeasible title thereto, and a contract for the purchase of such real estate will be enforced. *Vreeland v. Blauvelt*, 23 N. J. Eq. 483.

In equity, a marketable title is one in which there is no doubt involved, either as to law or fact. *Herman v. Somers*, 158 Pa. St. 424.

Title by adverse possession for forty years is a marketable title. *Tewksbury v. Howard* (Ind. 1894), 37 N. E. Rep. 355. And see *Waddell v. Latham* (Miss. 1894), 15 So. Rep. 32. But where the wall of a building which defendant had agreed to sell to plaintiff encroached about two inches on the adjoining lot, and the deed tendered plaintiff did not convey these two inches, and defendant did not have title thereto at the time, the title tendered

to plaintiff is not marketable. *Arnstein v. Burroughs* (Supreme Ct.), 27 N. Y. Supp. 958.

2. *Gill v. Wells*, 59 Md. 492; *Richmond v. Gray*, 3 Allen (Mass.) 25. And see *Schween v. Greenburg* (Supreme Ct.), 27 N. Y. Supp. 760; *Landon v. Walmuth* (Supreme Ct.), 27 N. Y. Supp. 717; *Street v. French*, 147 Ill. 342.

An agreement to sell land and execute a good and sufficient deed, is not satisfied by the tender of a deed sufficient in form, the vendor having no title. *Haynes v. White*, 55 Cal. 38. To the same effect are: *Brown v. Gammon*, 14 Me. 276; *Mead v. Fox*, 6 Cush. (Mass.) 199; *Porter v. Noyes*, 2 Me. 22; 11 Am. Dec. 30; *Greenwood v. Ligon*, 10 Smed. & M. (Miss.) 615; 48 Am. Dec. 775; *Story v. Conger*, 36 N. Y. 673; 93 Am. Dec. 546; *Pomeroy v. Drury*, 14 Barb. (N. Y.) 418; *Hill v. Ressegien*, 17 Barb. (N. Y.) 162; *Collins v. Delashmutt*, 6 Oregon 51; *Wilson v. Getty*, 57 Pa. St. 266; *Jones v. Huff*, 36 Tex. 678.

It would be against good conscience to force a title not marketable on a purchaser, although his contract may seem to contemplate it. *Freetly v. Barnhart*, 51 Pa. St. 279.

The vendor must show, when the vendee relies upon defect of title, that the vendee purchased at his own risk. *Littlefield v. Tinsley*, 26 Tex. 353.

Where a contract makes prompt payment of instalments material, a vendee who has been repeatedly delinquent and has made payments knowing that the vendor does not hold the legal title, but that the holder of such title is out of the state, cannot, when the last payment is due, at once tender it, and demand a deed without giving the vendor a reasonable time to get title. *Distler v. Dabney* (Wash. 1893), 35 Pac. Rep. 138.

3. *Chambers v. Tulane*, 9 N. J. Eq. 146; *Sibley v. Spring*, 12 Me. 460; 28 Am. Dec. 191; *Roberts v. Bassett*, 105 Mass. 409; *Murphree v. Scovell*, 41 Minn. 262. And see *Skinner v. Christie* (N. J. 1894), 29 Atl. Rep. 772.

It must be free from all claims of dower, inchoate or consummate. If the wife of the vendor refuses to release her rights, the purchaser may elect either to take a deed executed by the vendor alone, and bring his action for a breach of covenant, or to accept such deed as part performance, and retain so much of the purchase-money as shall be proportionate to the wife's contingent interest.¹ The title must not only be more than a mere litigious right, but must be not likely to lead its possessor into a lawsuit.²

The estate must be free from easements. *Prichard v. Atkinson*, 3 N. H. 335; *Wheeler v. Tracy*, 49 N. Y. Super. Ct. 208.

A mortgage dating back fifty years, and given to secure a life annuity to a person long since deceased, is not such an incumbrance as will justify a vendee in refusing to accept a conveyance. *Morgan v. Scott*, 26 Pa. St. 51. Neither is a mortgage under which the mortgagee has no right of possession until foreclosure, which, though paid, has not been discharged of record. *Curran v. Rogers*, 35 Mich. 221.

It is no defense to an action to recover an installment due from a vendee in a contract for the purchase of land, that the land is incumbered, if such incumbrance can be removed by the vendor before the time fixed for the execution of the deed. *Duluth Loan, etc., Co. v. Kloovdahl* (Minn. 1893), 56 N. W. Rep. 1119.

But a purchaser may refuse to take title and may recover money paid by him where there is of record an unsatisfied mortgage on the premises, though the mortgage has been paid and a satisfaction piece executed by the mortgagee, as the purchaser is entitled to a clear record title. *Zorn v. McParland* (Super. Ct.), 28 N. Y. Supp. 485.

1. *Zebble v. Sears*, 38 Iowa 507; *Lewis v. Coxe*, 5 Del. 401; *Weed v. Terry*, 2 Doug. (Mich.) 344; 45 Am. Dec. 257; *Fitts v. Hoitt*, 17 N. H. 530; *Pomeroy v. Drury*, 14 Barb. (N. Y.) 478; *Corson v. Mulvany*, 49 Pa. St. 88.

In *Davis v. Parker*, 14 Allen (Mass.) 104, the court by Chapman, J., said: "The general rule, as stated in *Hill v. Buckley*, 17 Ves. 394, is that the purchaser shall have what the vendor can give; with an abatement out of the purchase-money for so much as the quantity falls short of the representation. The principle applies to an incumbrance of any amount. The amount to be deducted is the value of

the wife's right at the time of the conveyance, and not the difference between the market value of the whole land with her release, and the value without it. The rule should be the same as if the conveyance had been made with a warranty against the right of dower, and the existence of the right had afterwards been discovered and an action had been brought to recover damages for a breach of the contract."

In *Wright v. Young*, 6 Wis. 132; 70 Am. Dec. 453, the court, by Cole, J., said: "There can be no doubt but the title of the vendee is defective while the inchoate right of dower is left outstanding. If the wife should survive the husband, the vendee's title might be partially defeated by her taking a life estate in one-third of the premises." But see *Powell v. Monson*, 3 Mason (U. S.) 355; *Bostwick v. Williams*, 36 Ill. 65. The rule is the same where the vendor expressly agrees to convey free of dower. *Leach v. Forney*, 21 Iowa 271; 89 Am. Dec. 574; *Presser v. Hildenbrand*, 23 Iowa 483; *Park v. Johnston*, 4 Allen (Mass.) 259; *Park v. Johnston*, 7 Allen (Mass.) 378. If the wife is before the court, she may be compelled to join in the deed. *Matter of Hunter*, 1 Edw. Ch. (N. Y.) 1. Where the contingent right to dower of the wife of a vendor of land, under articles for a deed clear of incumbrances, is known to the vendee, and the latter covenants to pay her for signing the deed, he does not thereby take the risk of her not signing on herself; nor will it excuse the vendor, so far as the vendee's right of action is concerned, that he offered to comply with his covenant, and to make such title as he was able to make without his wife's consent. *Bitner v. Brough*, 11 Pa. St. 127.

2. *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Speakman v. Forepaugh*, 44 Pa. St. 363; *Shriver v. Shriver*, 86 N. Y. 575; *Richmond v. Gray*, 3 Allen

The title must be free from reasonable doubt,¹ but the doubt

(Mass.) 25; *Jeffries v. Jeffries*, 117 Mass. 184; *Lockett v. Williamson*, 31 Mo. 54.

A title exposing the party holding it to litigation is not marketable. *Swayne v. Lyon*, 67 Pa. St. 436.

Every purchaser of land has a right to demand a title which shall put him in all reasonable security against loss or annoyance by litigation. He should have a title which will enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw will come up to disturb its market value. *Close v. Stuyvesant*, 132 Ill. 607.

But the mere fact that there is pending, between two outside parties, a litigation over the land which does not affect the vendor's title, is immaterial. *Curran v. Rogers*, 35 Mich. 221.

A purchaser cannot be required to accept a conveyance, where, because of a mistake in the description of the land in a former conveyance through which the vendor holds, the title as to a part is so doubtful that it may expose the vendee to litigation on the part of a third person, or where, for such reason the title is not marketable. *Smith v. Turner*, 50 Ind. 367.

Where the vendor's title to a lot was by purchase at a sheriff's sale, as the property of one who had two years before sold it to another, but the deed had not been recorded until after the sale, on a bill for specific performance to compel a vendee under articles to comply, it was held that as the vendee was liable to contest the unrecorded and outstanding title, he could not be compelled, in equity, to take the property. *Speakman v. Forepaugh*, 44 Pa. St. 363.

1. *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. St. 455; *Adams v. Valentine*, 33 Fed. Rep. 1; *Fleming v. Burnham*, 100 N. Y. 1.

A marketable title is one free from reasonable doubt. Such doubt exists when there is uncertainty as to some fact, appearing in the course of its deduction, which affects the value of the land or will interfere with its sale. *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 634. And though the court may entertain a favorable opinion of the title, yet, if that opinion may be fairly questioned by competent persons, it will not decree specific perform-

ance. *Hymers v. Branch*, 6 Mo. App. 511; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483.

It seems that a rational doubt exists when a court of law does not feel called upon to instruct a jury to find the existence of the fact on which the vendor's title depends. *Shriver v. Shriver*, 86 N. Y. 575.

A purchaser who has bargained for a good title, will not be compelled to take one which is subject to suspicion. It must be free from reasonable doubt—a title to which no reasonable man would object—one which a prudent man would not hesitate to purchase at a full market price. It is not sufficient that the title is probably good, but it must be one which the purchaser must feel a reasonable certainty that it is so. *Brown v. Cannon*, 10 Ill. 174.

The vendee may require not merely a title valid in fact, but a marketable one, such as can again be sold or mortgaged to a reasonable purchaser or mortgagee; a reasonable doubt as to the title proffered is sufficient to authorize its rejection. *Moore v. Williams*, 115 N. Y. 586; 12 Am. St. Rep. 844.

Title by Adverse Possession.—Where a vendor has been in adverse possession for the time specified in the Statute of Limitations, his title is not so impeached as to prevent his maintaining a suit for specific performance, by slight proof that the former owner was an alien, nor by the mere contingency that such owner may have died leaving heirs disabled from asserting their rights. *Seymour v. DeLancey*, Hopk. Ch. (N. Y.) 436; 14 Am. Dec. 552.

A clear adverse possession for twenty years makes a title to lands which a purchaser, upon a partition sale, may not refuse; he will not, however, be required to take title where there are circumstances which may prevent the possession from being adverse. Such purchaser will not be compelled to complete the purchase where there is some reasonable ground of evidence shown in support of an objection to the title, or where the title depends upon a matter of fact which is not capable of satisfactory proof, or, if capable of that proof, yet is not proved. *Shriver v. Shriver*, 86 N. Y. 575.

If the validity of the plaintiff's title is dependent on the question whether he has had ten years adversary posses-

must be more than a bare possibility;¹ it must be considerable, rational, and such as would induce a prudent man to pause and hesitate.² The purchaser will not be allowed to make a mere captious objection to the title,³ and defects in the record or paper title may be cured or removed by parol evidence.⁴

But the purchaser cannot insist on being discharged on the ground of defective title, if it is capable of being made good within a reasonable time, as to which the vendor will be put under terms.⁵

sion of land, he must, before he can enforce such contract, specifically establish, by a clear evidence, that he has had such adversary possession for ten years; and if he has declined to defend an action of ejectment brought by a stranger to test his title, this will be regarded as showing that his title is so doubtful that the court ought not to require it to be received as a good title by the other party. *Boggs v. Bodkin*, 32 W. Va. 566.

1. On this subject the court acts on moral certainty, and a purchaser will not be permitted to object to a title on account of a bare possibility. *Laurens v. Lucas*, 6 Rich. Eq. (S. Car.) 217; *Webb v. Chisolm*, 24 S. Car. 487; *Thompson v. Dulles*, 5 Rich. Eq. (S. Car.) 370.

The mere possibility that there may be litigation over the title, is not sufficient, but there must be a reasonable probability that there will be such litigation. And so, where, after plaintiff's intestate and his grantors had been in undisturbed possession for nearly forty years, under a deed with a defective description, he brought an action to correct the defect in his title arising from such error, and notice was served by publication, and the two years allowed by statute for a motion for a new trial had not expired, it was held that the possibility of the defendant applying for and obtaining a new trial was too remote to be considered. *Stevenson v. Polk*, 71 Iowa 278.

Where the existence of the alleged fact, which is claimed or supposed to constitute a defect in or cloud upon the title, is a mere possibility, or the alleged outstanding right is but a very improbable or remote contingency, the court may, in the exercise of a sound discretion, compel the purchaser to complete his purchase. *Cambrelleng v. Purton*, 125 N. Y. 610.

In 1863, J. S. died seised of land which he devised to his wife. The will

was proved, but no executor or administrator appointed. The wife married again, and in 1869 died intestate, leaving as her only heirs her children of the former marriage. Their duly licensed guardian sold the land by public auction in October, 1870, payment to be made one-half in cash and the other half to remain secured by a mortgage on the land. The purchaser, on examining the title, objected that neither the estate of J. S., nor his wife's estate, had been administered upon, whereupon the guardian, in December, 1870, took letters of administration on the wife's estate, and in January, 1871, on the estate of J. S., and in February, 1871, tendered a deed of the land to the purchaser and demanded performance of his contract, which he refused. The guardian filed a bill in equity to enforce the contract against the purchaser, and it was held that the possibility of debts against the estate of J. S., or his wife's estate, in the absence of any affirmative evidence thereof, was not a cloud on the title, which should debar the plaintiff from a decree for specific performance, protecting the defendant by not requiring him to give a negotiable note for the one-half of the contract price which was to remain for a reasonable time secured by mortgage. *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400.

2. *Per Lord Eldon in Stapylton v. Scott*, 16 Ves. 272.

3. *Hellreigel v. Manning*, 97 N. Y. 60.

4. *Hellreigel v. Manning*, 97 N. Y. 56. And see *Seymour v. DeLancey*, *Hopk. Ch. (N. Y.)* 436; 14 Am. Dec. 552; *Miller v. Macomb*, 26 Wend. (N. Y.) 229; *Fagen v. Davison*, 2 Duer (N. Y.) 153; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70; *Murray v. Harway*, 56 N. Y. 337; *Shriver v. Shriver*, 86 N. Y. 575.

5. *Coffin v. Cooper*, 14 Ves. 205.

Though the vendor has no title or a

b. EFFECT OF SPECIAL AGREEMENTS.—Special agreements are frequently made as to the title of land to be conveyed. They may either compel the production of a better title than the law would require, or arrange for a defective title, or merely express and emphasize what the law would otherwise have implied.¹

defective one, at the date of the contract, a court of equity will decree a specific performance if he is able to make a good title at any time before the decree is pronounced, or when the master makes his report upon the title, *Hepburn v. Dunlop*, 1 Wheat (U. S.) 179; *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *Luckett v. Williamson*, 37 Mo. 388; *Clute v. Robison*, 2 Johns (N. Y.) 595; *Pierce v. Nichols*, 1 Paige Ch. (N. Y.) 244; *Brown v. Haff*, 5 Paige Ch. (N. Y.) 235; 28 Am. Dec. 425; *Winne v. Reynolds*, 6 Paige Ch. (N. Y.) 407; *Jenkins v. Fahey*, 73 N. Y. 355; *Townsend v. Lewis*, 35 Pa. St. 125; *Wilson v. Tappan*, 6 Ohio 172; *Mortlock v. Buller*, 10 Ves. Jr. 315; unless it appears that the purchaser has been materially injured by the delay. Reformed Protestant Dutch Church *v. Mott*, 7 Paige Ch. (N. Y.) 77; 32 Am. Dec. 613. And though the vendor may perfect his title at any time before the decree, he must, in such case, pay costs. *Lyles v. Kirkpatrick*, 9 S. Car. 265.

It is sufficient if he is able to convey the property when, by the terms of the contract, or the equities of the case, he is required to do so in order to entitle himself to the consideration; and if time is not of the essence of the contract, nor made essential by an offer to fulfill by the purchaser and his request for a conveyance, the vendor will be allowed reasonable time and opportunity to obtain or perfect title. *Dresel v. Jordan*, 104 Mass. 407.

Where the vendor in such contract has no interest in the land which he agrees to convey, but enters into it as a mere speculation or venture, he is not deemed a *bona fide* contractor, and a court of equity will not lend him its aid in enforcing it. But if he has acquired an equitable title or interest in the land under an executory agreement, he may enter into another agreement for the sale thereof to a third party, without waiting until he has obtained a deed, and it will be sufficient if the sale is made in good faith, and the title is fully perfected by the time specified for the completion of the sale. *Town-*

shend v. Goodfellow, 40 Minn. 312; 12 Am. St. Rep. 736.

Specific performance will be decreed if the vendor is able to make a good title before the decree is pronounced, except where the contract is made in bad faith by one who knows that he has no title nor the means of acquiring one. *Moss v. Hanson*, 17 Pa. St. 379.

It is only in the absence of fraud that the vendee will be required to accept an after-acquired title. *Fraker v. Braxelton*, 12 Lea (Tenn.) 278.

1. A good title is one good both in law and equity. *Maberley v. Robins*, 5 Taunt. 625. For the construction of the term "satisfactory title," see SPECIFIC PERFORMANCE, vol. 22, p. 956.

If the legal title to land is outstanding in a trustee who may be compelled to convey at any time, the title is not "good and marketable," within the meaning of a vendor's covenant to convey such a title. *Murray v. Ellis*, 112 Pa. St. 485. An agreement of the vendor to present to the purchaser, "a perfect chain of title to said property from the *United States* government," compels him to show all the successive links, each perfect in itself, which connect the claimant of the title with, and invest in him, the title of the government. It is not enough to produce evidence of color of title and possession, and payment of taxes thereunder, which, under the Statute of Limitations, would bar recovery by an adverse claimant. *Payne v. Markle*, 89 Ill. 66. One who has contracted that he will thereafter, on demand, convey property by good and sufficient deed in fee simple, is in default, if he fails to have a perfect title when demand is made. *Gregory v. Christian*, 42 Minn. 304; 18 Am. Dec. 507. A vendor who has agreed to convey land free from incumbrances, must, in order to satisfy the requirements of his contract, tender not only a deed made by himself, but also a release of dower duly executed by his wife. *Heimburg v. Ismay*, 35 N. Y. Super Ct. 35.

A covenant to convey land, "the title to be a good and sufficient deed," is a covenant to convey a good title

If the contract calls for a record title, a title by adverse possession will not suffice, no matter how strong such a title may be,¹ and if the vendee agrees to purchase subject to the approval of the title by his attorney, he cannot be compelled to complete the sale unless his attorney accepts the title offered.² But a contract for a title satisfactory to the party to whom it is to be given, means a title to which there is no reasonable objection, and with which the party to whom it is tendered ought to be satisfied.³

by deed. *Brown v. Gammon*, 14 Me. 276.

By undertaking to sell land described as patented to another, the vendor must be understood as contracting to convey the title of the patentee. *Hays v. Bonner*, 14 Tex. 629.

A vendor bound to convey a good legal title, cannot force the vendee to accept a mere equitable title to the land. *Littlefield v. Tinsley*, 26 Tex. 353.

A covenant to execute and deliver "a good and sufficient, full and general, warranty deed" for land, binds the vendor to make something more than a bare legal title. But a title which, though imperfect as a legal one, is perfected by surrounding equities so that the vendor's deed will convey a good and sufficient title in fee simple, is sufficient. *Jones v. Huff*, 36 Tex. 678.

A contract by the vendor to furnish an abstract of title "showing a good and clear title free from defects," is not performed if the abstract shows defects which may or may not exist in the title as tested, by the original records, and an incumbrance which may or may not be barred by limitation. *Kane v. Rippey* (Oregon, 1893), 33 Pac. Rep. 936.

"**Lawful Title.**"—An obligation to make a "lawful title" to lands, binds the obligor for a perfect title, with a general warranty. A tender of a deed, without the signature of the obligor's wife, was held not sufficient. *Clark v. Redman*, 1 Blackf. (Ind.) 380.

"**Lawful Deed.**"—By a lawful deed of conveyance, a deed conveying a lawful or good title may be fairly understood. *Dearth v. Williamson*, 2 S. & R. (Pa.) 498; 7 Am. Dec. 652.

"**Good and Sufficient Deed, with Covenant of Warranty.**"—The words, "a good and sufficient deed, with covenant of warranty," in an agreement for the sale of land, will be held to mean "a good and sufficient title," if it appears in the agreement, or its attendant circumstances show that such was the intention of the parties. *Tindall*

v. Conover, 20 N. J. L. 214. See also *Fitch v. Casey*, 2 Greene (Iowa) 300; *Owings v. Baldwin*, 8 Gill. (Md.) 337; *Tinney v. Ashley*, 15 Pick. (Mass.) 546; 26 Am. Dec. 620; *Aiken v. Sanford*, 5 Mass. 494; *Parker v. Parmelee*, 20 Johns. (N. Y.) 130; 13 Am. Dec. 253; *Everson v. Kirtland*, 4 Paige (N. Y.) 628; 27 Am. Dec. 91; *Burwell v. Jackson*, 9 N. Y. 535; *Cunningham v. Sharp*, 11 Humph. (Tenn.) 116; *Stow v. Stevens*, 7 Vt. 27; 29 Am. Dec. 139; *Taft v. Kessel*, 16 Wis. 273.

Covenant to Convey By Special Warranty.—A covenant to convey land by a special warranty deed, implies that the covenantor has a legal title regularly derived from the commonwealth. If he cannot give such a title, the covenant is broken, and the contract may be rescinded. *Bodley v. McChord*, 4 J. J. Marsh. (Ky.) 475.

1. *Warvelle on Vendor and Purchaser*, p. 309; *Page v. Greeley*, 75 Ill. 400; *Noyes v. Johnson*, 139 Mass. 436; *Constantine v. East* (Ind. App. 1893), 35 N. E. Rep. 844. But where the vendee has not contracted for a record title, he may be compelled to accept one not of record. *Parks v. Laroche*, 15 Ill. App. 354.

2. **Title Subject to Approval of Attorney, etc.**—Where the vendee agrees to purchase land subject to the approval of the title by his attorney, unless such attorney accepts the title offered, he is not bound to consummate the sale, and may recover back any portion of the purchase-money deposited on the sale. *Allen v. Pockwitz* (Cal. 1894), 36 Pac. Rep. 1039.

Where the vendor agrees to give such a title as a named title guaranty company will approve, the vendee may recover the purchase-money paid on the contract, in case such guaranty company refuses to approve the title, although the title is free from legal objection, unless the approval is prevented by the vendee. *Flanagan v. Fox* (C. Pl.), 26 N. Y. Supp. 48.

3. In *Fagen v. Davison*, 2 Duer (N.

If the parties contract for an imperfect title, full effect will be given to their agreement.¹

If the contract be for the sale of the vendor's claim to land, rather than of the land itself, there is no implied warranty of title.²

Defects of title furnish a defense to the vendee, but not to the vendor. The former may elect to take such title as the latter has, but may not compel him to execute a deed, if he has no title at all.³

If the vendor has a good title at the time the contract is made, but conveys it away or forfeits it through laches, the vendee is discharged from all obligations to accept his deed, or pay the purchase price.⁴

4. Options. — The right to purchase land is frequently the subject of contract, and such a right may be styled an option. It is

Y.) 153, *Oakley, C. J.*, in delivering the opinion of the court, said: "The assertion, that the provision in the agreement that the title should be satisfactory to the party who was to receive it, gave to the defendant an absolute right to reject that which was tendered, scarcely requires an answer. We cannot give a construction to the agreement that, by enabling each party to rescind it at his pleasure, would have robbed it wholly of its obligatory character. We cannot say that there was no contract for the breach of which an action could be maintained. When such is its nature, so far from having a discretion to reject, he is bound to accept it." But see *Crigler v. Blair*, 4 Ohio Circ. Ct. 324.

1. *Sugden on Vendors and Purchasers* (8th Am. ed.), bottom page 337; *Lethbridge v. Kirkman*, 2 Jur. N. S. 372; *Freme v. Wright*, 4 Madd. 364.

Thus, where executors, acting under a power of sale in a will, agreed to sell the testatrix' interest in land, and recited that the purchaser "is to have a deed in fee for said interest from the executor," it was held that the contract taken as a whole showed that the interest of the testatrix, only, was sold, and that the purchaser could not demand an absolute title in fee simple. *Twitty v. Lovelace*, 97 N. Car. 54.

But general or doubtful expressions suggesting, but not specifying, a flaw in the vendor's title, are jealously viewed by the courts. *Edwards v. Wickwar*, L. R., 1 Eq. Cas. 68.

An agreement to convey "such title as they [the vendors] have received from A and B," will be enforced, as

made. *Wilmot v. Wilkinson*, 6 B & C. 506; 13 E. C. L. 238. To the same effect is *Stillman v. Canales*, 39 Tex. 406.

When the parties to an agreement to convey with a clear title, agree that part of the purchase-money be paid to the mortgagees to release a mortgage, and the vendor procures such release, the vendee cannot refuse to perform his part, and demand a conveyance free from incumbrance. *Derling v. Little*, 26 Pa. St. 502.

2. *Tweed v. Mills*, L. R., 1 C. P. 39; *Hill v. Hobart*, 16 Me. 164; *Broyles v. Bee*, 18 W. Va. 514. Thus, an agreement to convey all of the vendor's "right, title, and claim" in a certain tract of land, is complied with by the tender of a deed purporting to convey all such "right, title, and claim." *Herrod v. Blackburn*, 56 Pa. St. 103; 94 Am. Dec. 49. Thus, an agreement to make a good and sufficient conveyance, with full warranty only against the vendor's acts, and those of his heirs and personal representatives, compels the conveyance of such title, only, as the vendor has. *Thompson v. Hawley*, 14 Oregon 199.

Where one agrees to convey by quitclaim deed, his agreement has reference to the title as it was at the time of the agreement; not to one subsequently acquired. *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711; 13 Am. Dec. 568.

3. *Sugden on Vendors and Purchasers* (8th Am. ed.), bottom p. 218; *Bispham's Principles of Equity* (4th ed.), § 380; *Rohr v. Kindt*, 3 W. & S. (Pa.) 563; 39 Am. Dec. 53.

4. *Lull v. Stone*, 37 Ill. 224.

not an estate in land, and an option contract is not a contract of sale.¹ Such an agreement must rest upon a valuable consideration;² otherwise it is a mere offer, revocable until accepted,³ and personal to the parties to it. After the death of the vendee, his heirs cannot accept it.⁴ The option must be for a limited time, and, if none is mentioned, will remain in force for a reasonable time, to be determined under all the circumstances of the case.⁵ Time is thus always of the essence of the contract.⁶ All conditions as to time, and as to other particulars, must be strictly complied with by the prospective purchaser.⁷ Unless the terms of the option be clear and unequivocal, it will not be specifically enforced.⁸ Such a right cannot be given by one in a fiduciary

1. Warvelle on Vendor and Purchaser, p. 187; *Bostwick v. Hess*, 80 Ill. 138; *Richardson v. Hardwick*, 106 U. S. 252; *Smith v. Reynolds*, 3 McCrary (U. S.) 157; *Gordon v. Darnell*, 5 Colo. 302.

2. Or be under seal, which imports a consideration. *Hawralty v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613.

Thus, equity will enforce the specific performance of a covenant in a lease, which provides that the lessee shall have the privilege of purchasing for a fixed price, on or before the expiration of the term. *Townley v. Bedwell*, 14 Ves. 591; *Willard v. Tayloe*, 8 Wall. (U. S.) 557; *Hall v. Center*, 40 Cal. 63; *Hayes v. O'Brien* (Ill. 1894), 37 N. E. Rep. 73; *Maughlin v. Perry*, 35 Md. 352; *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526.

But an agreement in a case that, "if the premises are for sale at any time, the lessee shall have the refusal of them," is too indefinite to be specifically enforced. *Fogg v. Price*, 145 Mass. 513.

3. *Borst v. Simpson*, 90 Ala. 373; *Sutherland v. Parkins*, 75 Ill. 338; *Conner v. Renneker*, 25 S. Car. 514.

4. *Sutherland v. Parkins*, 75 Ill. 338. Compare *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526, which holds that an option to a lessee to purchase leased property, stipulated in the lease, may be exercised after the lessee's death.

5. *Larmon v. Jordan*, 56 Ill. 204; *Hanly v. Watterson* (W. Va. 1894), 19 S. E. Rep. 536.

6. *Lord Runelagh v. Melta*, 10 Jur. N. S. 1141; *Brooke v. Garrod*, 3 K. & J. 608; 2 De G. & J. 66; *Austin v. Tawney*, L. R., 2 Ch. App. 143; *Bostwick v. Hess*, 80 Ill. 138; *Bashor v. Cady*, 2 Ind. 582; *Steele v. Bond*, 32

Minn. 14; *Dennstaldt v. Smith*, 51 N. Y. 628; *Richardson v. Hardwick*, 106 U. S. 252.

But where a contract witnessed that defendant "agrees to buy and pay cash for certain tracts of timber," which plaintiff "has, or may hereafter contract for," that defendant would, at a certain time, take the timber at a stated advance on the price paid by plaintiff, and that defendant might at once cut, and manufacture the timber, it was held that the contract was not a mere option, but established the relation of vendor and vendee, and time was not of the essence thereof. *Sitterding v. Grizzard* (N. Car. 1894), 19 S. E. Rep. 92.

7. *Weston v. Collins*, 11 Jur. N. S. 190; *Longfellow v. Moore*, 102 Ill. 289; *Steele v. Bond*, 32 Minn. 14.

Where one having a written option for the purchase of land exercises it within the prescribed time, and enters into possession of the land and expends money thereon, he may enforce the contract against the owner. *Wall v. Minneapolis, etc., R. Co.* (Wis. 1893), 56 N. W. Rep. 367.

Where the owner of five lots gives another the option of buying them at \$500 each, in consideration of the latter taking all legal steps to perfect the title, the latter has not the right to buy any one of the lots unless he has perfected the title to all of them. *Dupuy v. Williams* (Ill. 1894), 37 N. E. Rep. 48, following *Sloan v. Williams*, 138 Ill. 43.

Notice of Forfeiture.—An option to buy land at a certain price by a date named, expires on such date without any notice of forfeiture. *Cummings v. Town of Lake Realty Co.* (Wis. 1893), 57 N. W. Rep. 43.

8. Warvelle on Vendor and Pur-

capacity, unless he has express authority to that effect.¹ An agreement to purchase land at the election of the owner is the counterpart of an option, and the rules of law governing it are substantially the same.²

III. PARTIES.—As in every contract there must be two parties, so in a contract for the sale of land there must be a vendor and a vendee, each competent to enter into a binding agreement. The capacity of these parties is presumed until the contrary is shown.³ It is to be noted that there is a difference between the capacity required to make a contract of sale, and that needed to carry the sale into full effect by a conveyance of the estate. The latter has been already considered.⁴ As to the former, it may be said that as the contract is bilateral, with rights and obligations on each side, the same degree of capacity is required on the part of both grantor and grantee.⁵

1. Persons Sui Juris.—The parties to a contract must not only be competent, but they must act voluntarily; otherwise, their acts are voidable.⁶ Certain persons, not under other circumstances incompetent parties, are rendered so by their relations to others, or else peculiar results follow from their contracts of sale or purchase. These instances are now to be considered.

a. JOINT TENANTS AND TENANTS IN COMMON.—(See also JOINT TENANTS AND TENANTS IN COMMON, vol. 11, p. 1057).—Contracts

chaser, p. 140; *Knight v. Cooley*, 34 Iowa 218.

Lease with Option of Purchasing.—The circulars of a land company invited settlers on its lands to cultivate them, with or without option to purchase, and its notices specified that the land was for sale or to rent. Its practice in dealing with its tenants was to execute written leases, with or without option to purchase. It was held, where there was no evidence of fraud or mistake, that a written lease to plaintiff containing no option to purchase, must be deemed to embody the final determination of the parties, and that no such option would be implied. *Abbott v. Seventy-Six Land, etc., Co.* (Cal. 1894), 36 Pac. Rep. 1.

1. *Clay v. Ruffard*, 5 De G. & S. 768.

2. In a contract for the sale of real estate, it was stipulated that the vendor would, upon the request of the vendee, at the expiration of three years from the sale, repurchase it at the same price, if the latter should desire to sell it. The vendee failed to make the request until nearly a month after the expiration of the three years. It was held that he thereby lost all right to enforce the contract, either at law or in equity. *Magoffin v. Holt*, 1 Duv. (Ky.) 95.

3. The presumption is that the grantor in a deed was sane and competent to execute it at the time of its execution. *Buckey v. Buckey*, 38 W. Va. 168. And see *Baxter v. Baxter*, 76 Hun (N. Y.) 98; **PRESUMPTIONS**, vol. 19, p. 45; **INSANITY**, vol. 11, p. 151; *Smith on Contracts* (7th Am. ed.), p. *307.

4. See **DEEDS**, vol. 5, p. 425.

Anyone may make a valid deed of real estate who has sufficient understanding to comprehend the transaction, sufficient freedom of will to act without constraint, and sufficient interest in the subject-matter to serve the purposes of the deed. 2 *Minor's Inst.* (3d ed.) 662; 2 *Bl. Com.* 296.

Persons wanting in sufficient understanding to comprehend the transaction are persons *non compos mentis*, infants, and persons drunken. See *infra*, this title, *Infants; Married Women; Persons of Weak Mind*.

5. *Warvelle on Vendor and Purchaser*, p. 57. And see 1 *Chitty on Contracts*, pp. 185, 400.

6. See **AGENCY**, vol. 1, p. 375; **CATCHING BARGAINS**, vol. 3, p. 37; **DURESS**, vol. 6, p. 57; **FRAUD**, vol. 8, p. 635; **GUARDIAN AND WARD**, vol. 9, p. 151; **PARENT AND CHILD**, vol. 17, p. 332; **UNDUE INFLUENCE**, vol. 27, p. 452.

of purchase and sale may be made between joint tenants or tenants in common. If, after compliance therewith, only one tenant then holds the whole estate, the tenancy is severed, and the remaining owner holds as tenant in severalty.¹ If there remain, after the sale and conveyance, two or more tenants, the one purchasing the share of the retiring joint tenant, or co-tenant, holds it as a tenant in common with the others.²

At law, these results only follow where the contract has been consummated by a conveyance; in equity, the agreement to sell is regarded as causing the changes in relationship.³

Joint tenants and co-tenants may purchase interests in the estate from outside parties. If these interests are adverse, however, they will inure to the benefit of the other tenants, if they so elect, who will be liable to contribution for the price given for them. They can sell only their undivided interests in the land.⁴

b. PARTNERS—(See also PARTNERSHIP, vol. 17, p. 824).—In the absence of special authority, one partner cannot make a binding contract to convey or encumber the real estate of the partnership, which will be specifically enforced against the other members of the firm. He has no power to convey the real estate of the firm either by deed or assignment.⁵ But where the business of the

1. JOINT TENANTS (AND TENANTS IN COMMON), vol. 11, p. 1143.

But at common law, in executing the contract between joint tenants, the conveyance should be by release, for no conveyance, operating by livery of seisin, would be proper between joint tenants, since each is seised of the whole conjointly, and there is nothing that can be delivered to him that he does not already possess. 2 Minor's Inst. (3d ed.) 468.

2. Robinson's Elementary Law, §§ 118, 120. "Thus, if A, B and C be joint tenants in fee, and C convey, or in equity contract to convey, his share to B, the jointure is dissolved as to C's share; for whilst the two remaining parts are still held in jointure, B holds C's original share by a different title, taking effect at a different time, by means of a different conveyance, and as to that share is a tenant in common with A." 2 Minor's Inst. (3d ed.), p. 474.

3. Brown v. Rindell, 3 Ves. Jr. 256; 2 Minor's Inst. (3d ed.) 473, 474.

4. Olney v. Sawyer, 54 Cal. 379; Montague v. Selb, 106 Ill. 49; Bracken v. Cooper, 80 Ill. 221; Gossom v. Donaldson, 18 B. Mon. (Ky.) 230; 68 Am. Dec. 723; Jones v. Stanton, 11 Mo. 433. And see JOINT TENANTS (AND TENANTS IN COMMON), vol. 11, p. 1082.

A surrender to or livery of seisin

made to, or entry or possession by one joint tenant, inures to all. This results from the entirety of interest, vested in joint tenants, so that they have one and the same reversion, and each has the whole jointly and nothing separately. 2 Minor's Inst. (3d ed.) 467; 2 Bl. Com. 182; 2 Co. Litt. 378.

Where one of several tenants in common, by descent, purchases an outstanding title, the fact that the common ancestor of all the co-tenants had no title, or a defective title, will not shield him from liability to account to his co-tenants as trustee of the property purchased. Clement v. Cates (Ark. 1887), 4 S. W. Rep. 776.

Where a joint tenant, or tenant in common, purchases an outstanding title, which is adverse to the common title, the co-tenant must elect within a reasonable time to avail himself of the benefit of the adverse title so purchased, and offer to contribute his due proportion of the money expended in purchasing the outstanding title. Brittin v. Handy, 20 Ark. 381; 73 Am. Dec. 497.

5. Ruffner v. McConnel, 17 Ill. 212; Keck v. Fisher, 58 Mo. 532; Piatt v. Oliver, 3 McLean (U. S.) 28; Arnold v. Stevenson, 2 Nev. 234; Willey v. Carter, 4 La. Ann. 56; Sutlive v. Jones, 61 Ga. 676; Anthony v. Butler, 13 Pet.

firm is dealing in real estate, one partner may bind the others by a contract to convey or purchase;¹ and when a partnership is dissolved by the death of one or more partners, leaving a sole survivor, such surviving partner may sell the partnership real estate, where it is necessary in order to meet the obligations of the firm.²

c. CORPORATIONS.—(See also CORPORATIONS, vol. 4, p. 184; MUNICIPAL CORPORATIONS, vol. 15, p. 949).—The power of a corporation to take and hold real estate is limited by law, and the terms of its charter. If its charter authorizes it to acquire real estate in certain cases, and for certain purposes, it can do so in those cases and for those purposes only.³ If the charter forbids it to

(U. S.) 423; *Napier v. Catron*, 2 Humph. (Tenn.) 534. And see PARTNERSHIP, vol. 17, p. 960.

Where a contract for the sale of partnership lands, is executed by one partner in the firm name, and in the presence and with the approbation and consent of the other partner, it is sufficient to enable the vendee to enforce a specific performance. *McWhorter v. McMahan*, Clarke Ch. (N. Y.) 400; 10 Paige (N. Y.) 386.

Though by the Statute of Frauds authority to convey land is required to be in writing, it is otherwise as to authority to contract to convey, and hence a contract to convey partnership lands, signed with the firm name by one partner under parol authority from the other, is valid and binding against both. *Lawrence v. Taylor*, 5 Hill (N. Y.) 107.

1. *Sage v. Sherman*, 2 N. Y. 417; *Young v. Wheeler*, 34 Fed. Rep. 98; *Thompson v. Bowman*, 6 Wall. (U. S.) 316; *Batty v. Adams County*, 16 Neb. 44.

It is now well settled that real estate may be bought and sold by a firm, and be held by a firm as part of their stock in trade, and therefore the acts or contracts of one of the partners, with respect to the partnership realty, and within the scope of the partnership business, are valid in equity and binding upon all the partners. *Baldwin v. Richardson*, 33 Tex. 16.

Where it appeared that the partners were "tobacconist merchants, and trading and dealing in real estate," and that the land was purchased with money of the firm, it was held that those facts alone did not authorize the conclusion that the partners had impressed upon the land the character of personal estate, and that they intended it to be used and disposed of as such. *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631.

2. *Easton v. Courtwright*, 84 Mo. 27;

Walling v. Burgess, 122 Ind. 299. But see, *contra*, *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631.

Such sale and deed by the surviving partner will pass the entire equitable interest of the parties in the property, and the purchaser will be entitled to a decree vesting the entire legal title in himself. *Easton v. Courtwright*, 84 Mo. 27; *Dupuy v. Leavenworth*, 17 Cal. 269; *Shanks v. Klein*, 104 U. S. 18. See *Andrews v. Brown*, 21 Ala. 443; 56 Am. Dec. 252; *Delmonico v. Guillaume*, 2 Sandf. Ch. (N. Y.) 367.

In *Dupuy v. Leavenworth*, 17 Cal. 262, one of the partners absconded with the assets of the firm, after which the remaining partner treated the partnership as dissolved as if by the death of one of its members, proceeded to sell the partnership real estate, and executed deeds therefor. The absconding partner afterward returned and sold and conveyed his legal interest in the land to another party. The court held that the case was the same as if the absconding partner, at the time the sale was made by the survivor, was dead, and, therefore, that the deed of the survivor passed the whole equitable or beneficial interest of the partnership, and the purchaser took the title in equity against the purchaser who bought under the absconding partner.

The *Tennessee* courts go to the length of holding that the partnership realty vests in the surviving partner absolutely, until the partnership affairs are wound up, and that, where there is no fraud or collusion, he may sell whether the sale is required for the payment of the firm debts or not. *Grieffey v. Northcutt*, 5 Heisk. (Tenn.) 746; *Solomon v. Fitzgerald*, 7 Heisk. (Tenn.) 552.

3. *Corporations*.—*Leazure v. Hillegas*, 7 S. & R. (Pa.) 321; *Chambers v.*

acquire and hold real estate, it can neither take nor hold, and a deed to it passes no title.¹ But if the charter is silent upon the subject, a power to take and hold real estate necessary to accomplish the objects of its incorporation will be implied.² Where a general power to acquire and hold real estate is given, a corporation may take and hold as freely and fully as natural persons.³

2. Persons Under Disability—*a*. ALIENS—(See also *ALIEN*, vol. 1, p. 456).—At common law an alien can acquire real property by purchase, and hold it until office found,⁴ a right that has been

St. Louis, 29 Mo. 543. But whether a corporation with power to take and hold real estate for certain purposes, has acquired the real estate in question for the authorized uses or not, cannot be made a question by any party except the state. *Hayward v. Davidson*, 41 Ind. 215; *Mallett v. Simpson*, 94 N. Car. 37; 55 Am. Rep. 595. See also *Dillon on Mun. Corp.*, § 444; *Ang. & Ames on Corp.* (11th ed.), § 152.

A corporation cannot acquire real estate to an amount exceeding that limited in its charter. *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 305.

The mere right of a foreign corporation to purchase and sell real estate, not being in its nature strictly a franchise, will be recognized and protected in another state, subject only to qualifications that the enjoyment and exercise of such right shall not be contrary to the laws or settled policy of the latter state, or prejudicial to its interest, or those of its citizens. *Thompson v. Waters*, 25 Mich. 214; 12 Am. Rep. 243.

1. *Hayward v. Davidson*, 41 Ind. 214; *Ang. & Ames on Corp.* (11th ed.), § 152.

2. *Hayward v. Davidson*, 41 Ind. 215; *Moss v. Averell*, 10 N. Y. 451; *State v. Madison*, 7 Wis. 688; *Blanchard's Gun Stock, etc., Co. v. Warner*, 1 Blatchf. (U. S.) 258; *State v. Mansfield*, 23 N. J. L. 510; *Nashville, etc., R. Co. v. Cowardin*, 11 Humph. (Tenn.) 348. And see *MUNICIPAL CORPORATIONS*, vol. 15, p. 1057.

A corporation is a being created by law and has properly no authority but such as is conferred upon it, expressly or by implication, by the law of its creation. *Auerbach v. LeSueur Mill Co.*, 28 Minn. 291; 41 Am. Rep. 285.

In *Missouri*, there is a general statute providing that every corporation has power to sell, purchase, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount

limited in its charter. *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 308.

At common law, corporations generally have the legal capacity to take a title in fee to real property, except where they undertake to hold it for purposes wholly outside and foreign to the objects of their incorporation, or unless restricted by charter or by statute. *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378; *Mallett v. Simpson*, 94 N. Car. 37; 55 Am. Rep. 595.

In *Morawetz on Corp.* (2nd ed.), § 327, it is said that this implied power extends not merely to the acquisition of such property as is absolutely necessary in carrying on the company's business, but that a corporation may acquire and hold whatever property is reasonably useful and convenient in attaining its legitimate ends. And in *Spear v. Crawford*, 14 Wend. (N. Y.) 20; 28 Am. Dec. 513, it was held that a canal company was not restricted, in its purchase of lands, to the mere thread of the canal.

A railway company may maintain a bill in equity for the specific performance of a contract to purchase of them land which they have purchased for the purpose of having gravel dug therefrom, and transported to a certain freight over their road, to be delivered to and used by a third party. *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25; 66 Am. Dec. 394.

3. *Hayward v. Davidson*, 41 Ind. 215.

4. *Doe v. Robertson*, 11 Wheat. (U. S.) 332; *Phillips v. Moore*, 100 U. S. 208; *Smith v. Zaner*, 4 Ala. 99; *Ramires v. Kent*, 2 Cal. 558; *Guyer v. Smith*, 22 Md. 239; 85 Am. Dec. 650; *Sheaffe v. O'Neil*, 1 Mass. 256; *Fox v. Southack*, 12 Mass. 143; *Scanlan v. Wright*, 13 Pick (Mass.) 523; 25 Am. Dec. 344; *Montgomery v. Dorion*, 7 N. H. 475; *Stephen v. Swann*, 9 Leigh (Va.) 404; *Read v. Read*, 5 Call. (Va.) 207. His title is not subject to collateral attack. *Harley v.*

generally extended by statute.¹ He may, before any action has been taken against him by the state, convey his interest, and transmit a good title to the purchaser.²

As to the contract of sale, there is a difference, according as it is made by an alien friend, or an alien enemy. The contract of the former is valid and enforceable; that of the latter void by the law of nations.³

b. INFANTS—(See also *INFANTS*, vol. 10, p. 613).—The contracts of an infant for the conveyance of real estate, and conveyances of real estate by him, are, like the great majority of an infant's contracts, voidable only, and, until disaffirmed by him, are binding.⁴ But the mere recognition by an infant, after arriving at full age, of a contract of conveyance made during minority, or his temporary acquiescence in the same, does not amount to a confirmation.⁵

c. MARRIED WOMEN.—Conveyances by a married woman are, at common law, absolutely void, unless joined in by the husband as grantor, and even as to her separate estate, the deed is unavailable to pass the husband's curtesy, unless signed by him.⁶ But

State, 40 Ala. 689; *Morris v. Hoyt*, 18 Cal. 217. If the alien die, his estate passes directly to the state without inquest of office. See, on this point, Co. Litt. 2 b; *Fairfax v. Hunter*, 7 Cranch (U. S.) 621; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Wilbur v. Tobey*, 16 Pick. (Mass.) 179; *Foss v. Crisp*, 20 Pick. (Mass.) 124; *People v. Conklin*, 2 Hill (N. Y.) 67. An alien cannot protect himself by taking title in the name of another. The title will vest in that other and no trust will result for his benefit. *Perry on Trusts* (4th ed.), § 64; *Taylor v. Benham*, 5 How. (U. S.) 270; *Philips v. Crammond*, 2 Wash. (U. S.) 441; *Leggett v. Dubois*, 5 Paige (N. Y.) 114; 28 Am. Dec. 413; *Anstice v. Brown*, 6 Paige (N. Y.) 448. An alien may take land as trustee, and hold it until office found. *Perry on Trusts* (4th ed.), § 55. If he is the beneficiary under a passive trust, his estate is liable to be defeated by inquest of office, but not if the trust is active. *Perry on Trusts* (4th ed.), § 64.

1. See *ALIEN*, vol. 1, p. 458; *DEEDS*, vol. 5, p. 431.

An act was passed by the Texas legislature, in 1891, prohibiting aliens from acquiring title to, or owning any interest in lands in the State of Texas, and providing that any deed or other conveyance purporting to convey such title or interest to any alien or unnaturalized foreigner, or to any firm, company, or corporation composed of

such, in whole or in part, should be void. But this act was found to be disastrous to the business interests of the state, and has been since repealed. See *Texas Gen. Laws*, 1891, p. 82.

2. *Halstead v. Lake County*, 56 Ind. 363; *Montgomery v. Dorion*, 7 N. H. 475.

3. *Wharton on Private International Law* (2d ed.), § 17; *Brooke v. Filer*, 35 Ind. 402; *Hill v. Baker*, 32 Iowa 302; 7 Am. Rep. 193; *Fisher v. Kurtz*, 9 Kan. 501; *Clements v. Graham*, 24 La. Ann. 446; *McCormick v. Arnspiger*, 38 Tex. 569.

The fact that the alien party employed a resident agent is immaterial. *Dillon v. U. S.*, 5 Ct. of Cl. 586.

The following cases lay down a doctrine somewhat different from that of the text: *Conrad v. Waples*, 96 U. S. 290; *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594.

4. *Infants*.—*Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Irvine v. Irvine*, 9 Wall. (U. S.) 617.

5. *Tucker v. Moreland*, 10 Pet. (U. S.) 58. See generally, as to conveyances by infants and their ratification or avoidance of contracts and conveyances, *INFANTS*, vol. 10, pp. 628, 644, 649; *DEEDS*, vol. 5, p. 423.

It is a question for the jury and not for the court, whether the evidence shows an affirmation or not. *Irvine v. Irvine*, 9 Wall. (U. S.) 617.

6. *Married Women*.—At common law,

as to her separate estate, and property held by her as trustee, without any beneficial interest, she is considered a *feme sole*, and her contracts concerning the same may be valid and enforceable in equity against her.¹ She may also make a valid conveyance of land when her husband is civilly dead, or is an alien enemy, or has abjured the realm.²

d. PERSONS OF WEAK MIND—(1) *Insane Persons*.—Generally speaking, insane persons are incapable of making valid contracts, and all contracts entered into by them are either void or voidable.³ The same principle applies to contracts for the purchase and sale of real estate, and to conveyances of the same.⁴ Deeds

a married woman could convey only by a fine or common recovery, but by 3 & 4 Wm. IVth, ch. 74, it was enacted that the joint deed of husband and wife, when properly acknowledged, should pass a good title. Williams on Real Prop. (6th ed.), pp. 229-232; Tiedeman on Real Prop., § 794; 3 Washburne on Real Prop., p. 252; Martin v. Dwelly, 6 Wend. (N. Y.) 9; 21 Am. Dec. 245. Similar statutes have been enacted in the *United States*. Lawrence v. Heister, 3 Har. & J. (Md.) 371; Preston v. Fryer, 38 Md. 225. And see DEEDS, vol. 5, p. 427; MARRIED WOMEN, vol. 14, p. 626; HUSBAND AND WIFE, vol. 9, p. 789.

In some of the *United States*, the joint deed of the husband and wife always has been recognized independently of statute, as if authorized by the common law. Fowler v. Shearer, 7 Mass. 14; Davey v. Turner, 1 Dall. (U. S.) 11.

Thus, by the customary and ancient law of *Rhode Island*, a *feme covert* may pass her estate by a deed in which her husband joins, which is duly executed and acknowledged. Manchester v. Hough, 5 Mason (U. S.) 67.

Under *Massachusetts* Gen. Stat., p. 108, § 3, a married woman may, with the written assent of her husband, enter into a written executory contract for the sale of her real estate, and specific performance will be enforced in equity. Baker v. Hathaway, 5 Allen (Mass.) 103.

1. Martin v. Dwelly, 6 Wend. (N. Y.) 9; 21 Am. Dec. 245; Butler v. Buckingham, 5 Day (Conn.) 492; 5 Am. Dec. 174. And see MARRIED WOMEN, vol. 14, p. 628; DEEDS, vol. 5, p. 429; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 22, pp. 9 and 41 *et seq.*

If she enters into an agreement,

clearly indicating her intention to affect her separate property, a court of equity will, in the absence of fraud or undue advantage taken of her, apply her separate property to discharge such engagement. Jaques v. M. E. Church, 17 Johns. (N. Y.) 549; 8 Am. Dec. 447.

2. 2 Minor's Inst. (3d ed.) 650; 2 Bl. Com. 121; Rhea v. Rhenner, 1 Pet. (U. S.) 108; Danner v. Berthold, 11 Mo. App. 351; Rosenthal v. Mayhugh, 33 Ohio St. 155; Portland v. Prodders, 2 Vern. 104; Newsome v. Bowyer, 3 P. Wms. 38; Lean v. Schultz, 2 Wm. Bl. 1198; Carrol v. Blencow, 4 Esp. 27; Deerly v. Duchess of Mazarine, 1 Salk. 116; Kav v. De Pienne, 3 Campb. 123; Marshall v. Rutton, 8 T. R. 545.

3. See INSANITY, vol. 11, p. 132.

4. Dexter v. Hall, 15 Wall. (U. S.) 9; Behrens v. McKenzie, 23 Iowa 333; 92 Am. Dec. 428; Scanlan v. Cobb, 85 Ill. 296; Lang v. Whidden, 2 N. H. 435; Eaton v. Eaton, 37 N. J. L. 108; 18 Am. Rep. 716; Van Deusen v. Sweet, 51 N. Y. 378. See also the following: Thompson v. Leach, 3 Mod. 310; Yates v. Boem, 2 Stra. 1194; Ball v. Mannin, 1 Dow & Clark, 380; Molton v. Camroux, 4 Exch. 17; Wray v. Wray, 32 Ind. 126; Leaver v. Phelps, 11 Pick. (Mass.) 304; 22 Am. Dec. 372; Davis v. Lane, 10 N. H. 156; Burke v. Allen, 29 N. H. 106; 61 Am. Dec. 642; Dennett v. Dennett, 44 N. H. 531; 84 Am. Dec. 97; Jackson v. King, 4 Cow. (N. Y.) 216; 15 Am. Dec. 354; Rice v. Peet, 15 Johns. (N. Y.) 503; Sprague v. Duel, 11 Paige (N. Y.) 480; Newhouse v. Godwin, 17 Barb. (N. Y.) 236; Alston v. Jones, 17 Barb. (N. Y.) 276. "Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity or, for his protection, estops the other

of insane persons are generally voidable,¹ unless the grantor has been placed under guardianship, in which case they are absolutely void.²

(2) *Persons of Slight Intelligence.*—Though mere weakness of mind or inferiority of intellect will not necessarily incapacitate one from making a binding contract,³ yet one may be so enfeebled in mind and memory, either from old age, disease, or other cause, as to destroy his capacity to contract, and constitute ground for setting aside his contracts and conveyances.⁴ Then, too, a person in such condition is peculiarly susceptible to undue influence,

party to set up and sustain this objection." *Allen v. Berryhill*, 27 Iowa 539; 1 Am. Rep. 309. And see *DEEDS*, vol. 5, p. 426.

1. *Wait v. Maxwell*, 5 Pick. (Mass.) 217; 16 Am. Dec. 391; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434; *Freed v. Brown*, 55 Ind. 310. See *Gribben v. Maxwell*, 34 Kan. 8. But a power of attorney given by a lunatic is absolutely void, and, therefore, a deed given under such power is void also. *Dexter v. Hall*, 15 Wall. (U. S.) 9.

If the deed of an insane person not under guardianship, obtained without fraud and for an adequate consideration, has never been ratified or affirmed, it may be avoided by his heirs, not only as against his immediate grantee, but also as against subsequent *bona fide* purchasers for value and without notice. *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705.

2. If a person *non compos mentis* has been placed under guardianship, his deed is void, as the decree and letters of guardianship take from him all capacity to convey. But where there is no such decree or letters, the presumption of law is in favor of his sanity. *Wait v. Maxwell*, 5 Pick. (Mass.) 217; 16 Am. Dec. 391.

In *Griswold v. Butler*, 3 Conn. 227, it was held that a deed, executed by a person under a conservator, with the consent of such conservator, but without authority from the county court, was void.

A remarkable doctrine was recognized by Littleton and Coke as undoubted law, namely, that if an insane person executes a conveyance, he cannot plead his want of reason to invalidate the conveyance, although his heir may, because "no man of full age shall be received in any plea by the law to disable his own person;" 3 Th. Co.

Lit. 44-46; to which the further reason was sometimes added that if he were really out of his senses, he could not know whether he had made the conveyance or not. 2 Bl. Com. 291; *Beverley's Case*, 4 Co. 123b. This doctrine, however, is now wholly abandoned, and the party himself may in all cases invalidate any conveyance or other contract made while in a state of mental aberration. 2 *Minor's Inst.* (3d ed.), p. 642; 2 *Kent's Com.* 451; 2 Bl. Com. 292, n; 1 *Story's Eq. Jur.* (13th ed.), § 230.

3. 1 *Parsons on Contracts* (7th ed.) 383. See *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428.

4. *Coleman v. Frazer*, 3 Bush (Ky.) 300; *Davis v. Cummings*, 60 Vt. 502.

Persons of unsound mind incompetent to take good care of themselves and property, are entitled to the protection and curation of courts of equity as much as technical idiots and lunatics. The jurisdiction of the courts extends to the case of every person who, in consequence of old age, disease, or other cause, is in such a state of mental imbecility as to be incapable of conducting his affairs with common prudence, and leaves him liable to become the victim of his own folly, or the fraud of others. *Nailor v. Nailor*, 4 Dana (Ky.) 339; *Shaw v. Dixon*, 6 Bush (Ky.) 644.

Deaf Mutes.—Persons born deaf and dumb are *prima facie non compos mentis*. *Gartside v. Isherwood*, 1 Bro. C. C. 560; *Dickenson v. Blisset*, 1 Dick. 268; *Cruise v. Christopher*, 5 Dana (Ky.) 181; *Oliver v. Berry*, 53 Me. 206; *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Dunn v. Chambers*, 4 Barb. (N. Y.) 376; *Buffalow v. Buffalow*, 2 Dev. & B. Eq. (N. Car.) 241; *Whitehorn v. Hines*, 1 Munf. (Va.) 557.

The civil law rule is the same.

and if others have taken undue advantage of his mental weakness to inveigle him into contracts or conveyances, a court of equity will set them aside.¹

c. PERSONS UNDER DURESS AND UNDUE INFLUENCE.—In all contracts there must be an *aggregatio mentium*, an agreement of minds, which can never be the case where one of the parties enters into the agreement by fear or the threats of the other, or yields his will to some force, either moral, social, or domestic, unduly exercised upon him. In such case a court of equity will relieve against the transaction.²

Justinian Inst. Bk. 1, tit. 23, § 4; Digest, Bk. 26, tit. 5, f. 8, § 3.

A person deaf and dumb from his birth who has in fact sufficient capacity, is not legally incapable of executing a deed. *Brown v. Brown*, 3 Conn. 299; 8 Am. Dec. 187.

Drunken Persons.—All contracts and transactions entered into by a drunken person are invalid or voidable, where the drunkenness was brought about by the opposite party, or a fraudulent advantage was taken of it, or it deprived the party of his reason and of an agreeing mind. ¹Minor's Inst. (3d ed.), p. 644; ¹Chitty on Contracts (11th Am. ed.) 192; *Smith's Contracts* 202; ¹Parsons on Contracts (7th ed.), *384, n; *Gore v. Gibson*, 13 M. & W. 623. But the mere fact of being drunk is insufficient to enable a grantor to set aside a deed where no contrivance was used to draw him into drink, and no unfair advantage taken of his situation. *Cooke v. Clayworth*, 18 Ves. 12; 11 Rev. Rep. 137. But if, through the management or contrivance of him who gained the deed, he was drawn into drink, it will be set aside. *Johnson v. Medlicott*, 3 P. Wms. 130; *Harvey v. Pecks*, 1 Munf. (Va.) 518.

A person reduced to a state of mental imbecility by habitual intoxication, is incapable of making a deed. *Samuel v. Marshall*, 3 Leigh (Va.) 567.

¹*Davis v. Cummings*, 60 Vt. 502; *Wray v. Wray*, 32 Ind. 126; *Whitehorn v. Hines*, 1 Munf. (Va.) 557; *Tracey v. Sacket*, 1 Ohio St. 54; 59 Am. Dec. 610. See **UNDUE INFLUENCE**, vol. 27, p. 457.

Where one stands in a relation of trust and confidence to another who is old and failing in mind, the law will presume a contract between them to have been the result of undue influence emanating from the stronger party. *Cadwallader v. West*, 48 Mo. 483.

In *Tracey v. Sacket*, 1 Ohio St. 54; 59 Am. Dec. 610, Bartley, J., in delivering the opinion of the court, said: "It is said that a court of equity will not measure the size of men's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity; and that the law will not relieve a man who is capable of taking care of his own interest, except where he is imposed on by deceit, against which ordinary prudence could not protect him. But whatever weight this may be entitled to, and whatever may be its application, it is obvious that weakness of mind may constitute a very important circumstance to prove that a contract has been obtained through fraud, imposition, or undue influence."

² See **FRAUD**, vol. 8, p. 635; **UNDUE INFLUENCE**, vol. 27, p. 457.

Equity reaches every case "where influence is acquired and abused, or where confidence is reposed and betrayed." *Smith v. Kay*, 7 H. L. Cas. 750.

All grants and contracts made under duress are voidable by the parties who make them. *Reed v. Exum*, 84 N. Car. 430; *Somere v. Pumphrey*, 24 Ind. 231; *Deputy v. Stapleford*, 19 Cal. 302; *Sharon v. Gager*, 46 Conn. 189. And see **DURESS**, vol. 6, p. 57.

In the great majority of cases, undue influence arises from the condition of the grantor, such as mental or physical weakness, or the confidential relations of the parties, such as guardian and ward, trustee and *cestui que trust*, attorney and client, physician and patient, etc. We have seen that weakness of mind renders a party peculiarly susceptible to the undue influence of others, and that a deed or contract secured under such conditions would be set aside. See *supra*, this title, *Persons of Slight Intelligence*; ²*Pomeroy's Eq. Jur.* (2d ed.), § 951.

3. Persons in Fiduciary Capacities—*a. TRUSTEES*—(See also POWERS, vol. 18, p. 901; TRUSTS AND TRUSTEES, vol. 27, p. 1).—A trustee, upon conveyance to him, takes an estate commensurate with the objects of the trust, unless terms negating this construction are used.¹

As to persons in confidential relations, the general rule is, that where the existence of such relations is once established, there is a presumption against the validity of such transactions on the ground of public policy. *Dunn v. Dunn*, 42 N. J. Eq. 431; *Caspari v. First German Church*, 12 Mo. App. 314; *Kempson v. Ashbee*, L. R., 10 Ch. App. 15; *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. Cas. 481; *UNDUE INFLUENCE*, vol. 27, p. 461, *et seq.*; 2 *Pomeroy's Eq. Jur.* (2d ed.), § 951.

All contracts and transactions entered into by a former ward, soon after arriving at full age, with his recent guardian, are scrutinized with rigor, for the influence usually exercised by a guardian over his ward is presumed to last while the guardian's functions are, to any extent, still performed. Consequently, all contracts and conveyances between them, by which the guardian derives a benefit made under such circumstances, will be presumed invalid and set aside at the request of the ward; the burden being cast upon the guardian to show full knowledge, freedom of will, and absence of undue influence. *Hatch v. Hatch*, 9 Ves. 292; *Wright v. Vanderplank*, 8 De G. M. & G. 133; *Somes v. Skinner*, 16 Mass. 348. And see *GUARDIAN AND WARD*, vol. 9, p. 151.

Conveyances by wards to guardians, soon after the termination of the wardship, or at, or before the time of settling the accounts and delivering up the estate, will be set aside as against public policy, without any proof of actual fraud, and especially where there are circumstances of positive fraud. *Waller v. Armistead*, 2 Leigh (Va.) 11; 21 Am. Dec. 594. The court will not permit such transactions to stand, unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian. *Meek v. Perry*, 36 Miss. 190.

Thus, where a ward, shortly after arriving at age, was induced by her guardian, before a settlement of his accounts, to convey her real estate to him for the express consideration of \$1,300, he paying but \$600, and representing that in-

debtedness amounting to \$700 was existing against the land, when such was not the case, it was held that the conveyance would not be sanctioned in equity. *Wickiser v. Cook*, 85 Ill. 68. See, to the same effect, *Eberts v. Eberts*, 55 Pa. St. 110; *Williams v. Powell*, 1 Ired. Eq. (N. Car.) 460; *Wright v. Arnold*, 14 B. Mon. (Ky.) 513; 61 Am. Dec. 172.

Where one standing in *loco parentis* to the minor owners of real estate, who were accustomed to obey him and were ignorant of business affairs, induced them, after they had attained their majority, to make a contract, unconscionable in character, to convey to him their real estate, the court refused to enforce it. *Tucke v. Buchholz*, 43 Iowa 415.

A court of equity will set aside a deed where the undue influence is exercised by the former guardian, in favor of a third person, the same as if it was exercised by the beneficiary in the deed; the latter takes it subject to the taint of improper influence. *Ranken v. Patton*, 65 Mo. 378.

If, however, all the circumstances of good faith, full knowledge, and free consent are shown, the transaction will be valid and binding. *Cowan's Appeal*, 74 Pa. St. 329; *Bickerstaff v. Marlin*, 60 Miss. 509; 45 Am. Rep. 418; *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 242.

The mere fact that the relation of guardian and ward has existed will not preclude the making of contracts between the two, after the guardianship has ceased and the accounts fully and fairly settled. After the fiduciary relation has terminated and the influences which that relation would necessarily create have ceased to exist, the parties may make contracts which, if fairly and honestly made and based upon an adequate consideration, will be sustained. *Wickiser v. Cook*, 85 Ill. 68.

1. TRUSTS AND TRUSTEES, vol. 27, p. 111.

Thus, if the fee is required to carry out the objects of the trust, such an estate will be vested in the trustee,

So far as third parties without notice are concerned, he is, as to this estate, in the same position as though it were unincumbered by the trust. He may convey it as though he were the beneficial as well as the legal owner.¹

If he sells the estate, acting beyond the powers given him in the trust instrument, to one having notice—either actual or constructive—the purchaser will hold it subject to the same trusts as attached to it in the original trustee's hands.² If the purchaser knows that he is dealing with the trustee, in regard to trust prop-

although the usual words of limitation are not used. *Villiers v. Villiers*, 2 Atk. 72; *Blagrove v. Blagrove*, 4 Exch. 569.

In *Webster v. Cooper*, 14 How. (U. S.) 499, the court, by Curtis, J., said: "A devise to the trustees and their heirs to the uses mentioned, carries the legal estate to the *cestui que use*, unless the will has imposed on the trustees some duty, the performance of which requires the legal estate to be vested in them. And in that case they would take an estate exactly commensurate with the exigencies of their trust." See also *Doe v. Willan*, 2 B. & Ald. 84; *Morrant v. Gough*, 7 B. & C. 206; *Kenrick v. Beauchlerk*, 3 B. & P. 178; *Trent v. Hanning*, 7 East 99; *Leonard v. Sussex*, 2 Vern. 526; *Mott v. Buxton*, 7 Ves. 201; *Neilson v. Lagow*, 12 How. (U. S.) 111; *Farquharson v. Eichelberger*, 15 Md. 72; *Cleveland v. Hallett*, 6 Cush. (Mass.) 407; *Packard v. Marshall*, 138 Mass. 302; *Newhall v. Wheeler*, 7 Mass. 189; *Stearns v. Palmer*, 10 Met. (Mass.) 32; *Gould v. Lamb*, 11 Met. (Mass.) 84; 45 Am. Dec. 187; *Fisher v. Fields*, 10 Johns. (N. Y.) 505; *Welch v. Allen*, 21 Wend. (N. Y.) 147; *Ellis v. Fisher*, 3 Sneed. (Tenn.) 231; 65 Am. Dec. 52.

Although words of limitation are used, the fee will not pass if the trust can be executed without its passing. *West v. Fitz*, 109 Ill. 425.

The same principles are applied to the case of an alien. *Craig v. Leslie*, 3 Wheat. (U. S.) 563.

1. *Perry on Trusts* (4th ed.), § 218; *Jerrard v. Saunders*, 2 Ves. Jr. 457; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *High v. Batte*, 10 Yerg. (Tenn.) 335; *Hamilton v. Mound City Mut. L. Ins. Co.*, 3 Tenn. Ch. 124; *Tompkins v. Powell*, 6 Leigh (Va.) 576.

Even though the transfer is in violation of the trust, it cannot be called in question in a court of law, but relief must be sought in equity. *Dawson v.*

Hayden, 67 Ill. 52; *Canoy v. Troutman*, 7 Ired. (N. Car.) 155.

It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase-money. *Wormley v. Wormley*, 8 Wheat. (U. S.) 449.

2. *Perry on Trusts* (4th ed.), § 217; *Bovey v. Smith*, 1 Vern. 149; *Daniels v. Davison*, 16 Ves. 249; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Mansell v. Mansell*, 2 P. Wms. 681; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Caldwell v. Carrington*, 9 Pet. (U. S.) 86; *Smith v. Walser*, 49 Mo. 250.

A purchaser with notice of a prior equity is a trustee, and will be compelled to convey. *Liggett v. Wall*, 2 A. K. Marsh. (Ky.) 149; *Wright v. Dame*, 22 Pick. (Mass.) 55; *Reed v. Dickey*, 2 Watts (Pa.) 459. Statutes sometimes provide that, if the trust is expressed in the instrument which creates the trustee's estate, every sale, conveyance, or other act of the trustee, in contravention of the trust, shall be absolutely void. These statutes have been given full effect as written. *Russell v. Russell*, 36 N. Y. 581; 93 Am. Dec. 540; *Anderson v. Mathes*, 44 N. Y. 249; *Douglas v. Cruger*, 80 N. Y. 15.

The grantees of land in trust for the payment of debts, reconveyed to the grantor, reciting that the trusts had been executed. The debts had not all been paid. It was held that the reconveyance, being in contravention of the trust, was void, and that the estate remained in the trustees. *Briggs v. Davis*, 20 N. Y. 15; 75 Am. Dec. 363.

It does not affect the question that such a sale was under an order of the court. *Cruger v. Jones*, 18 Barb. (N. Y.) 168; *Lahens v. Dupasseur*, 56 Barb. (N. Y.) 266.

In the absence of such a statute, however, a sale and conveyance of the legal

erty, he is bound at his peril to take notice of the extent of the trustee's powers.¹

The questions whether a given trustee has power to make a sale which will divest the interest of the *cestui que trust*, or may make a purchase, are considered elsewhere.²

b. EXECUTORS AND ADMINISTRATORS.—(See also DEBTS OF DECEDENTS, vol. 5, p. 206; EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; POWERS, vol. 18, p. 877).—Executors and administrators frequently have powers of sale over the real estate of decedents, either expressly given them by will or in accordance with statutes directing the sale of lands to pay debts.³ They have no right or title in real estate by virtue of their office, and can make no sale without express direction in the will, or under an order of the court acting in pursuance of the law.⁴

The executor, unless specially permitted by the will to go

title to one, either with or without notice, passes the legal estate. *Canoy v. Troutman*, 7 Ired. (N. Car.) 155; *Shortz v. Unangst*, 3 W. & S. (Pa.) 55.

Whether the legal estate will thus pass in any given conveyance is largely a matter of intention. Thus, in a general assignment for the benefit of creditors, made by a trustee, only those estates in which he had a beneficial interest will pass. *Abbott*, Petitioner, 55 Me. 480.

The assignees, being mere volunteers, are regarded simply as the agents of the assignor, standing in his place, and consequently, as a general rule, take only such rights and interests as he himself had and could claim at the time of the assignment made. *Ludwig v. Highly*, 5 Pa. St. 132; *Luckenbach v. Brickenstein*, 5 W. & S. (Pa.) 149; *In re Wilson*, 4 Pa. St. 430; 45 Am. Dec. 701. A voluntary assignment by a debtor is, in this respect, like the assignment of a bankrupt or insolvent, which passes nothing more than he possessed or enjoyed, and under which the assignee takes his rights, precisely as he had them. *Mitford v. Mitford*, 9 Ves. 100; *Worrall v. Marlow*, 1 P. Wms. 459, note; *Like v. Beresford*, 3 Ves. 506.

The assignees could not take more than the legal estate, burdened with the equity to which it was subject in the hands of the assignor. *Twelves v. Williams*, 3 Whart. (Pa.) 485; 31 Am. Dec. 542; *Wolf v. Eichelberger*, 2 P. & W. (Pa.) 346; *Knowles v. Lord*, 4 Whart. (Pa.) 500; 34 Am. Dec. 525; *Vandyke v. Christ*, 7 W. & S. (Pa.) 373.

If the legal estate passes, it does not

follow that the vendee will have the discretionary powers given to the original trustee. Such will be the case only when the instrument of trust contemplated and authorized a transfer of the estate and the power. *Perry on Trusts* (4th ed.), § 410.

The rule is settled as well that a discretionary power cannot be delegated to a stranger by assignment. *Alexander v. Alexander*, 2 Ves. 642; *Saunders v. Webber*, 39 Cal. 287; *Hawley v. James*, 5 Paige (N. Y.) 318; *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368.

1. *Owen v. Reed*, 27 Ark. 122; *Vernon v. Board of Police*, 47 Miss. 181.

2. See POWERS, vol. 18, p. 901; TRUSTS AND TRUSTEES, vol. 27, p. 1.

3. See POWERS, vol. 18, p. 877.

4. EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; *Stuart v. Allen*, 16 Cal. 473; 76 Am. Dec. 551. In *Ryan v. Duncan*, 88 Ill. 144, the court, by Sheldon, J., said: "An administrator takes neither an estate, title, nor interest in the realty, and he cannot support any possessory or real action, in law or equity, for the recovery or maintenance of possession or title, or to clear up title from clouds from adverse claims. If necessary to sell for payment of debts, he must take the estate as he finds it, and if incumbered, or there be clouds upon the title, sell it subject thereto." *Stone v. Wood*, 16 Ill. 177; *Smith v. McConnell*, 17 Ill. 135; 63 Am. Dec. 340; *Walbridge v. Day*, 31 Ill. 379; 83 Am. Dec. 227; *Phelps v. Funkhouse*, 39 Ill. 402; *Cutter v. Thompson*, 51 Ill. 390; *LeMoyne v. Quimby*, 70 Ill. 399; *Gridley v. Watson*, 53 Ill. 186.

further, and the administrator in every case, are restricted to a sale of the premises as they are.¹

They cannot relieve the title of incumbrances, nor perfect it.² They cannot delegate their authority;³ nor can they warrant the title; and if they attempt to do so, the warranty will be binding upon themselves personally.⁴

c. GUARDIANS.—(See also GUARDIAN AND WARD, vol. 9, p. 85).—It is a well settled general principle that a guardian cannot, by his contracts, bind the estate of his ward,⁵ and cannot make a valid sale of the latter's real estate without an order of court.⁶

d. MORTGAGEES.—(See also POWERS, vol. 18, p. 877; TRUST DEEDS, vol. 26, p. 859).—Sales by mortgagees, under mortgages with power of sale, are governed by the same rules as sales by trustees under powers. The power of the mortgagee depends upon the terms of the mortgage.⁷ It is immaterial whether it be conferred by the instrument conveying the title, or by another instrument made simultaneously with it.⁸ The power may be created by express words or by necessary implication.⁹ A power to sell implies the power to convey.¹⁰ The whole of the mortgagor's interest in the land must be sold, not an undivided part.¹¹ All the conditions as to time, notice, and manner of sale, must be strictly complied with.¹² The assignee of the mortgagee may

1. Gridley v. Watson, 53 Ill. 186; Martin v. Beasley, 49 Ind. 280.

2. LeMoine v. Quimby, 70 Ill. 399; Ryan v. Duncan, 88 Ill. 146.

3. Chambers v. Jones, 72 Ill. 280; Gridley v. Phillips, 5 Kan. 349.

4. DEBTS OF DECEDENTS, vol. 5, p. 281.

5. Guardians.—Jones v. Brewer, 1 Pick. (Mass.) 317; Tenney v. Evans, 14 N. H. 343; 40 Am. Dec. 194; McGavock v. Whitfield, 45 Miss. 452; Reading v. Wilson, 38 N. J. Eq. 446.

Even his contracts for the care and support of the ward, bind the guardian personally, Rollins v. Marsh, 128 Mass. 116; and cannot be made a charge upon the ward's real estate. St. Joseph's Academy v. Augustini, 55 Ala. 493.

He cannot bind the estate of the ward without the sanction of the court. Dalton v. Jones, 51 Miss. 585.

6. Skelton v. The Ordinary, 32 Ga. 266; Collins v. Dixon, 72 Ga. 475; Woods v. Boots, 60 Mo. 546; West v. West, 75 Mo. 204; Holbrook v. Brooks, 33 Conn. 347; GUARDIAN AND WARD, vol. 9, pp. 112, 113 *et seq.* He cannot convert the personal property of his ward into real estate, or buy land with the ward's money. White v. Parker, 8 Barb. (N. Y.) 48.

7. Mortgages.—Perry on Trusts (4th ed.), § 602 g.

8. Brisbane v. Stoughton, 17 Ohio 482.

9. Purdie v. Whitney, 20 Pick. (Mass.) 25; Goodrich v. Proctor, 1 Gray (Mass.) 567; Hyman v. Devereux, 63 N. Car. 624; Williams v. Otey, 8 Humph. (Tenn.) 563; 47 Am. Dec. 632. But see Wing v. Cooper, 37 Vt. 169.

10. Fogarty v. Sawyer, 17 Cal. 589; Williams v. Otey, 8 Humph. (Tenn.) 563; 47 Am. Dec. 632.

"Where the term 'sale' is used in its ordinary sense, and the general tenor and effect of the instrument is to confer on the attorney a power to dispose of real estate, the authority to execute the proper instruments, required by law to carry such sale into effect, is necessarily incident." Shaw, C. J., in Valentine v. Piper, 22 Pick. (Mass.) 85; 33 Am. Dec. 715.

11. Fowle v. Merrill, 10 Allen (Mass.) 350; Torrey v. Cook, 116 Mass. 163.

12. Perry on Trusts (4th ed.), § 602; Pope v. Durant, 26 Iowa 233; Ormsby v. Tarascon, 3 Litt. (Ky.) 405; Fenner v. Tucker, 6 R. I. 551; Hoffman v. Anthony, 6 R. I. 282; 75 Am. Dec.

execute the power,¹ which may be by either a private sale or an auction.²

IV. THE FORMATION OF THE CONTRACT—1. General Principles—Offer and Acceptance.—Every contract consists of an offer and an acceptance.³ If an offer is made to sell land, it is revocable until accepted, even though a certain time, which has not yet elapsed, is given for acceptance.⁴

Acceptance completes the contract and renders it binding on both parties.⁵ The acceptance must, however, in order to be operative, be made within a reasonable time, unless some special period, during which it is to remain open, is named.⁶

701; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64; 75 Am. Dec. 681; *Smith v. Provin*, 4 Allen (Mass.) 516.

A condition, attached to a power of sale contained in a trust deed, that the trustee shall sell only by and with the consent of the grantor, to be manifested by the grantor's joining in the conveyance, is valid. The condition is reasonable, and the trustee must comply with it. *Kissam v. Dierkes*, 49 N. Y. 602.

If a power is to sell partly for cash and partly on credit, the sale cannot be made entirely on credit. *Strother v. Law*, 54 Ill. 413. If at public auction, a private sale will be set aside. *Greenleaf v. Queen*, 1 Pet. (U. S.) 138.

Where the mortgagee was given the right, on default, to enter, take possession, and sell, it was held that he could not sell without entry and taking possession, or, at least, a demand for possession and refusal. *Roarty v. Mitchell*, 7 Gray (Mass.) 243.

1. *Strother v. Law*, 54 Ill. 413.

2. *Perry on Trusts* (4th ed.), § 602 q.

3. *CONTRACT*, vol. 3, p. 841.

4. *Smith v. Reynolds*, 3 McCrary (U. S.) 157; *Perkins v. Hadsell*, 50 Ill. 216.

A party making an offer has a right to withdraw it, at any time before the one to whom it is made accepts it. The party to whom the offer is made must accept within the time limited, and before the offer is withdrawn. *School Director v. Trefethren*, 10 Ill. App. 127; *Larmon v. Jordan*, 56 Ill. 204.

A gave an option to C, to be exercised within a given time for a valuable consideration. Before the expiration of the time thus limited, it was verbally agreed to extend the time for the exercise of the option, no further consideration being given. After the expiration of the time, as first limited, A

sold and conveyed the property in question to B. Before the time had expired, as agreed upon verbally, C tendered the amount agreed upon to A, and demanded a deed, which was refused. On a bill for specific performance, it was held that, as there was no consideration for the verbal promise, or agreement to extend the time for the exercise of the option, such promise was a mere *nudum pactum* and, therefore, not enforceable. *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417. See also *Conner v. Renneker*, 25 S. Car. 514.

5. *Perkins v. Hadsell*, 50 Ill. 216.

The burden of proof that a proposal has been accepted, and the requisite notice communicated, rests upon the party claiming to have accepted it. *Weaver v. Burr*, 31 W. Va. 736.

6. *Martin v. Black*, 21 Ala. 721; *Larmon v. Jordan*, 56 Ill. 204; *Longfellow v. Moore*, 102 Ill. 289; *Peru v. Turner*, 10 Me. 185; *Wilson v. Clements*, 3 Mass. 1.

Parol evidence of material facts and circumstances, known to the parties at the time, may be introduced to show what is a reasonable time. *Stone v. Harmon*, 31 Minn. 512. See *REASONABLE TIME*, vol. 19, p. 1089.

Where, from the terms of the offer made by mail, or from the nature of the business, the vendor has a right to expect an answer by return mail, the acceptance must be made in that manner. *Maclay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35.

The defendant wrote a letter to D., empowering him to sell certain land at a specified price, agreeing to confirm any sale made "within a reasonable time," and also gave D. an option to purchase the land for himself for a less amount. D. transferred the letter to the plaintiff, but nothing was paid on the price, and it was held not to constitute a sale to the

No special form of language is required for either offer or acceptance. It is enough that each be fairly deducible from the terms used.¹ The two must agree in their terms; otherwise, the apparent acceptance is in reality merely a new offer.² The acceptance may be in writing, or may consist of some act prejudicial to the purchaser and named by the vendor as a means of

plaintiff. *Dyer v. Duffy* (W. Va. 1894), 19 S. E. Rep. 540.

A clause in a lease, giving the lessee a right to purchase the property demised, is a continuing offer to sell. Unless otherwise provided, it extends throughout the term of the lease. *Willard v. Tayloe*, 8 Wall. (U. S.) 557. See also, to same effect, *Welshman v. Spinks*, 5 L. T. N. S. 385; *Warner v. Willington*, 3 Drew. 523; *Boston, etc., R. Co. v. Bartlett*, 3 Cush. (Mass.) 224.

Such an offer differs from an ordinary offer to sell, in that it is supported by a consideration and hence is not revocable. See *supra*, this title, *The Subject-Matter—Options*.

1. An agreement to execute and deliver a deed of land, is an agreement to sell and convey. *Martin v. Colby*, 42 Hun (N. Y.) 1.

The mere naming of a price for land, or the terms on which a sale will be made, in response to an inquiry, is not an offer to sell. *Knight v. Cooley*, 34 Iowa 218; *Burns v. Allen*, 11 Ired. (N. Car.) 25. But see *Kempner v. Cohen*, 47 Ark. 519; 58 Am. Rep. 775.

An agreement to sell land, "the said A [the vendor] to retain possession and enjoyment of said land while he lives . . . and, upon his death, the said B [the purchaser] to have full and entire possession and enjoyment thereof," is an agreement for the sale of land, and not a will. *Book v. Book*, 104 Pa. St. 240.

Offers and acceptances may be by letters, *Thames L. & T. Co. v. Beville*, 100 Ind. 309; *Lynn v. Lynn*, 10 Ill. 602; *Knight v. Cooley*, 34 Iowa 218; *Otis v. Payne*, 86 Tenn. 663; *Matteson v. Scofield*, 27 Wis. 671; or by telegrams. *Deshon v. Fosdick*, 1 Woods (U. S.) 286; *Duble v. Batts*, 38 Tex. 312; *Wells v. Milwaukee, etc., R. Co.*, 30 Wis. 605.

It is the duty of the court to determine whether the letters contain the essentials of a contract, and it is error to submit the question to the jury. The letters being proved, and the acts of the parties shown, it is the duty of the

court to determine their legal effect whether or not they constitute a contract, and to give construction to the same. *Ranney v. Higby*, 5 Wis. 62.

A letter takes effect from the time that it is mailed. *Potter v. Sanders*, 6 Hare 1; *Duncan v. Topham*, 8 C. B. 225; 65 E. C. L. 225; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Averill v. Hedge*, 12 Conn. 424; *Moore v. Pierson*, 6 Iowa 279; 71 Am. Dec. 409; *Hutcheson v. Blakeman*, 3 Metc. (Ky.) 80.

The letter must actually be placed in the post office, directed to the proper place. If directed to a place where the party to be bound sometimes resorts, but does not live, it must be proved to have been received. *Potts v. Whitehead*, 20 N. J. Eq. 55; *Vassar v. Camp*, 14 Barb. (N. Y.) 341; *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Myers v. Smith*, 48 Barb. (N. Y.) 614.

Where the offer is by letter or by telegram, the acceptance signified in the same manner is sufficient, irrespective of the time when it comes to the knowledge of the proposing party. *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511.

2. *Lucas v. James*, 7 Hare 410; *Bowman v. Patrick*, 36 Fed. Rep. 138; *Fox v. Turner*, 1 Ill. App. 153; *Maclay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35; *Lyman v. Robinson*, 14 Allen (Mass.) 242; *Lanz v. McLaughlin*, 14 Minn. 72; *Bruner v. Wheaton*, 46 Mo. 363.

The acceptance must be unconditional, and notice of such acceptance must be communicated within the time limited, or within that time some act must be done, which the parties expressly or impliedly agreed to treat as notice of such acceptance. *Weaver v. Burr*, 31 W. Va. 736.

An acceptance of a simple offer to sell land, which is made conditional by a clause reading "provided the title is perfect," is not binding. *Corcoran v. White*, 117 Ill. 118; 57 Am. Rep. 858.

An answer to an offer to sell land, fixing a different place for the delivery of the deed and the payment of the price,

completing the sale.¹ Such an act furnishes a consideration, and prevents the vendor from withdrawing his offer.²

In every contract for the sale of lands, the act of assent must be complete. If the agreement is executed by some of the parties only, or if it appears that certain conditions, still unfulfilled, were to be complied with, before it should go into effect, there is no contract.³

2. Auctions.—(See AUCTIONS AND AUCTIONEERS, vol. 1, p. 977).—Sales of land are frequently made by auction. They do not differ in their essentials from private sales. The rules for conducting auctions are substantially the same, whether the subject of the sale is real or personal property. The power of the auctioneer over the estate is not materially different from that of an ordinary agent.⁴

3. Contracts Through Agents, Brokers, etc.—(See also AGENCY, vol. 1, p. 331; BROKERS, vol. 2, p. 571; POWER OF ATTORNEY, vol. 18, p. 871).—Sales of land are very often made through agents or brokers.⁵ The power of the representative depends upon the terms of his appointment. It may extend merely to finding a purchaser, to the making of a binding contract of sale, or to the execution of the instruments of conveyance. The former is the usual authority of a real estate broker;⁶ the latter requires an instrument of the same solemnity as that to be executed by the agent.⁷

is not a binding acceptance. *Langelier v. Schaefer*, 36 Minn. 361.

A conditional acceptance is not only no real acceptance, but it has an effect of declining the offer, which cannot be subsequently accepted. *Hyde v. Wrench*, 8 Beav. 334; *Weaver v. Burr*, 31 W. Va. 736.

1. *Mix v. Baldue*, 78 Ill. 215; *Perkins v. Hadsell*, 50 Ill. 216; *Lanz v. McLaughlin*, 14 Minn. 72; *Bruner v. Wheaton*, 46 Mo. 363.

2. *Perkins v. Hadsell*, 50 Ill. 216; *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417; *McDonald v. Huff*, 77 Cal. 279; *Stub v. Grimes*, 38 Minn. 317.

3. Where the papers evidencing a proposed contract were left with the clerk of the attorney of the purchaser, to be delivered only in case the attorney approved the title, and were obtained by the vendor before an opinion as to the title was given, it was held that there was no binding agreement. *Dietz v. Farish*, 79 N. Y. 520. See also *Griffith v. Winborne*, 105 N. Car. 403.

4. AUCTION AND AUCTIONEERS, vol. 1, p. 977.

5. A vendor or purchaser may be represented, at any stage of the negoti-

ation, by an agent, and such agent need not present proof of authority unless it is required. Thus, a claim that the purchaser was in default because he was not present in person, but merely by agents, who failed to produce evidence of authority, was not well founded, the vendor not having at the time questioned the authority of such agents. *Baumann v. Pinckney*, 118 N. Y. 604.

6. *Rutenburg v. Main*, 47 Cal. 213; *Braun v. Chicago*, 110 Ill. 186; *Henderson v. State*, 50 Ind. 234. A broker, however, may be invested with a wider authority. See BROKERS, vol. 2, p. 592.

A verbal authority to an agent "to sell" or "to close a bargain," gives merely the power to find a purchaser and bring the parties together. *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Shepherd v. Hedden*, 29 N. J. L. 343; *Morris v. Ruddy*, 20 N. J. Eq. 238; *Coleman v. Garrigues*, 18 Barb. (N. Y.) 60; *Glentworth v. Luther*, 21 Barb. (N. Y.) 45.

7. AGENCY, vol. 1, p. 337. If an agent, acting under parol authority, makes a sealed instrument in the name of his principal, it is inoperative as such, but will have the effect of an ordinary

The general principles of agency are universal and apply to those dealing with either personal or real property.¹

In the conferring of express authority, there is no difference in the application of these principles. It may be granted by parol, even though its exercise requires a written instrument.² If it is sought to establish an authority by implication, and thus hold a principal responsible for the acts of his alleged agent, the rules are the same, but stronger proof is required if the dealing is with real, than if with personal, property, for the reason that the policy of the law requires more formality in the former case and because of the different nature and effect of possession on the part of the agent.³ The authority in the latter case must be clear and distinct, and naturally inferable from the language or dealings of the parties.⁴

Every agent has the incidental powers necessary to transact the business intrusted to him in the usual manner.⁵ Subject to this qualification, however, it is the duty of the agent to act strictly within his authority; if he does not do so, he is liable to his principal; if he acts without the apparent authority with which his principal has invested him, his acts will be binding only upon himself.⁶

A contract, made by an agent in behalf of an undisclosed principal, may be enforced either in favor of, or against, the latter.⁷

contract in writing, the seal being regarded as surplusage. *Long v. Hartwell*, 34 N. J. L. 116. See also *Adams v. Power*, 52 Miss. 828.

1. See *AGENCY*, vol. 1, p. 331.

2. *AGENCY*, vol. 1, p. 338.

3. *Warvelle on Vendor and Purchaser*, pp. 212, 215.

4. *Proudfoot v. Wightman*, 78 Ill. 553. Authority must be clear and explicit and not clouded with any uncertainty. *Taylor v. Merrill*, 55 Ill. 52. It cannot be inferred properly merely from a correspondence between a real-estate owner and an agent, in which the former speaks of the property and names a price and terms of sale. *Bosseau v. O'Brien*, 4 Biss. (U. S.) 395; *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Albertson v. Ashton*, 102 Ill. 50.

An agency to sell land will be construed as a special agency, unless a general agency is clearly intended. *AGENCY*, vol. 1, p. 360.

5. An agent to plat, subdivide, and sell land may dedicate part of it for a street. *Barteau v. West*, 23 Wis. 416, and cases cited in *AGENCY*, vol. 1, p. 361.

A clause in a power of attorney, "giving and granting unto our said

attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises," confers no additional powers. *Jenkins v. Funk*, 33 Fed. Rep. 915.

6. *Thornton v. Boyden*, 31 Ill. 200. The acts of a special agent are not binding on his principal, unless they are strictly within his authority. *Mathews v. Hamilton*, 23 Ill. 470; *Speer v. Hadduck*, 31 Ill. 439; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44; 8 Am. Dec. 219; *Beals v. Allen*, 18 Johns. (N. Y.) 363; 9 Am. Dec. 221; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; 24 Am. Dec. 62.

7. **Enforcement.**—*AGENCY*, vol. 1, p. 416; *Lawrence v. Taylor*, 5 Hill (N. Y.) 113.

Where the agent contracts under seal, the rule is different. The seal is his alone, and no one else can be treated as a party to the instrument. *Huntington v. Knox*, 7 Cush. (Mass.) 374; *Briggs v. Partridge*, 64 N. Y. 357.

But if the principal has ratified the contract and received the benefit of it, and his interest appeared upon its face, he may hold others, or may be held liable himself in an action of *assumpsit*.

The amount of compensation and the terms of its payment depend upon the agreement of the parties.¹

4. **Sales Under Order of Court.**—The sale of land may be ordered by a court of competent jurisdiction through its officers duly appointed and commissioned to sell.²

Townsend v. Hubbard, 4 Hill (N. Y.) 351; *Spencer v. Field*, 10 Wend. (N. Y.) 88.

1. **Compensation.**—Where a landowner and real-estate broker agreed in advance that payment of commissions should be made in lots of land, and a deed of the same was tendered by the former to the latter, who had selected certain lots, it was held that the agent could not repudiate the agreement and recover his commissions, but he could recover only for the value of his services after a refusal by the obligee to convey, it being immaterial that the agreement to convey the land was not legally enforceable. *Bailey v. Gardner*, 6 Abb. N. Cas. (N. Y. C. Pl.) 147.

Compensation may consist, by agreement, of a part of the interest in the purchase-money mortgage. *Artcher v. McDuffie*, 5 Barb. (N. Y.) 147.

If the agreement is merely to find a purchaser, the compensation may be recovered if this is done, although the sale does not result immediately from the agent's efforts. *Phelan v. Gardner*, 43 Cal. 306; *Leete v. Norton*, 43 Conn. 219; *Hoyt v. Shipherd*, 70 Ill. 309; *Vinton v. Baldwin*, 88 Ind. 104; 45 Am. Rep. 447; *Tombs v. Alexander*, 101 Mass. 255; 3 Am. Rep. 349; *Jones v. Adler*, 34 Md. 440; *Hamlin v. Schulte*, 34 Minn. 534; *Bell v. Kaiser*, 50 Mo. 150; *Hinds v. Henry*, 36 N. J. L. 328; *Knapp v. Wallace*, 41 N. Y. 477; *Wylie v. Marine Nat. Bank*, 61 N. Y. 416; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; 22 Am. Rep. 441; *Edwards v. Goldsmith*, 16 Pa. St. 43; *Delaplaine v. Turnley*, 44 Wis. 31. He must, however, be a proper and solvent purchaser, or accepted by the principal. *Coleman v. Meade*, 13 Bush (Ky.) 358; *Kimberly v. Henderson*, 29 Md. 512; *Hinds v. Henry*, 36 N. J. L. 328.

The insolvency of the party found is a matter of defense, in a suit by an agent to recover his fees. It is no part of the plaintiff's case to disprove it. *Cook v. Kroemeke*, 4 Daly (N. Y.) 268. But see *Coleman v. Meade*, 13 Bush (Ky.) 358.

The right to compensation is not affected by a capricious refusal of the

vendor to convey, *Phelan v. Gardner*, 43 Cal. 306; *Stewart v. Murray*, 92 Ind. 543; 47 Am. Rep. 167; *Tyler v. Parr*, 52 Mo. 249; *Moses v. Bierling*, 31 N. Y. 462; *Delaplaine v. Turnley*, 44 Wis. 31; nor by any act of the owner, either before the sale, as fraudulent conduct or misrepresentation, or after the sale, as voluntarily placing it beyond his power to comply, *Leete v. Norton*, 43 Conn. 219; *Lane v. Albright*, 49 Ind. 275; *Love v. Miller*, 53 Ind. 294; 21 Am. Rep. 102; *Chapin v. Bridges*, 116 Mass. 105; *Pearson v. Mason*, 120 Mass. 53; for it is an established principle that a broker, employed to make a sale under an agreement for a commission, is entitled to pay when he makes a sale according to instructions and in good faith, and the principal cannot relieve himself from liability, by a refusal to consummate the sale, or by a voluntary act of his own disabling him from its performance. *Nesbitt v. Helser*, 49 Mo. 383; *Bailey v. Chapman*, 41 Mo. 536; *Woods v. Stephens*, 46 Mo. 555; *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Reed v. Reed*, 82 Pa. St. 420. Nor by the fact that the title was defective. *Knapp v. Wallace*, 41 N. Y. 477; *Doty v. Miller*, 43 Barb. (N. Y.) 529. But see *Tombs v. Alexander*, 101 Mass. 255; 3 Am. Rep. 349. Where the broker failed to bind the purchaser by a contract which the vendor could enforce under the Statute of Frauds, it was held that he was not entitled to compensation as broker for the parol contract of the sale made by him, where the proposed purchaser refused to accept a good title, which the vendor was ready, willing, and able to make. *Gilchrist v. Clarke*, 86 Tenn. 583.

As to other causes of failure to complete the contract and their effect on the broker's commission, see *BROKERS*, vol. 2, p. 578.

2. *Williamson v. Berry*, 8 How. (U. S.) 495; *JUDICIAL SALES*, vol. 12, p. 208. And see *RECEIVERS*, vol. 20, p. 13; *SHERIFF'S SALES*, vol. 22, p. 597.

The court is the vendor through the instrumentality of its agent. *Hurt v. Stull*, 4 Md. Ch. 391.

V. THE ESSENTIALS OF THE CONTRACT—(See also FRAUDS, STATUTE OF, vol. 8, p. 657).—A contract for the sale of land must have competent parties, a subject-matter, and a valuable consideration.¹

1. Of What Consideration May Consist.—A covenant, though to be executed by the grantee *in futuro* for life, is a proper consideration. *Stewart v. Redditt*, 3 Md. 67. So is the cancellation of an existing indebtedness. *Schluter v. Harvey*, 65 Cal. 158. So, also, is a promise to move on to the land and support the vendor. But where this was not done within two years, it was held that there had been a failure of consideration. *Shepardson v. Stevens*, 77 Mich. 256.

A promise to pay for a deficiency in quantity of land sold, as containing a certain number of acres, made after the completion of the transaction, is a mere *nudum pactum*. *Smith v. Ware*, 13 Johns. (N. Y.) 257.

A note given by the vendee payable to the vendor, the same to be in trust for the infant son of the vendee, furnishes a sufficient consideration. *Eldridge v. Turner*, 11 Ala. 1050.

Where a vendee, as the surety of the vendor, was liable to damages, it was held that this was not a sufficient consideration as against creditors, to support the absolute transfer of land. *Gorham v. Herrick*, 2 Me. 87.

A promise by the vendor to pay the vendee the amount of any improvements that he may make, if the title fails, is supported by a consideration, and it makes no difference whether the promise was made before or after the deed. *Richardson v. Gosser*, 26 Pa. St. 335.

Payment of Consideration by Discharging Incumbrances.—An agreement on the sale of a farm, that an incumbrance thereon may be paid as a means of discharging the indebtedness secured by purchase-money notes, is binding. *Joy v. Hull*, 4 Vt. 455; 24 Am. Dec. 625.

In that case if the vendee expressly or impliedly promises on his part, but does not keep the promise, the vendor may discharge the incumbrance and claim exoneration at the expense of the land. *Curry v. Hale*, 15 W. Va. 867.

Such will be the case where land is sold "under and subject" to an incumbrance. *Moore's Appeal*, 88 Pa. St. 450; 32 Am. Rep. 469.

If a purchaser, as a part of the consideration, covenants to pay a mortgage given by the vendor, he cannot avoid

liability by showing that it was not binding on the vendor by reason of a personal disability to execute a valid and binding mortgage. *Comstock v. Smith*, 26 Mich. 306; *Ritter v. Phillips*, 53 N. Y. 586. See also MORTGAGES, vol. 15, p. 832.

Failure of Consideration.—An agreement to exchange land for slaves was held binding, even though the abolition of slavery occurred between the making of the contract and its fulfillment. *Calloway v. Hamby*, 65 N. Car. 631.

In the absence of fraud, the fact that the vendor has no title does not constitute a total failure of consideration, the conveyance having been with warranty and the vendee being undisturbed in his possession, for the vendee may receive some benefit or interest of value, even if the vendor has no title. *Winslow v. Buel*, 11 How. Pr. (N. Y. Supreme Ct.) 373. But the rule is otherwise where there is fraud, as in assigning a worthless patent. *Babb v. Lindley*, 23 Kan. 478.

Nude Facts.—Where the owner of land, purchased on execution sale, promised to convey it to the party with whom the debtor had a contract of sale, there being no new consideration, it was held that his promise was not binding. *Lanier v. Brooker*, 65 Ga. 761.

Where the facts disclosed an absolute sale of lots, a deed executed and delivered, and notes executed for the purchase-money upon which suit was instituted and a new and distinct agreement to forbear the enforcement of the collection of the purchase-money for ten years, upon the condition that the vendee in that period should erect a tavern house upon the premises worth the sum of \$10,000, the court, by *Lindsay, J.*, said: "Now we cannot appreciate the force of the conclusion, that the erection of such a building upon the property of the vendee was any consideration in law to give any binding effect to a promise from the vendor. To whose benefit did such an improvement inure? Surely to the vendee himself. But it is alleged that the security of the vendor was thereby increased, when he should come to enforce his lien as a vendor. That may be very true, but it was one

All of these must appear with reasonable certainty. As to the subject-matter, it is sufficient if the land can be identified, proof *aliunde* being admissible to fit the description to the land.¹

of those benefits resulting from the improvement in which the local community also participated and may be fitly characterized as *potentia remotissima*, upon which no legal obligation could be justly predicated. It was no legal consideration upon which to found a promise. If made, it was a nude contract and could not be enforced." *Hogan v. Crawford*, 31 Tex. 633. See also *CONTRACT*, vol. 3, p. 830; *INADEQUATE CONSIDERATION*, vol. 10, p. 325.

Certainty Required in Consideration.

—*Id certum est quod certum reddi potest*: A contract for the sale of a village lot provided that its price should be that for which the first lot disposed of in the vicinity should be sold. In a suit for the breach, it appeared that an adjacent lot had been sold for \$125. It was held that the contract was not void for uncertainty. *Cunningham v. Brown*, 44 Wis. 72.

An agreement specifying that deferred payments shall be made in the autumn following, is sufficiently definite. *Everett v. Dilley*, 39 Kan. 73. So is one which leaves the amount of the first payment open, the amount of the whole consideration being certain. *Doyle v. Teas*, 5 Ill. 202.

In *California*, the burden of proof rests upon the party seeking to avoid a written contract on the ground of lack of consideration. *Deering's Codes*, vol. 2, § 1615. In *Georgia*, it is provided by statute that a consideration moving from another is sufficient. *Code* (1882), § 2747.

Effect of Seal.—By statute, a seal is sometimes made presumptive evidence of consideration, rebuttable by proof. *Howell's Michigan Ann. Stat.* (1882), § 7520; *New York Rev. Stats.* (7th ed.), § 840; *Hill's Oregon Ann. Laws*, vol. 1, § 753.

1. *Young v. Griffith*, 84 N. Car. 715. A bond described land as follows: "Two hundred acres of land, it being part of the tract which I bought of Charles Vinzent, lying about one mile east of Mount Enterprise; said two hundred acres to be run off of the south end of said tract next to John Salmon's and extending across said south end." It was held that the bond was not void on its face for insufficient

description, for the land might be identified by aid of extrinsic evidence. *Rainbolt v. March*, 52 Tex. 246.

"The farm situated in that part of Mount Desert Island, called Pretty Marsh, and consisting of between two hundred and sixty and two hundred and seventy acres, and standing in the name of Benjamin Hodgdon," was held a sufficient description. *Mansfield v. Hodgdon*, 147 Mass. 304.

"My house and lot in the town of Jefferson, in Ashe County, *North Carolina*," the grantor having but one house and lot in that town, was held to be a sufficient description of the premises to pass them by deed. *Carson v. Ray*, 7 Jones (N. Car.) 609; 78 Am. Dec. 267.

Description is sufficient if it will distinguish and identify the land. *Doe v. Low*, 2 Ired. (N. Car.) 457.

An agreement under seal to "furnish water out of the milldam sufficient to carry the fulling-mill and carding machine at all times, except in drought in summer, and the usual times of freezing in winter, and at all times to have such a share as is sufficient to carry one wheel, when either of the wheels of the gristmill and sawmill are running," was held sufficient as to certainty of description, it being proven by extraneous evidence that the grantor had no other mills or dams at the time of the contract. *Fish v. Hubbard*, 21 Wend. (N. Y.) 651.

Thus, "my Lenoir lands" is a sufficient description, if it can be established what land is intended. *Thornburg v. Masten*, 88 N. Car. 293. As is a description by numbers of sections, townships, numbers of acres, and all known as "the Shook farm or place on the Coosa river." *Bogan v. Hamilton*, 90 Ala. 454. And "We agree to purchase of P. H. Hodges, his place at Stratford containing fifteen acres, more or less." *Hodges v. Kowing*, 58 Conn. 12. And "a house and lot situated on Amity street, Lynn, Mass." *Hurley v. Brown*, 98 Mass. 545; 96 Am. Dec. 671. Also "a tract in Iredell county, containing thirty acres, adjoining the lands of William Shaver, Caldwell, and others." *Shaver v. Shoemaker*, Phil. Eq. (N. Car.) 327. And "my farm." *Thomas v. Mathis*, 92 Ind. 560.

Less certainty is required in a contract to convey than in a deed.¹

A memorandum of sale of "my right in B's (my father's) estate" sufficiently describes the property, it being shown that B owned only a homestead which he devised in equal shares to the vendor and vendee. *Ryder v. Loomis* (Mass. 1894), 36 N. E. Rep. 836.

In a written contract to convey real estate, the words "a house on Church street" are a sufficient description of the estate to satisfy the Statute of Frauds; and the house may be identified by parol evidence. Upon this point Wells, J., delivering the opinion of the court, said: "It is not a question of the sufficiency of the writing under the Statute of Frauds, so much as it is of the right to resort to parol evidence in aid of the writing, where an ambiguity exists in respect to the property intended to be sold, or to which the contract relates. The most specific and precise description of the property intended requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties, and of their relation to each other and to the property, as they were when the negotiations took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. That parol evidence is competent to furnish these means of interpreting and applying written agreements is settled by the uniform current of authorities." *Mead v. Parker*, 115 Mass. 413; 20 Am. Rep. 110.

But "sixty acres Comida and Cove bottom, also ten acres hillside woodland adjoining the Mitchell tract" unaided by extraneous evidence of identification of the land intended to be sold, is too uncertain. *Meyer v. Mitchell*, 75 Ala. 475. As is "Forty acres of land." *Thompson v. Gordon*, 72 Ala. 455. See also *Rollin v. Pickett*, 2 Hill (N. Y.) 552.

If land be described by numbers and measurements and also by the words "known as the Cook and Clover block," the latter words will prevail in case of discrepancy. *Lyman v. Gedney*, 114 Ill. 388; 55 Am. Rep. 871.

A description in a bond for title cannot be aided by reference to the obligor's receipt for purchase-money when the papers can be connected only by aid of parol evidence. *Falls of Neuse River Mfg. Co. v. Hendricks*, 106 N. Car. 485.

1. *Lewis v. Baird*, 3 McLean (U. S.) 56; *Bogan v. Hamilton*, 90 Ala. 454.

Thus, an agreement to convey ten lots in a town, which does not point out certain ones, is good, although a deed to that effect would be void for uncertainty. *Bemis v. Becker*, 1 Kan. 226.

A contract to convey an acre to be laid out, is certain enough if the purchaser has entered upon the land and laid out that amount; it then becomes an agreement to buy as well as to sell, and either party can compel specific performance. *Collins v. Vandever*, 1 Iowa 573.

A slight error in the survey will not affect a contract to convey. *Kennedy v. Davis*, 2 Bibb. (Ky.) 343.

A description as two acres of land adjoining and connected with a saw-mill, is sufficiently certain. *Brown v. Bellows*, 4 Pick. (Mass.) 179.

A description of land as lying in a certain section, upon a certain creek, is sufficient, although the subdivision of the section, township and range are not mentioned. The location on the particular creek removes the uncertainty as to the subdivision and township. *Hazlip v. Noland*, 6 Smed. & M. (Miss.) 294. But an agreement "to execute and deliver to each and every lot owner, who may have title thereto from J. B. and wife, or from either of them, in any portions of lot known as lot 4, section 29, town 111, north of range 10 west, State of Minnesota, a good and sufficient deed in fee simple, with all proper covenants of warranty, whenever hereafter a patent shall be issued for said lot 4," to one of the obligors, is void for uncertainty in the description of the property. *Sharpe v. Rogers*, 10 Minn. 168.

A contract to convey "a certain piece of land in the county aforesaid, adjoining the lands of A and B, and others, being a part of the Alexander tract, supposed to contain 30 or 35 acres," is so vague and indefinite that it cannot be enforced specifically. *Grier v. Rhyne*, 69 N.

The effect of the Statute of Frauds has been elsewhere considered at length.¹ By the fourth section of that act it was provided that no action should be brought, whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which the action was brought, or some memorandum or note thereof, should be in writing, and signed by the party to be charged therewith, or his duly authorized agent;² and this section has been adopted substantially in all of the states of the Union save *Pennsylvania*.³

VI. THE FORM OF THE CONTRACT.—A contract for the sale of land may assume any form, so long as it makes apparent the intention of the parties.⁴

Car. 346. See also *Capps v. Holt*, 5 Jones Eq. (N. Car.) 153; *Murdock v. Anderson*, 4 Jones Eq. (N. Car.) 77; *Allen v. Chambers*, 4 Ired. Eq. (N. Car.) 125.

1. **FRAUDS, STATUTE OF**, vol. 8, pp. 657, 694.

2. Stat. 29 Car. II., ch. 3, § 4.

The phraseology of the original section was "no contract or sale of lands," but this has been held to mean no contract for the sale of lands, as was the case in *Massachusetts*, where the identical terms of the English act were adopted and given this construction by the courts. *Boyd v. Stone*, 11 Mass. 346.

In the *Virginia* statute, in parol agreements, this error in phraseology was corrected. See *Virginia Code* 1873, ch. 140, § 1.

The act applies to sales at auction and by guardians, executors, administrators, sheriffs, public officers, commissioners, etc., *Carroll v. Powell*, 48 Ala. 298; *Hutton v. Williams*, 35 Ala. 503; 76 Am. Dec. 297; *Ruckle v. Barbour*, 48 Ind. 274; *Ingram v. Dowdle*, 8 Ired. (N. Car.) 455; *Smith v. Arnold*, 5 Mason (U. S.) 414; *Brent v. Green*, 6 Leigh (Va.) 16; save in so far as they are judicial sales, for the reasons for the statute were held not to apply to the latter, since the sale in such cases is made directly by an officer of the court and is ineffective until ratified by it, and hence no chance for fraud or perjury exists. *Fulton v. Moore*, 25 Pa. St. 468; *Tate v. Greenlee*, 4 Dev. (N. Car.) 149.

Thus, under the probate system of *California*, a sale by an executor or administrator is made under an order of the probate court and is a judicial sale, and hence, the contract need not be in

writing subscribed by the parties. *Hallock v. Guy*, 9 Cal. 181; 70 Am. Dec. 643.

A sale of land by a commissioner, under a decree of court, does not come within the statute, and is valid without writing. *Watson v. Violet*, 2 Duv. (Ky.) 332. And so of a chancery sale of land by a trustee, under an order of court. *Warfield v. Dorsey*, 39 Md. 299; 17 Am. Rep. 562.

In *Minnesota*, it is held that, upon an execution sale of land by a sheriff, no note or memorandum other than the certificate of sale, is required under their statute. *Armstrong v. Vroman*, 11 Minn. 220; 88 Am. Dec. 81. And it has been held that a sale under an authority given in a mortgage, as provided for by article 64 of the *Maryland Code*, which requires all such sales to be reported under oath to the court, and provides for the same proceedings on such report as if the same were made by a trustee under a decree, does not come within the application of the statute. *Warfield v. Dorsey*, 39 Md. 299; 17 Am. Rep. 562.

Auction Sales.—Sales at auction are within the statute, except sales under a decree, and the auctioneer's receipt for the deposit not containing expressly, or by reference, the terms, namely, the price, cannot have the effect of an agreement binding the vendor within the statute. *Blagden v. Bradbear*, 12 Ves. 466.

3. See **FRAUDS, STATUTE OF**, vol. 8, p. 694.

4. Thus, a paper which is in form a receipt, also, if it contains all the elements necessary, may be construed to be a contract. *Schweitzer v. Connor*, 57 Wis. 177.

An obligation to pay money, with a

The Statute of Frauds generally require that a memorandum of the contract be in writing,¹ but this memorandum is quite distinct from the contract itself, which may be made orally.²

The question whether an instrument is a deed, vesting title, or a mere executory contract, is often a difficult one. It is largely one of intention.³

condition that it shall be null and void if a conveyance of a tract of land is made, is equivalent to a direct covenant to convey land. *Kennedy v. Kennedy*, 2 Bibb. (Ky.) 465; 5 Am. Dec. 629.

A memorandum read: "It is agreed that B is to have the refusal of a certain farm, situate, etc., which was bought by me for nineteen hundred and forty dollars, upon his complying with certain conditions from the first day of April next, which conditions the aforesaid B has complied with." It was held that this constituted a valid contract, and that it expressed the price for which the land was to be conveyed. *Bird v. Richardson*, 8 Pick. (Mass.) 252; *Atwood v. Cobb*, 16 Pick. (Mass.) 227; 26 Am. Dec. 657.

Words of Inheritance.—No words of inheritance are necessary in an executory contract, if it is manifest from the instrument that a fee simple was intended to be conveyed. *Gaule v. Bilyeau*, 25 Pa. St. 521.

A contract to convey land passes the equitable fee-simple title to the grantee and his heirs, even if it runs to the grantee alone, and not to the grantee and his heirs. The feudal doctrine that the fee simple passes only by a deed running to the grantee and his heirs, does not extend to contracts to convey land. *Bodley v. Ferguson*, 30 Cal. 511.

Informal Deed Construed as Contract to Sell.—A, the attorney in fact of B, executed a conveyance of land owned by A; but the deed throughout was in the name of "A, attorney in fact for B," and was so signed. It was held, that though the deed did not convey the land, it was a contract to convey, binding upon B, and might be enforced after B's death. *Oliver v. Dix*, 1 Dev. & B. Eq. (N. Car.) 158.

A deed lacking attestation and acknowledgment, often may be enforced as an agreement to convey, if it is fair and just, and founded on a valuable and adequate consideration. *Caperton v. Hall*, 83 Ala. 171; *Pollard v. Maddox*, 28 Ala. 321; *Louisville, etc., R. Co. v. Boykin*, 76 Ala. 560.

1. As in *Connecticut Gen. Stats.* (1888), § 1366. But where the petition in an action for the purchase price of land sold, alleges that the defendant accepted a deed therefor, it is not demurrable on the ground that it fails to show a memorandum or contract of sale in writing, signed by the defendant. If the deed is accepted in consummation of the sale, the vendee will have to pay, notwithstanding the Statute of Frauds. *Tinsley v. Miles* (Tex. Civ. App. 1894), 26 S. W. Rep. 999.

2. **FRAUDS, STATUTE OF**, vol. 8, p. 710. Under the civil law, as existing in *New Mexico* in 1868, a verbal contract for the sale of real estate, accompanied by delivery of possession, could be enforced. *Maxwell Land-Grant Co. v. Dawson* (N. Mex. 1893), 34 Pac. Rep. 191.

3. **Boone on Real Property**, § 372; *Brown v. Ewing*, 19 Ind. 373.

Whether an agreement for the sale of land is executed, a present conveyance operating to pass title, or executory, contemplating further assurance, depends upon the intention of the parties as evidenced by the whole instrument. Where an agreement for the sale of land to a married woman, in consideration of a sum of money to be paid annually during the lifetime of the grantor and his wife, for their support, with a provision for an increase or reduction, in case the annual sum should be too small or too large for that purpose, contained the formal words of a present deed of conveyance and was duly executed, acknowledged, and possession delivered, the instrument was held an executed conveyance vesting the title in the grantee, though the stipulated consideration was to be paid in the future, and although the grantee was a married woman and the title was incurred with a condition. *Bortz v. Bortz*, 48 Pa. St. 382; 86 Am. Dec. 603.

In *Shirley v. Shirley*, 59 Pa. St. 267, the court, by Thompson, C. J., said: "Courts should be slow to give the effect of absolute conveyances to instruments for provisions made between

VII. THE CONSTRUCTION OF THE CONTRACT.—(See also *INTERPRETATION*, vol. II, p. 507.)

The construction of agreements for the sale of land is a matter of law for the court.¹

The rules governing construction and interpretation of contracts are the same, whatever the subject-matter may be. Sales of real estate present, however, a few peculiarities in their application.²

parents and children, unless the intention be very clear. Such agreements are usually fruitful sources of strife, litigation, and, very often, of great wrong."

Where one who has purchased land at an execution sale, agrees, after the time for redemption has expired, to convey the land to the execution debtor whenever he shall pay the debt, the writing which states the agreement is not a deed vesting title. *Anderson v. Ingram*, 13 Lea (Tenn.) 270.

Where the owner of land agreed to sell it, and the purchaser accepted the offer and paid the price, but before receiving the deed, took back his money, and accepted a contract binding him to pay at a future day upon certain conditions, it was held that there was a contract to sell and not a present conveyance passing the legal title. *Oliver v. Livingston County*, 62 Ill. 528.

Where S. and N. made a contract by which S. was to convey his farm to N., who paid a sum in cash and agreed to pay a further sum at a future time, and executed a mortgage for the balance of the purchase price, at which time S. agreed to make a deed to the farm, and give possession; and at the same time it was further agreed that if N. failed to pay the further sum of money and to execute the mortgage, the money already paid should be forfeited to S., it was held that the instrument was a contract to sell and not a sale itself. *Stewart v. Fowler*, 37 Kan. 677.

Contracts should be construed so as to give effect to the intention of the parties, and where that intention is sufficiently apparent, effect should be given to it, even though violence be thereby done to its words; for greater regard is to be had to the clear intent of the parties, than to any particular words they may have used in the expression of their intent. *Walker v. Douglas*, 70 Ill. 445; 2 Parsons on Contracts (7th ed.), side page 512; *Maxfield v. Terry*, 4 Del. Ch. 618.

Sale or Option.—N., the owner of certain premises, agreed that G. might, during the year, purchase the same for \$5,000; and G. bound himself to pay N., for this privilege, the sum of \$10,000 at the expiration of the year, if he did not purchase the property for the \$5,000; and, if he should complete the purchase within the year, then the \$1,000 should be considered as included in the purchase-money, and should not be required of him. It was held that the contract between the parties was not a bargain and sale of the property, but the giving of an option of purchase to G., in consideration of the \$1,000. *Grabenhorst v. Nicodemus*, 42 Md. 236.

1. See *CONTRACT*, vol. 3, p. 867; *INTERPRETATION*, vol. II, p. 519, where the apparent exceptions to the rule are noted and explained.

2. Acts and relationships of parties may be shown in case of ambiguity. Thus, an agreement to convey "ten acres out of one hundred and sixty acres," is not void for uncertainty, if the vendee has previously gone into possession of certain ten acres. *Purinton v. Northern Ill. R. Co.*, 46 Ill. 297.

One guarantying a certain amount of timber on the land sold, cannot charge his vendee, for the purpose of the guaranty, with timber in swamps which it is impossible to remove. *Anderson v. Northern Nat. Bank* (Mich. 1894), 57 N. W. Rep. 808.

Rule "Contra Preferentem."—Both deeds and contracts for sale are construed most strongly against the one framing the instrument. *Warvelle on Vendor and Purchaser*, p. 122; *Lawson on Contracts*, § 389; *Hager v. Spect*, 52 Cal. 579; *Winslow v. Patten*, 34 Me. 25; *Duryea v. Mayor*, 62 N. Y. 592; *Rung v. Shoneberger*, 2 Watts (Pa.) 23; 26 Am. Dec. 95; *Waterman v. Andrews*, 14 R. I. 589; *Mills v. Catlin*, 22 Vt. 98.

Entire or Separable Contract.—The question of whether a contract for the sale of land is entire or separable, is

largely one of intention, to be discovered by a view of the language employed, and surrounding circumstances. *Southwell v. Beezley*, 5 Oregon 458.

No precise rule for determining this intention can be given. When the price is especially apportioned by the contract, or such an apportionment is to be implied clearly, the contract will be regarded as several. *Mayfield v. Wadsley*, 3 B. & C. 357; 10 E. C. L. 110; *More v. Bonnet*, 40 Cal. 251; 6 Am. Rep. 621; *Lucoso Oil Co. v. Brewer*, 66 Pa. St. 351.

Thus, a contract for the sale of two pieces of land, one for £700 and the other for £300, is separable. *Johnson v. Johnson*, 3 B. & P. 162.

Where a contract was for the sale of a piece of land and "also a tract of coal property," the "coal to be paid for at the rate of half a cent a bushel," this was held divisible in *Graver v. Scott*, 80 Pa. St. 88.

Where an estate is sold in separate lots and one person buys several of them, there are several distinct contracts. *Emerson v. Heelis*, 2 Taunt. 38; *Roots v. Lord Dorman*, 4 B. & Ad. 77; 24 E. C. L. 28; *Seaton v. Booth*, 4 Ad. & El. 528; 31 E. C. L. 124.

A purchase of three pieces of ground for a single sum, taking title to one of them by a separate deed, and giving a mortgage thereon to secure all the unpaid purchase-money, was held to constitute a separable and not an entire contract. The purchaser could not set up, as a defense to an action on the mortgage, that the title to the two other lots had failed. *Fisk v. Duncan*, 83 Pa. St. 196.

If the purchaser desired especially to buy one piece of land, and it had for him a value independent of another piece, with which it formed the subject-matter of one sale at a round figure, and if the two would not be injured by their separation, the contract will be construed as separable. *M'Queen v. Farquhar*, 11 Ves. 467; *Bowyer v. Bright*, 13 Price 698; *Simpson v. Hawkins*, 1 Dana (Ky.) 305; *Collard v. Groom*, 2 J. J. Marsh. (Ky.) 488; *Waters v. Travis*, 9 Johns. (N. Y.) 450; *Van Eps v. Schenectady*, 12 Johns. (N. Y.) 436; 7 Am. Dec. 330; *Stoddard v. Smith*, 5 Binn. (Pa.) 355.

A landowner made a written contract to sell a certain piece of land, and at the same time delivered a deed of the same. In a second paragraph of the same writing, he agreed to sell

certain other land, when a deed could be procured from the owner, and to forfeit one thousand dollars in case he could not get the title. The consideration for the first piece was paid, excepting one thousand dollars, which was reserved to cover the chance of forfeiture on the second piece. Owing to a failure of a condition precedent, the second agreement was not carried out, and a suit to recover the one thousand dollars kept back as above, was brought. It was held that there were two distinct contracts, and that the one thousand dollars was reserved merely to secure performance, and not as part payment. *Jacobs v. Spalding*, 71 Wis. 177.

Where several distinct pieces of property are sold for one consideration, the contract is generally entire. *Dykes v. Blake*, 4 Bing. N. Cas. 463; 33 E. C. L. 413; *Chambers v. Griffith*, 1 Esp. 150; *Drew v. Hanson*, 6 Ves. 675; *Scheland v. Erpelding*, 6 Oregon 258.

If the vendor has title to some pieces, but not to others, he can enforce the sale of none of them. *Johnson v. Johnson*, 3 B. & P. 162; *Dalby v. Pullen*, 3 Sim. 29; *Parham v. Randolph*, 4 How. (Miss.) 435; 35 Am. Dec. 403; *Bates v. Delavan*, 5 Paige (N. Y.) 300; *Reed v. Noe*, 9 Yerg. (Tenn.) 283.

Where the plaintiff agreed to convey certain property to the defendant, for a consideration payable, part in cash and by the assignment of certain mortgages, and part by the conveyance by the defendant to the plaintiff of certain premises, it was held that the contract was entire. *Sternberger v. McGovern*, 56 N. Y. 12.

Contract for Quitclaim Deed.—The defendant held junior mortgages on certain lots, and having bought the sheriff's certificate of sale on the foreclosure of the first mortgage, denied the right of certain judgment creditors to redeem. The parties then agreed to divide the lots, and the defendant to "quitclaim and convey" certain ones to the judgment creditors, and it was held that the defendant was bound to quitclaim only, and not to make a good title. *Brame v. Towne* (Minn. 1894), 57 N. W. Rep. 454.

Admissibility of Parol Evidence to Explain Contract.—A verbal promise at the making of a written contract, if made to obtain its execution, may be given in evidence. *Graver v. Scott*, 80 Pa. St. 88. But where a sale of land is verbally made, and a bond for title

A question frequently arises as to whether a sale is by the acre or is of a tract of land, the acreage being merely for description and not determining the amount of the price. The question is largely one of intention.¹

If nothing is said as to the payment of the price the presumption is that the sale is for cash.² The effect of special agreements as to the time of payment are considered in the notes,³ as is

given three weeks later, it will not be presumed that the verbal agreement contained more stringent obligations than are found in the written instrument. *Twitty v. Lovelace*, 97 N. Car. 54. A condition cannot be annexed by parol to a written contract, as that the land shall correspond with the representations of the vendor. *Lowber v. Connit*, 36 Wis. 176.

It is not admissible to show that the vendor agreed to pay certain assessments which would otherwise fall upon the vendee. *Jones v. Schulmeyer*, 39 Ind. 119.

It is admissible to show that time was not of the essence of the contract, which contained a recital: "balance of purchase-money to be paid within thirty days from date, said S. [vendor] giving said T. [purchaser] proper title." *Scarlett v. Stein*, 40 Md. 512. And see *PAROL EVIDENCE*, vol. 17, p. 419.

The Contract to be Construed as a Whole.—In a title bond, the vendor agreed to convey a certain strip described by metes and bounds, and farther on in the same contract the whole tract, including the strip. It was held that this was an evident mistake, as the plaintiff would never have specifically described the strip, had he intended to convey the whole tract. *Eggspieller v. Nockles*, 58 Iowa 649.

1. In a sale of lands described in the deed as containing five hundred and three acres, the presumption is that the specified number of acres was intended, and if there is a considerable deficiency—here thirty-four acres—the purchaser is entitled to an abatement of price. *Watson v. Hoy*, 28 Gratt. (Va.) 698.

A sale of a tract of land, described by metes and bounds as containing a certain number of acres, "more or less," is a sale in gross and not by the acre, though the price named be an exact multiple of the number of acres named. *Depue v. Sergeant*, 21 W. Va. 326; *Anderson v. Snyder*, 21 W. Va. 632; *Crislip v. Cain*, 19 W. Va. 438. But see *Benson v. Humphreys*, 75 Va. 196.

See also *ABOUT*, vol. 1, p. 32; *MORE OR LESS*, vol. 15, p. 717.

2. *Angel v. Simpson*, 85 Ala. 53.

When interest-bearing notes are given for land, the interest is no part of the price of the land. *McCann v. Bell*, 79 Ky. 112.

When a conveyance is to be made upon payment of the purchase-money, the respective acts are dependent, and neither party can maintain suit for breach of contract without performance, or an offer to perform, upon his part. A mere allegation in the bill of an offer and readiness to make a deed, is not sufficient. *Kimbrough v. Curtis*, 50 Miss. 117; *Klyce v. Broyles*, 37 Miss. 524; *Robinson v. Harbour*, 42 Miss. 800; 97 Am. Dec. 501; 2 Am. Rep. 671.

3. A contract for the sale of land provided that, if a recovery in certain suits affecting the title should be had against the vendor, the part of the land affected by them should not be paid for, and that the last installments of the price might be withheld until the determination of the suits. It was also provided that interest on payments should be computed from a certain date. It was held that the installment withheld bore interest from that date, although the suits were not decided in the vendor's favor until afterward. *Baines v. Clarke*, 111 U. S. 789.

If a payment is to be made upon a day specified, "if required or demanded," a reasonable time after demand must be allowed. *Dunbar v. Stickler*, 45 Iowa 384.

A contract for the sale of land provided that the purchaser should pay "the following sums of principal and interest at the several times named below: Due August 1, 1885, \$40; due September 1, 1885, \$40; due October 1, 1885, \$40. And forty dollars on the first day of each month thereafter, until this contract is fulfilled, said payments to bear 7 per cent. interest per annum, payable with each payment." It was held to be a contract for the payment of forty dollars, and interest thereon

also the effect of stipulations affecting consideration generally.¹ In sales of land, time is generally not of the essence of the contract,² but a contrary rule prevails in case of options.³

each month. *Delaney v. Linder*, 22 Neb. 274.

Where land is sold upon the agreement that the price shall be one half of that which the purchaser shall realize on it, and the purchaser sells it, together with land bought from other parties on similar terms, for a gross sum, the amount due on the contract to his grantor is determined by apportioning the whole amount received, between the two tracts at their respective values. *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34; 60 Am. Rep. 831.

Where a bond is given for the performance, by a vendor, of a contemporaneous contract of sale, which is referred to in, and so made a part of, the recitals of the bond, stipulations in such contract as to the times of making payments and of delivery of the conveyance will control repugnant provisions in the condition of the bond. *Coughran v. Bigelow*, 9 Utah 260.

1. Where the vendors agreed to refund the purchase-money, "if it should be adjudged that they had no legal right to sell, and if said defendant, by reason thereof, be legally compelled to give up possession of said premises," it was held that the defendant had no greater right under this contract than one who takes under a deed with a covenant of general warranty. No cause of action arises unless there has been either an actual or constructive ouster. *Failing v. Osborne*, 3 Oregon 498.

An agreement made by the vendor, upon a sufficient consideration, that he will look only to the property for his price, applies both to obligations not yet matured, and to those upon which suit has been brought. *Montgomery v. Gibbs*, 40 Iowa 652.

A landowner proposed to sell a tract of land for a certain sum to be deposited in the bank. The one to whom the offer was addressed, telegraphed that he accepted the offer, but said nothing as to price and did not deposit the money; it was held there was no contract. *Sands Lumber Co. v. Crosby*, 74 Mich. 313.

Where the purchaser agreed to assume the payment of a \$4,000 subscription, made by the grantor in aid of the extension of a railroad, but, because of

the abandonment of such extension before completion, is rendered liable only for a portion of the subscription, he is liable for the balance to the grantor. *Miller v. Barler* (Tex. Civ. App. 1894), 26 S. W. Rep. 1105. But a purchaser, under a contract containing a condition that he should pay one half the cost of a survey, does not forfeit his rights under the contract by a refusal to pay, as costs, a sum greater than half. *Davis v. Terry* (N. Car. 1894), 18 S. E. Rep. 947.

Where a widow sold land for \$1,817.50, in notes, it being agreed, as she owned only a dower interest therein, that it should be sold by a decree of court, and the sale was made, and the vendee bid it in for \$1,460, it was held that the widow could recover on the notes, less a credit of \$1,460. *Smith v. Meek*, 85 Ky. 46. And see, generally, *Syllacanga Land Co. v. Hendrix* (Ala. 1894), 15 So. Rep. 594; *Miller v. Rheinzwieg* (Supreme Ct.), 29 N. Y. Supp. 466.

2. See SPECIFIC PERFORMANCE, vol. 22, p. 1043.

In *Coughran v. Bigelow*, 9 Utah 260, it was held that, where it appears from the contract that the parties have, in fact, agreed that by failure to make certain deferred payments at the specified times the vendee shall lose the benefit of his purchase, the courts will not grant him relief.

Where time is made the essence of the contract, but the parties for several years do not treat it as such, and the vendor seems to treat the transaction as an investment on which she is satisfied to receive the interest, she cannot claim a forfeiture, as provided by the contract, for failure of the vendee to make payments at the time stipulated. *Robinson v. Trufant*, 97 Mich. 410.

3. If the option is to be exercised any time within sixty days, the purchaser has the whole of the sixtieth day in which to make his election. *Webb v. Fairmaner*, 3 M. & W. 472; *Serrill v. Burk*, 8 Phila. (Pa.) 515.

The rule of the common law, as to the computation of time, is to include the first day, and exclude the last. *Thomas v. Afflick*, 16 Pa. St. 14; *Barber v. Chandler*, 17 Pa. St. 48; 55

Under a contract of sale the property specifically described passes, and, by implication, those privileges which are in the power of the owner to grant, and which are necessary to its complete enjoyment.¹

VIII. THE EFFECT OF THE CONTRACT.—1. Upon the Title.—An executory contract of sale is regarded differently at law and in equity. At law, it is a mere agreement which does not affect the title, and the breach of which gives but the right to sue for damages;² while at equity, it vests an equitable title in the vendee, and

Am. Dec. 533; *Cromelien v. Brink*, 29 Pa. St. 522; *Mark v. Russell*, 40 Pa. St. 372; *Lysle v. Williams*, 15 S. & R. (Pa.) 135. See *supra*, this title, *Subject-Matter—Options*.

1. Property Specifically Described—Terms Construed.—An agreement to convey a tract to be surveyed so as to include the dwelling house of the vendee, and “also the fields and fenced lands in front of and about said house,” does not include a “corral” on the land. *Hearst v. Pujol*, 44 Cal. 230. A sale of a store “and premises” includes the water and gas pipes, water-closets, basins, etc., and if these have been removed by the vendor’s tenant, under a right that was known neither to the vendor nor vendee, to the serious depreciation of the value of the property, the vendee is released from his contract. *Smyth v. Sturges*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 75.

If the phrase, a mill “with all the additions thereto,” is used, personal property, such as oxen, carts, etc., used in connection with the mill, is not included. *Hill v. Townsend*, 69 Ala. 286.

A sale of all the coal under a certain tract, with the privilege, for forty years, to use the railroad and other improvements of the vendor, for the removal thereof, confers no right to use the improvements, etc., in taking coal from an adjoining tract. *McCloskey v. Miller*, 72 Pa. St. 151.

A bond to a railroad company to convey to it the right of way through a certain tract of land, “and also seven acres of land in said section, tract, and orchard, adjoining to said right of way on either side thereof,” is not so uncertain in its terms as to be a nullity. It requires a conveyance of the right of way wherever the company may choose to establish its track, and a strip of land of uniform width along the railway, through the entire tract described in the bond, and having three and one half acres on each side of the right of way.

It cannot construct its road so as to leave a tract containing nine tenths of an acre on one side of the right of way, and six and one tenth acres on the other. *Chidester v. Springfield, etc., R. Co.*, 59 Ill. 87.

The purchaser is entitled to a deed describing the land in the words of the agreement without any limitation other than those therein agreed upon. *Waters v. Bew* (N. J. 1894), 29 Atl. Rep. 590.

A contract for the sale of tannery property, stipulating that “all bark is to be sold to the purchaser at the cost price thereof,” does not embrace bark on trees on other lands of the vendor to which no reference whatever is made in the contract, but the contract relates only to peeled bark on the premises contracted to be sold. *Baugh v. White* (Pa. 1894), 29 Atl. Rep. 267.

Property Passing by Implication.—Where the owner of two estates, so uses them that a burden rests upon one for the benefit of the other, and sells the latter estate, there is an implied agreement that the advantages and burdens shall continue after the sale. *Ingals v. Plamondon*, 75 Ill. 118. But no interest in a street, other than what he has in common with the public, passes to the purchaser of a lot abutting thereon, if the fee is in the municipality. If the street is abandoned, the fee reverts to the original proprietor. *St. John v. Quitzow*, 72 Ill. 334.

2. In the ordinary case of an executory contract for the sale of real estate, the effect is such that at law it confers upon the vendee a mere right of action. The estate remains the estate of the vendor, and the money remains that of the vendee. *Lombard v. Chicago Sinai Congregation*, 64 Ill. 481. And see *Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586. It confers, however, color of title upon the vendee. *Farley v. Smith*, 39 Ala. 38.

makes of him a trustee of the purchase-money which he holds,¹ upon the theory that equity looks upon that as done which ought to be done.² This is the case, however, only with binding agree-

1. *Baum v. Grigsby*, 21 Cal. 175; 81 Am. Dec. 153; *Bodley v. Ferguson*, 30 Cal. 511; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 481; *Linscott v. Buck*, 33 Me. 530; *Cary v. Whitney*, 48 Me. 516. The court, by Maxwell, C. J., in *Dorsey v. Hall*, 7 Neb. 464, said: "It is a well-established principle of equity that, where a contract is made for the sale of real estate, it considers the vendor as a trustee of the purchaser for the estate sold, and the purchaser as a trustee of the purchase-money for the vendor."

A contract for the sale of real estate, works an equitable conversion of the land into personalty from the time when it was made, and the purchase-money, thereupon, becomes a part of the personal estate of the vendor, and, in equity, on the execution of the contract, the vendor becomes trustee of the property for the purchaser, and upon his death intestate, his heir-at-law becomes trustee in his place. *Miller v. Miller*, 25 N. J. Eq. 354. But he is not a mere naked trustee. *Swepton v. Rouse*, 65 N. Car. 34; 6 Am. Rep. 735.

In *Derr v. Dellinger*, 75 N. Car. 302, the court, by Pearson, C. J., said: "The legal effect of a contract of sale, and a bond for title in pursuance thereof, is to create an equitable estate in the vendee, leaving the legal estate in the vendor in trust to secure the payment of the purchase-money, and then in trust to convey to the vendee." See also *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526.

In *Siter's Appeal*, 26 Pa. St. 180, the court, by Woodward, J., adopting the auditor's report, said: "It seems to be well settled that, when articles of agreement are entered into for the sale and purchase of land, the purchaser is considered the owner in equity of the land, subject to the payment of the purchase-money, he is regarded as trustee of the purchase-money for the vendor, and the vendor is treated as a trustee for the purchaser of the legal title, having no interest in the land beyond the amount of the purchase-money due. It does not seem to be necessary, to produce this effect, that any part of the purchase-money should be paid, it results from the contract." To the same

effect is *Reed v. Lukens*, 44 Pa. St. 200; 84 Am. Dec. 425.

The legal title remains, however, in the vendor. *Snodgrass v. Parks*, 79 Cal. 55; *Martin v. Wright*, 21 Ga. 504; *Secrest v. Jones*, 21 Tex. 121; *Lewis v. Cole*, 60 Tex. 341. It is not changed by payment or tender of the purchase price by the vendee. Either a conveyance or a suit is necessary for that purpose. *Scheaff v. Dodge*, 33 Ark. 340.

2. In *Craig v. Leslie*, 3 Wheat. (U. S.) 578, the court, by Washington, J., said: "The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed, or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity." Where it was verbally agreed, between the father and a son, that the son should convey to the father a lot of land, and that, in consideration therefor, the father should devise to the son two other lots of land, and the son conveyed his lot to the father, and the father devised his two lots to the son, but the will, by which he did this, had but two witnesses to it and was, therefore, void, it was held that the son was entitled to have a specific performance of the contract from the representatives of his father. *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535.

In *King v. Ruckman*, 21 N. J. Eq. 604, the court, by Dalrimple, J., said: "A contract for the sale of land is regarded in equity, for most purposes, as if it had been specifically executed. The purchaser becomes the equitable owner of the land, and the seller of the purchase-money."

Where the purchaser goes into possession with the consent of the vendor, and pays the purchase-money, but receives no deed of conveyance, he is entitled to specific performance, and for all practical purposes is owner of the land, although a part of the purchase-

ments to convey, which do not make other provisions as to the time when the title shall pass.¹

The property is, from the time of the delivery of the executed contract, at the risk of the vendee,² who holds the full equitable title,³ the vendor's legal title merely remaining in him for

money was paid after the death of the purchaser. *Roberts v. Smith*, 21 S. Car. 455. See generally SPECIFIC PERFORMANCE, vol. 22, p. 925.

1. *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Millard v. McMullin*, 5 Hun (N. Y.) 572; *Carnes v. Apperson*, 2 Sneed (Tenn.) 564.

In a contract with reference to the sale of land, the parties may stipulate that the title shall pass at the time, or that it shall be withheld until a future day, or the performance of a further condition; and if, upon survey of the entire instrument, the latter intention appear, it must have effect. *Topp v. White*, 12 Heisk. (Tenn.) 174.

If the contract provides that a conveyance shall be made when the purchaser performs certain acts, the equitable title does not vest in him until he complies with this requirement. *Chappell v. McKnight*, 108 Ill. 575.

The owner of a farm allowed his daughter and son-in-law to go into possession, under a contract, by which they were to cultivate it during his lifetime, support him and his wife from the proceeds thereof, and apply anything left to the improvement of the place. In consideration of this, he was to give the daughter an undivided one-half interest in the farm. It was held that the daughter and son-in-law did not become the equitable owners of one half of the farm, upon the making of the contract, but were entitled to receive that interest only when they had performed their undertakings under it. *Flower v. Cruikshank*, 77 Iowa 110.

2. *Brewer v. Herbert*, 30 Md. 301; 96 Am. Dec. 582.

After an executory contract for the conveyance of real estate has been entered into, the property is at the risk of the purchaser. If it burns up, it is his loss; if it increases in value, it is his gain. This is the settled equity doctrine, and it is based upon the principle that in equity what is agreed to be done must be considered as done. *Snyder v. Murdock*, 51 Mo. 175.

After a contract for the sale of real estate duly executed, the purchaser is the equitable owner thereof, entitled

to all advantages that may thereafter arise, and responsible for all loss that may befall it, *Reed v. Lukens*, 44 Pa. St. 200; 16 Am. Dec. 425, unless the agreement provides that possession of the premises shall be delivered with improvements in the same condition as at the time of the sale. *Goddard v. Bebout*, 40 Ind. 115.

The same exception holds true where the loss was occasioned by the culpable negligence of the vendor. *Marks v. Tichenor*, 85 Ky. 536. But see, *contra*, *Wells v. Calnan*, 107 Mass. 514.

If the vendor cannot make title, the premises remain at his risk. *Christian v. Cabell*, 22 Gratt. (Va.) 82.

After the contract for the sale of an interest in land, to commence *in futuro*, but before the purchaser had right of entry, or was entitled to the possession and use of the property, a considerable part of the land was washed away by an ocean storm. It was held that the loss must fall on the vendor who was still the owner. *Huguenin v. Courtenay*, 21 S. Car. 403.

Where a contract of sale was made and the deed delivered in October, and the vendor agreed to paint the house and put a new roof on it, and deliver possession by the following January, it was held that there was an agreement to repair only, and not one on the part of the vendor to assume the risk of fire. The house having been destroyed between the two dates above, the loss fell on the vendee. *Marks v. Tichenor*, 85 Ky. 536. As to loss by fire, see *Wicks v. Bowman*, 5 Daly (N. Y.) 225.

3. The vendee may dispose of the property or incur it, subject to the vendor's rights in it to secure the purchase-money, if the purchaser is in possession under the contract to convey. *Smith v. Price*, 42 Ill. 399; *Baldwin v. Pool*, 74 Ill. 97; *Ricker v. Moore*, 77 Me. 295.

A vendee may sue for the destruction of his crops, caused by the vendor's overflowing the land, if he has right of possession. *Connally v. Hall*, 84 Ga. 198.

Liable for Vendee's Debts.—*Neal v. Murphey*, 60 Ga. 388. Property held under a bond for a deed is subject to the

security to compel the payment of the purchase price.¹ The relation between the parties is analogous to that between mortgagor and mortgagee, the vendee holding an equity which is liable to foreclosure on the suit of the vendor.²

The parties hold their respective interests in the land subject to the disabilities to be hereafter noted.³

The contract is not discharged by bankruptcy or insolvency,⁴

purchaser's debts, no matter when created. A provision in the writing attempting to secure it from prior debts contracted before a certain date, is inconsistent with the grant itself, and null and void. *Carlin v. Carlin*, 8 Bush (Ky.) 141.

Dower of Vendee's Widow.—Where the purchaser of land has been in possession under a title bond, having paid part of the purchase-money, his widow, after his death, will be entitled to her dower in the land. *Hart v. Logan*, 49 Mo. 47.

1. *Boone v. Chiles*, 10 Pet. (U. S.) 225.

It is a well settled rule that the vendor of real estate, who has not executed a deed to the purchaser, holds the legal title as a security for the payment of the purchase-money. *Conner v. Banks*, 18 Ala. 44; 52 Am. Dec. 209; *Baldwin v. Pool*, 74 Ill. 97; *Miller v. Corey*, 15 Iowa 166; *Cary v. Whitney*, 48 Me. 516; *Fitzhugh v. Maxwell*, 34 Mich. 138; *Strickland v. Kirk*, 51 Miss. 795; *King v. Ruckman*, 21 N. J. Eq. 599.

The legal effect of a contract of sale and a bond for title in pursuance thereof, is to create an equitable estate in the vendee, leaving the legal estate in the vendor, in trust, to secure the payment of the purchase-money, and then in trust to convey to the vendee. *Derr v. Dellinger*, 75 N. Car. 302; *Reed v. Lukens*, 44 Pa. St. 200; 84 Am. Dec. 425; *Church v. Smith*, 39 Wis. 492.

Although the vendor is, in equity, a trustee for the purchaser, yet, if he has not received the whole of the purchase-money, he is not a mere naked trustee, and on his becoming a bankrupt, his interest passes to the assignee. *Swepton v. Rouse*, 65 N. Car. 34; 6 Am. Rep. 735.

2. See "Contract for the Sale of Land and Foreclosure Thereof" by Hon. Samuel Maxwell, 39 Cent. L. J. 471.

In *Chapman v. Chunn*, 5 Ala. 399, the court, by Clay, J., said: "All the essential incidents of a mortgage, particularly in regard to a lien upon the premises for the purchase-money, attach

to and control a contract for the sale of lands, where the vendor makes a bond, conditioned for title, when payment is complete."

In *Haley v. Bennett*, 5 Port. (Ala.) 470, the court, by Goldthwaite, J., said: "The particular form of the contract cannot be considered as material. It is, to all intents and purposes, in the nature of a mortgage, and all the equitable incidents of one must attach to the contract." See also *Roper v. McCook*, 7 Ala. 322.

In *Conner v. Banks*, 18 Ala. 44; 52 Am. Dec. 209, the court, by Dargan, C. J., said: "If the vendor has executed a bond to make title, when the purchase-money is paid, the contract in a court of equity will be considered in the nature of a conveyance to the purchaser, and a reconveyance back by way of mortgage." See also *Fitzhugh v. Maxwell*, 34 Mich. 138.

In *Tanner v. Hicks*, 4 Smed. & M. (Miss.) 300, the court, by Clayton, J., said: "Retention of the title by the vendor upon a sale is, in effect, the same thing as conveying the title and taking a security by mortgage."

In *Strickland v. Kirk*, 51 Miss. 798, the court, by Sinnall, J., said: "The vendor is treated by the courts as mortgagee; his retention of the title operates as an equitable mortgage, which is of equal import with the ordinary mortgage."

In *Church v. Smith*, 39 Wis. 495, the court, by Lyon, J., said: "The relation between the parties is analogous to that of equitable mortgagor and mortgagee." See also *Edwards v. Thompson*, 71 N. Car. 177; *Button v. Schroyer*, 5 Wis. 598.

3. See *infra*, this title, *Rights, Duties, and Liabilities of the Parties*.

4. *Orlebar v. Fletcher*, 1 P. Wms. 737; *Brooke v. Hewitt*, 3 Ves. 255; *Whitworth v. Davis*, 1 Ves. & B. 545.

The assignee takes the estate of the insolvent or bankrupt, subject to all its burdens, and the equities in favor of third persons attached to it. *Hardin v. Osborne*, 94 Ill. 571.

nor by death of either party,¹ nor by a conveyance of the land to a third party with notice.²

2. On Third Parties.—(See also *BONA FIDE*, vol. 2, p. 444; *LIS PENDENS*, vol. 13, p. 868; *NOTICE*, vol. 16, p. 787; *RECORDING ACTS*, vol. 20, p. 527.)

It is immaterial that the vendee has failed to place his contract on record. *Holbrook v. Dickenson*, 56 Ill. 497.

1. *Pahlman v. King*, 49 Ill. 266; *Bell v. Hewitt*, 24 Ind. 280.

In *Muldrow v. Muldrow*, 2 Dana (Ky.) 387, the court, by Nicholas, J., said: "Nothing can be better settled than that, after the contract for the sale of real estate, the vendor is to be deemed a trustee of the estate for the purchaser, and the vendee is a trustee of the purchase-money for the vendor, and that the death of either, even before the time agreed on for the completion of the contract, does not alter his relative attitude." See also *Wright v. Tinsley*, 30 Mo. 389; *Hiatt v. Williams*, 72 Mo. 214; 37 Am. Rep. 438; *Brown v. Leavitt*, 26 N. H. 493; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 316; *Rutherford v. Green*, 2 Ired. Eq. (N. Car.) 121.

In *Billing's Appeal*, 106 Pa. St. 558, the court, by Clark, J., said: "Where distinctly personal considerations are at the foundation of the contract, the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract. The *casus* must be such, however, as to wholly prevent the performance of the contract." *Green v. Rugely*, 23 Tex. 539; *Fowler v. Kelly*, 3 W. Va. 71. See also *SPECIFIC PERFORMANCE*, vol. 22, p. 1064.

In *Kentucky*, the contract is binding even if the obligee is dead at the time of its execution. *Kentucky Gen. Stats.*, ch. 22, § 9. And so in *Virginia*, *Virginia Code* (3d ed.), ch. 99, § 12, and *West Virginia*, *West Virginia Code* (1887), § 2854.

2. He who takes a legal title, with notice of a prior equitable title, is trustee for him who holds the equitable title; but the legal title obtained by a purchaser under the former, although with notice of the prior equitable title, will not be disturbed, if the purchaser was encouraged by the latter to pay the purchase-money. *Kurtz v. Bank of Columbia*, 2 Cranch (C. C.) 701.

A party who purchases land which another has contracted to convey, with

a full knowledge of that fact, takes it subject to the rights and equities of the claimant. *Glover v. Fisher*, 11 Ill. 666.

In *Walker v. Cox*, 25 Ind. 272, the court, by Elliott, J., said: "It is well settled that a purchaser of real estate cannot hold against a prior equitable title, if he has notice of the equity, either before the payment of the purchase-money or the execution of the deed."

A purchaser who takes an estate, after notice of a prior equitable right, though for a valuable consideration, makes himself a *mala fide* purchaser, and will not be enabled, by getting in the legal title, to defeat such prior equitable interest. *Mitchell v. Peters*, 18 Iowa 119; *Baldwin v. Lowe*, 22 Iowa 367.

A man who receives a deed of conveyance for land and pays for it, after he knows that the vendor had previously contracted for the sale of it to a third person, and is in equity bound to convey it to him, will be decreed to convey to such third person, although he knew nothing of this outstanding equity at the time he contracted for the purchase of the land. *Simms v. Richardson*, 2 Litt. (Ky.) 274; *Liggett v. Wall*, 2 A. K. Marsh. (Ky.) 149; *Clough v. Clough*, 3 B. Mon. (Ky.) 64; *Langdon v. Woolfolk*, 2 B. Mon. (Ky.) 105; *Muldrow v. Muldrow*, 2 Dana (Ky.) 387; *Linscott v. Buck*, 33 Me. 530; *Derr v. Dellinger*, 75 N. Car. 300; *Hoagland v. Latourette*, 2 N. J. Eq. 254; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 403; 10 Am. Dec. 343; *Ten Eick v. Simpson*, 1 Sandf. Ch. (N. Y.) 244.

A third person who purchases with notice of the outstanding contract, does so subject to all equities growing out of the contract, and will be in no better condition than the original vendor. *School Dist. No. 3 v. MacLoon*, 4 Wis. 98.

He is liable to the same equity, and is bound to do that which his vendor should have done under the contract with such other. *Cox v. Cox*, 5 W. Va. 335.

One purchasing land, with notice that there is a prior contract affecting the land for the benefit of the vendor's

While, so far as subsequent grantees with notice are concerned, the rights of the vendee of land remain intact,¹ the case is otherwise if there is present no element of notice. Under such circumstances, the equities being equal, the law will prevail, and the second purchaser take a full title, free from any rights on the part of the first vendee.²

The general principles as to what constitutes such notice, have been already given under the titles referred to above, and little is required to be said to apply them to the subject in hand.³

wife, takes it subject to all of the wife's equities growing out of such contract. *Phillips v. South Park Com'rs*, 119 Ill. 626.

1. A contract to convey land, on payment of the price, gives the vendee at once the right to specific performance, defeasible only by his failure to pay; and a grantee of the vendor's executor, with notice, cannot claim such land as included in his deed merely because, when his deed was executed, the contract had not been fully performed. *Rapley v. Klugh* (S. Car. 1893), 18 S. E. Rep. 680.

2. *Allen v. Holding*, 29 Ga. 485; *Walker v. Cameron*, 78 Iowa 315.

An agreement under private signature, not recorded, between A and certain other persons, that lands purchased by him in his own name are to be conveyed to them, can have no effect against third persons. The apparent title being in A, the property is bound for judgments recorded against him. *Robertson v. Wood*, 5 La. Ann. 197.

A purchaser for value, who has notice of a previous contract to convey, which is void under the Statute of Frauds, acquires good title, the grantor having elected to treat his former contract as void. *Messmore v. Cunningham*, 78 Mich. 623.

A purchaser with notice of outstanding equities is not affected thereby, if his vendor was an innocent purchaser. *Gulf, etc., R. Co. v. Gill*, 5 Tex. Civ. App. 496; *Klinger v. Lemler* (Ind. 1893), 34 N. E. Rep. 698.

In order to be a *bona fide* purchaser, a second grantee must have paid value, NOTICE, vol. 16, p. 834; as by the transfer of other land. *Bowen v. Prout*, 52 Ill. 354. It must, however, be in money or its equivalent. The giving of a bond or note, secured by mortgage, is not sufficient, *Haughwout v. Murphy*, 21 N. J. Eq. 118; nor is a payment in Confederate bills. *Willis v. Johnson*, 38 Tex. 303.

A subsequent purchaser of lands, who has made part payment without notice, leaving a balance unpaid, and who then receives notice of a prior equity, cannot, as against the holder of the prior equity, perfect his entire claim as a purchaser without notice, by afterwards paying the balance. *Wells v. Morrow*, 38 Ala. 125; *Warner v. Whittaker*, 6 Mich. 133.

Possession as Notice.—The visible and unequivocal possession of the vendee is notice. *Moss v. Atkinson*, 44 Cal. 317; *De Wolf v. Pratt*, 42 Ill. 198; *Rogers v. Hussey*, 36 Iowa 664.

3. *Strickland v. Kirk*, 51 Miss. 795; *Izard v. Kimmel*, 26 Neb. 51.

Actual, open, and notorious possession of land is constructive notice of the possessor's right. *Cunningham v. Brown*, 44 Wis. 72.

But the possession of a wife, to whom her husband has executed a deed, which is not recorded, is not notice of her title, where she merely continues to live on the land with him as they did before the deed was made. *Motley v. Jones*, 98 Ala. 443.

Constructive Notice.—Where, by the statute, a contract to convey can be recorded like a deed, the occupancy of land by one under such a contract instead of under a conveyance, affords notice in like manner. *Weisberger v. Wisner*, 55 Mich. 246.

The mere record is constructive notice, if, by the local law, the instrument is recordable. *De Wolf v. Pratt*, 42 Ill. 198. The registration of a bond, conditioned to make title to land on payment of a certain consideration, is constructive notice to a purchaser of the land under execution of the rights and equities of the obligee. *Schuster v. La Londe*, 57 Tex. 28.

Where a bank acquires title to land by deed from its president, who held the land under a deed reciting full payment of the price, and it has no actual knowledge that the price was not in fact paid, it is an innocent purchaser

As between the parties, however, the rights are vested, and are affected only by the action of some innocent third party having a real interest.¹

IX. RIGHTS, DUTIES, AND LIABILITIES OF THE PARTIES—1. In Making the Contract—*a. CONCEALMENTS AND MISREPRESENTATIONS.*—(See also *DECEIT*, vol. 5, p. 318; *FRAUD*, vol. 8, p. 635; *MISTAKE*, vol. 15, p. 625; *RESCISSION*, vol. 21, p. 24; *UNDUE INFLUENCE*, vol. 27, p. 452.)

Whatever may be the moral obligations of the parties to a contract for the sale of land, the vendor is under no legal duty to point out defects, and the vendee under none to disclose circumstances unknown to the vendor, which would tend to increase the value.²

without notice, and is not chargeable with constructive notice because of the knowledge of its president. *First Nat. Bank v. Tompkins*, 57 Fed. Rep. 20.

Suspicious Circumstances.—Notice may be inferred from suspicious circumstances, as the refusal of a vendor to give a general warranty deed, without any explanation, *Lowry v. Brown*, 1 Coldw. (Tenn.) 456, or the fact that the consideration paid was very inadequate, as five dollars for land worth \$6,000. *Gaines v. Summers*, 50 Ark. 322.

But where land worth \$30,000 was sold for \$18,000, it was held that the consideration was not so inadequate as to be equivalent to notice of fraud. *Fish v. Benson*, 71 Cal. 428.

Willfully Abstaining from Inquiry.—If a vendee designedly and fraudulently abstains from making inquiries, he will not be regarded as a *bona fide* purchaser. *Wilson v. Miller*, 16 Iowa 111.

Louisiana.—*Bona fide* purchaser defined in *Louisiana Rev. Civ. Code* (Saunders, 1888), art. 503.

Statutory Provisions—Recording Agreements to Sell, and Title Bonds.—It is generally provided that agreements and title bonds may be recorded, and that such record furnishes constructive notice binding upon those acquiring interests subsequently. See *Connecticut Gen. Stats.* (1888), § 2964; *Indiana Rev. Stats.*, § 2956; *Howell's Michigan*, Annot. Stat., § 5712; *Mississippi Rev. Code*, § 1214.

1. *Harrison v. Roberts*, 6 Fla. 711.

A purchase made pending an injunction forbidding the sale, though void against the complainant's interest, is valid as against the vendor. *Greenwald v. Roberts*, 4 Heisk. (Tenn.) 494.

2. Sugden on Vendors and Purchasers (8th Am. ed.), p. 1.

In *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, the court, by Marshall, C. J., said: "The question in this case is, whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of the opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other." The same rule is laid down in the following cases: *Warner v. Daniels*, 1 Woodb. & M. (U. S.) 90; *Ward v. Packard*, 18 Cal. 392; *Oldham v. Bently*, 6 B. Mon. (Ky.) 428; *Williams v. Spurr*, 24 Mich. 335; *Burt v. Mason*, 97 Mich. 127; *Smith v. Countryman*, 30 N. Y. 655; *Hanson v. Edgerly*, 29 N. H. 343; *Bench v. Sheldon*, 14 Barb. (N. Y.) 72; *Farrar v. Alston*, 1 Dev. (N. Car.) 73; *Alston v. Outerbridge*, 1 Dev. Eq. (N. Car.) 18; *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717.

But there is a distinction between *suppressio veri* and *suggestio falsi*. *Hunt v. Moore*, 2 Pa. St. 107; *Fisher v. Budlong*, 10 R. I. 525.

It has been held that where a vendor, at the time of his conveyance, knows of the interest of others in the land growing out of the original purchase, he cannot bind his vendee, who is ignorant of the facts, to assume all the risk of the title; and that his concealment of such facts is constructive fraud. *Lloyd v. Farrell*, 48 Pa. St. 73; 86 Am. Dec. 563.

This rule is confined, however, to dealings between those who stand in no special relation of confidence one towards the other.¹

Where property was sold low on execution, it being supposed to be subject to a prior mortgage, when the fact that it was not might have been easily ascertained, it was held that the mere fact that the purchaser knew to the contrary was not ground to set aside the sale. *Drake v. Collins*, 5 How. (Miss.) 253.

In *Mitchell v. McDougall*, 62 Ill. 503, the court, by Breese, J., said: "The party in possession of the facts must be under some special obligation, by confidence reposed or otherwise, to communicate them truly and fairly."

A failure to disclose facts within the knowledge of the seller of lands, to constitute fraud must amount to a suppression of such facts as he is bound, under the circumstances, in conscience and duty, to disclose to the purchaser, and in respect to which he cannot, innocently, be silent. Where there is no fraud or mistake in such facts, a party may properly be remitted to his remedy at law. *Conover v. Wardell*, 22 N. J. Eq. 492.

A bargain or dealing with one who supposes his own rights are defective, because of the supposed validity of a conflicting conveyance, is not bound to disclose his knowledge that the conveyance was fraudulent, the means of information being equally within the reach of both. A purchaser is not bound to disclose his knowledge of facts which enhance the price, where opportunities for information are equally open to both parties. *Kintzing v. McElrath*, 5 Pa. St. 467.

In a case where a purchaser, who knew of the existence of a mine, unknown to the vendor, merely kept silent but used no misrepresentations, the court refused to set the sale aside. *Caples v. Steel*, 7 Oregon 491.

The Opposite Doctrine.—It has been said that if one of two parties to a contract know that the other is acting under a misapprehension of fact, and does not set him right, there is a fraud which vitiates the agreement. As illustrating this view, see *Gerhard v. Bates*, 2 El. & Bl. 488; 75 E. C. L. 486; *Crocker v. Lewis*, 3 Sumn. (U. S.) 8; *Bowers v. Johnson*, 10 Smed. & M. (Miss.) 169; *Hunt v. Moore*, 2 Pa. St. 105; *Moore v. Clay*, 7 Ala. 742.

Where one purchased land under the false impression that he thereby

acquired the elder, legal title, the facts being known to the seller, who did not disclose the date of his grant, it was held that the contract should be rescinded. *Kennedy v. Johnson*, 2 Bibb (Ky.) 12; 4 Am. Dec. 666.

A willful concealment by the vendor, of a defect in his title, which does not appear on the face of his title papers, and of which the purchaser is ignorant, is a fraud on the purchaser against which equity will relieve. *Bryant v. Boothe*, 30 Ala. 311; 68 Am. Dec. 117.

If the vendor of land knows, when he effects the sale, that the purchaser has been induced to buy by the false representations of a third person, he is responsible for the fraud, though such third person was not his agent. *Law v. Grant*, 37 Wis. 548.

If the vendor knows of a defect in the title to a part of the thing sold, which is material to the enjoyment of the rest, and he does not disclose the defect to the purchaser, and the purchaser buys, ignorant of the defect, the purchaser, although he has taken a deed, may in equity have a rescission of the sale. *Prout v. Roberts*, 32 Ala. 427; *Crutchfield v. Danilly*, 16 Ga. 432; *Campbell v. Whittingham*, 5 J. J. Marsh. (Ky.) 96; 20 Am. Dec. 241; *Parham v. Randolph*, 4 How. (Miss.) 435; 35 Am. Dec. 403; *Johnson v. Pryor*, 5 Hayw. (Tenn.) 243.

1. If one party occupies toward another such a position that he is under an obligation to disclose the true state of affairs to the other, he must do so, or the contract will be vitiated by the fraud. *Roseman v. Canovan*, 43 Cal. 110.

Undue concealment which amounts to a fraud from which a court of equity will relieve, where there is no peculiar relation of trust or confidence between the parties, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientia* but *juris et de jure*, to know. *Fish v. Cleland*, 33 Ill. 243; *Mitchell v. McDougall*, 62 Ill. 498; *Swimm v. Bush*, 23 Mich. 99; *Conover v. Wardell*, 22 N. J. Eq. 492; *Kintzing v. McElrath*, 5 Pa. St. 467; *Paddock v. Strobbridge*, 29 Vt. 470. See also *UNDUE INFLUENCE*, vol. 27, p. 452.

It is generally held that, in order to render a party liable, he must have been guilty of active concealment,¹ made false assertions by word or action, or prevented inquiry on the part of the vendee;² in short, his conduct must have been active and not merely passive.³

1. *Mason v. Crosby*, 1 Woodb. & M. (U. S.) 342.

To make the mere suppression of a fact such a fraud as avoids the contract, there must be something more than a failure to communicate facts within the knowledge of the vendor; there must be a concealment, as by withholding information when asked for, or by using some device to mislead, thus involving act and intention. *Kohl v. Lindley*, 39 Ill. 195; 89 Am. Dec. 294; *Sieveking v. Litzler*, 31 Ind. 13; *Martin v. Jordan*, 60 Me. 531; *Fari-bault v. Sater*, 13 Minn. 223; *Coon v. Atwell*, 46 N. H. 510; *Coleman v. Burr*, 93 N. Y. 31; 45 Am. Rep. 160; *Simar v. Canada*, 53 N. Y. 298; 13 Am. Rep. 523.

But where a vendee, in a conversation with the vendor, charged him with having concealed an incumbrance upon the land sold, and the vendor neither admitted nor denied it, it was held that this was not sufficient evidence of fraudulent concealment to justify a rescission of the contract. *Hall v. Thompson*, 1 Smed. & M. (Miss.) 443.

2. In *Bailey v. Smock*, 61 Mo. 213, the court, by Wagner, J., said: "The principle is unquestionably established that fraudulent representations, in respect to the title of land, will entitle the aggrieved party to relief; but the misrepresentations must be concerning something unknown to the party injured, who has been induced to act or abstain from examination from some special confidence reposed in the other party, as in this case, where the vendor prevents the vendee from making an examination of the records in regard to the title, by assurances that the title is perfectly good and the property is free from incumbrances, and upon the faith of such assurances and representations the vendee abstains from making the proper examination."

A purchaser living at a great distance from the land, may rely on the representations of the vendor's agent, and need not make a personal inspection of the land. *White v. Lowden* (Supreme Ct.), 28 N. Y. Supp. 619. And false

representations as to value will authorize a rescission of the sale, where the buyer, a non-resident, was ignorant of its value and dissuaded from making inquiries by the fraud of the vendor. *McKnight v. Thompson* (Neb. 1894), 58 N. W. Rep. 453.

3. Where a purchaser represented to the vendor that the land was valueless except as a sheep pasture, when he knew—although the vendor did not—that it contained a valuable mine, it was held that there had been a fraud which would avoid the purchase. *Livingston v. Peru Iron Co.*, 2 Paige (N. Y.) 390.

Where A discovered a salt spring on B's land, and purchased the land at the ordinary price, concealing the fact of his discovery, the contract was rescinded. *Bowman v. Bates*, 2 Bibb (Ky.) 47; 6 Am. Dec. 677.

But the fact that the vendees of land discovered a valuable mine on it soon after their purchase, is no ground for rescission of the sale, where there is no proof that the vendees knew the fact before the purchase, and suppressed it. *Bean v. Valle*, 2 Mo. 83.

In *Mitchell v. Zimmerman*, 4 Tex. 79; 51 Am. Dec. 717, the court, by Wheeler, J., said: "If the party intentionally misrepresents a material fact, or produces a false impression by words or acts, in order to mislead or obtain an undue advantage, it is a case of manifest fraud. It is a rule in equity that all the material facts must be known to both parties, to render the agreement just and fair in all its parts, and if there be any intentional misrepresentation or concealment of material facts in the making of a contract, in cases in which the parties have not equal access to the means of information, it will vitiate and avoid the contract."

In *Crocker v. Lewis*, 3 Sumn. (U. S.) 8, the court, by Story, J., said: "No principle seems better founded than this, that if a party makes a representation to one person in respect to a sale, and that representation constitutes the basis of a subsequent sale, made by the party so making the representation, to the party to whom it is

Misrepresentations thus stand upon a different footing from passive concealment. If sufficient to constitute fraud, they vitiate the contract.¹ They must be proved clearly by the party alleging them,² however, in every case where the parties stand in no fiduciary relation. The fact of the making of the representation, and the knowledge of the parties as to its truth or falsity,

communicated by the third person, it is treated in the same way as if directly made by the vendor to himself. It is by no means true that representations made to third persons are to be treated as *res inter alios acta*, if those representations have been communicated and acted upon by another person who places entire confidence in them."

In *Smith v. Hughes*, L. R., 6 Q. B. 597, the court, by Cockburn, C. J., said: "The passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract," and in the same case Blackburn, J., said: "There is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the vendor." In *Smith v. Countryman*, 30 N. Y. 655, the court, by Mullin, J., said: "A vendor of property may put upon the purchaser the responsibility of informing him correctly as to the market value, or any other fact known to him, affecting the market price of the property, and if the purchaser answers untruly, the purchase will be void by reason of the fraud. The purchaser is not bound to answer in such a case; but if he does, he is bound to speak the truth."

1. *Hickey v. Drake*, 47 Mo. 369.

The doctrine of *caveat emptor* does not apply where the buyer was induced, by the fraud of the vendor, to enter into the contract to purchase. *Wright v. Deniston* (C. Pl.), 29 N. Y. Supp. 718.

The false and fraudulent representations of a seller of an estate to two or more purchasers, constitute several torts, and those injured cannot join in actions therefor. *Woodbury v. Deloss*, 65 Barb. (N. Y.) 501.

In *Tindall v. Harkinson*, 19 Ga. 448, relief was refused to a vendee who had relied upon the false statements of the vendor as to value, when he was on the land when the bargain was made, and was not prevented from making a personal examination.

Where a party purchased property for \$7,000, its full value, and procured a deed

to be made to him for \$12,000, which latter sum he assured a purchaser from him was the amount he had paid for the property, which statement was relied on by the purchaser, it was held a good defense to the foreclosure of a mortgage given to secure part of the price. *Fairchild v. McMahon*, 139 N. Y. 290. And where one is induced to purchase land by fraudulent representations as to its quantity, and the cash payment exceeds its value, the covenant of warranty as to the land conveyed constitutes no consideration for the notes given for the deferred payments, since it affords no remedy for the fraud. *Still v. Snow* (Vt. 1894), 29 Atl. Rep. 250.

2. *Rupart v. Dunn*, 1 Rich. (S. Car.) 101.

It was held that a sale of land should not be rescinded because the vendor represented that a certain spring was on the land, the vendee charging it to be within the boundaries of the adjoining tract, it being a doubtful matter on which tract the spring was, and the defendant denying all fraud, or that he knew that the spring was on the adjoining tract, and there being no proof that he did know it. *Jasper v. Hamilton*, 3 Dana (Ky.) 280.

The mere reading by the vendee, of letters addressed to him by a third person, to the vendor, cannot constitute fraudulent representations. *Cooper v. Lovering*, 106 Mass. 77; *Crist v. Dice*, 18 Ohio St. 536. Misrepresentations may be proved by parol evidence. *Thomas v. Kennedy*, 24 La. Ann. 209; *Coon v. Atwell*, 46 N. H. 510; *Van Kleeck v. Le Roy*, 37 Barb. (N. Y.) 550; *Sandford v. Rose*, 2 Tyler (Vt.) 428.

Statements other than those alleged in the pleadings may be proved, to show the *animus*. *Updike v. Abel*, 60 Barb. (N. Y.) 15.

To show the condition of the premises at the time of the representation, that of a time subsequent may be shown. *Mason v. Raplee*, 66 Barb. (N. Y.) 180.

Where, in an action for the pur-

are for the jury.¹ They may be by act, as well as by word;² they must be other than mere praise by the vendor, or words of disparagement on the part of the vendee,³ other than matters of opinion⁴

chase price of land, the defendant alleges that the delivery of the deed was only conditional, and, if not, that he was induced to make the purchase through fraud, and there is evidence to prove the fraud, failure to submit the question to the jury is error. *Tinsley v. Miles* (Tex. Civ. App. 1894), 26 S. W. Rep. 999. And see *Smalley v. Morris*, 157 Pa. St. 349, where it was held that there was sufficient evidence of fraud to warrant the submission of the issue to the jury.

1. *Williams v. McFadden*, 23 Fla. 143; 13 Am. St. Rep. 345; *Pritchett v. Munroe*, 22 Ala. 501.

2. As where a vendor, while negotiating the sale of land, fraudulently shows to the vendee the house and inclosure, in such a manner as to induce the belief that two certain lots were included, but that two omits them in the deed. *Underwood v. West*, 43 Ill. 403.

3. Where parties are negotiating a trade for property which there is opportunity to examine, each has the right to exalt the value of his own property to the highest point his antagonist's credulity may bear, and depreciate that of the other. Such boastful assertions, or highly exaggerated descriptions, do not amount to fraudulent misrepresentation or deceit. In such case the parties are upon equal ground, and their own judgments must be their guide, in coming to conclusions. *Miller v. Craig*, 36 Ill. 109.

4. A statement made by the vendor, which is tantamount to an estimate or opinion of the value, condition, character, adaptability to certain uses, etc., of such real estate, is not actionable, unless the seller resorts to some fraudulent means to prevent the purchaser from examining the property. *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Nostrum v. Halliday* (Neb. 1894), 58 N. W. Rep. 429.

Statements of mere matters of opinion or judgment, although known to be false, do not constitute fraud in the absence of relations of trust and confidence. *Wise v. Fuller*, 29 N. J. Eq. 257.

The maxim *caveat emptor* has ever been held to apply with regard to affirmations and representations in relation to real estate. When the vendor

affirms to the purchaser that his estate is worth a certain sum, that he gave so much for it, that he has been offered so much for it, or has refused so much for it, such statements, though known by him to be false, and though uttered to deceive, are not actionable. *Medbury v. Watson*, 6 Met. (Mass.) 259; *Mooney v. Miller*, 102 Mass. 220; *Maney v. Porter*, 3 Humph. (Tenn.) 347; *Law v. Grant*, 37 Wis. 548. But see cases cited in the next note.

False representation, as of the quantity of wood on the land, being merely an opinion, is not ground for rescission, and is not a basis of an action against the vendor. *Longshore v. Jack*, 30 Iowa 298.

Mistaken opinion as to title gives no right of action, neither is it ground for a rescission of the contract. *Glascocock v. Minor*, 11 Mo. 655.

The same rule applies to representations of value. *Marshall v. Lewis*, 4 Litt. (Ky.) 140.

In *Speiglemyer v. Crawford*, 6 Paige (N. Y.) 254, the court, by Walworth, Ch., said: "The law at the present day appears to be well settled that a false assertion by the vendor, merely as to the value of the property which he is about to sell, or as to the amount of its future income, where there is neither a warranty as to value, nor a misrepresentation of any fact respecting the property which is not a mere matter of opinion, forms no substantive ground for relief either at law or in equity. A naked assertion by the vendor as to the present or future value of property, does not imply knowledge, but must necessarily be understood by the purchaser as a mere matter of judgment or opinion; and upon a subject as to which the purchaser is generally supposed to be as competent to form a correct judgment as the vendor. I will not attempt to defend the morality of a false assertion either by the seller or the buyer, in relation to his real opinion as to the value of property which is the subject of negotiation between them. It is sufficient to say the law presumes that each relies upon his own judgment and opinion as to the value of property, rather than upon the opinion of the other party to the negotiation, where

or of law.¹ They must be, in other words, of facts.² They must

the facts upon which the value of the property depends are equally known to both." To the same effect is *Sandford v. Handy*, 23 Wend. (N. Y.) 260.

The opinion of the vendor, honestly expressed, in regard to the location of a boundary line, constitutes no fraud, and is no misrepresentation available to the purchaser, although it is erroneous. *Stow v. Bozeman*, 29 Ala. 397; *French v. Griffin*, 18 N. J. Eq. 297.

The representations of a broker that certain improvements on neighboring lots are contemplated, and that the lots he is selling will be much enhanced thereby, are expressions of opinion, and unless known by the broker to be false, are no defense to a suit for the price. *Cooke v. Cook* (Ala. 1893), 14 So. Rep. 171.

1. As a statement of the vendor of land, made pending negotiations, that "his wife would be in no event entitled to dower in the lands sold by him in his lifetime, but would be entitled to dower in the lands owned and possessed by him at the time of his death." *Martin v. Wharton*, 38 Ala. 637.

2. *Kelly v. Allen*, 34 Ala. 663.

The rule is the same, if matters of opinion are combined with them. *Wright v. Wright*, 37 Mich. 55.

Representations as to Quantity.—Statements as to quantity, where the sale is in gross, are generally representations of facts. *Boyce v. Grundy*, 3 Pet. (U. S.) 210; *Spence v. Duren*, 3 Ala. 251; *Harris v. Carter*, 3 Stew. (Ala.) 233; *Pitts v. Cottingham*, 9 Port. (Ala.) 675; *Yost v. Shaffer*, 3 Ind. 331; 56 Am. Dec. 509; *Mitchell v. Moore*, 24 Iowa 394; *Stephenson v. Taylor*, 1 A. K. Marsh. (Ky.) 235; *Pringle v. Samuel*, 1 Litt. (Ky.) 43; 13 Am. Dec. 214; *Parret v. Shaubhut*, 5 Minn. 323; 80 Am. Dec. 424; *Thomas v. Beebe*, 25 N. Y. 244; *M'Alister v. Barry*, 2 Hayw. (N. Car.) 290; *Estes v. Odom* (Ga. 1894), 18 S. E. Rep. 355; *Peyton v. Butler*, 3 Hayw. (Tenn.) 141; *Harris v. Williamson*, 4 Hayw. (Tenn.) 124; *Walker v. Dunlop*, 5 Hayw. (Tenn.) 271; 9 Am. Dec. 787; *Lewis v. McLemore*, 10 Yerg. (Tenn.) 206; *Hatch v. De La Garza*, 7 Tex. 60.

As where one, who was about to sell land, represented to the purchaser that an open unmarked line would run so as to include a field of forty acres of

rich bottom land adjoining, when he had been informed previously to the contrary. *Camp v. Camp*, 2 Ala. 632; 36 Am. Dec. 423.

Representations as to Location.—A vendor is liable for false representations as to the location of land, if the purchaser has not an opportunity, at the time, of seeing the land. So he is liable for a misrepresentation as to the cost of the land. *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Newell v. Horn*, 45 N. H. 421. But is not liable for a statement that the land is in an eligible situation. *French v. Griffin*, 18 N. J. Eq. 279.

Where a vendor of land pointed out to the vendee the probable western boundary, there being no definite marks laid down; and upon a survey of the line, after the purchase, it was found that the line fell so far east of the line so pointed out as to cut off twenty-five acres, the vendee receiving, however, the full number of acres he bargained for, and of equal quality, the court refused to rescind the contract on the ground of misrepresentation. *Hall v. Thompson*, 1 Smed. & M. (Miss.) 443.

Representations as to Productive Qualities.—Where a vendor sold land, and, at the time, represented that it was valuable for agricultural purposes, but when asked if it overflowed, he represented that it only overflowed from the backwater of a certain bayou, though it was shown that the vendor knew at the time that the land did overflow generally, which diminished its value, it was held that the sale was a fraud upon the vendee, and a court of equity would rescind the contract. *Alexander v. Beresford*, 27 Miss. 747; 61 Am. Dec. 538.

Where the vendor of a saltpetre cave misrepresented the quantity of saltpetre which could be produced from a given quantity of the nitrous earth of the cave, it was immaterial that the vendee employed a person, in whom he confided, to examine the cave. *Perkins v. Rice*, 6 Litt. (Ky.) 218; 12 Am. Dec. 298.

Representations as to Character of Land.—Such representations are generally regarded as matters of fact. *Hutcheon v. Johnson*, 33 Barb. (N. Y.) 392.

Where one selling land represented that it was early vegetable land, which was a material matter and known by

have been relied upon by the other party,¹ and a material inducement to the making of the contract,² but need not have been fraudulently made.³

him to be such, though the fact so asserted was not true, this was held sufficient ground for rescinding the contract. *Taylor v. Fleet*, 1 Barb. (N. Y.) 471.

Where a party has purchased city lots on the representation of the vendor, among other things, that other parties have bought lots in the same neighborhood at a certain price, and it afterward turns out that they were bought for much less than was represented, there is sufficient ground for a rescission of the contract. *Kertz v. Dunlop*, 13 Ind. 277.

Representations as to Quality.—Where land was sold under representations made by the vendor, that it was level and in a state for building, it was held that the vendor could recover in a suit on a bond given for value, the land proving rough and uneven. *Van Epps v. Harrison*, 5 Hill (N. Y.) 63; 40 Am. Dec. 314. See also *Gilbert v. Cherry*, 57 Ga. 129.

An agreement to purchase a farm, made because of the vendor's false representation that the neighborhood is not unhealthy, cannot be enforced. *Holmes' Appeal*, 77 Pa. St. 50.

Representation as to Title.—Where positive statements as to title are made, they are representations of matters of fact. *Smith v. Robertson*, 23 Ala. 312; *Carr v. Callaghan*, 3 Litt. (Ky.) 365; *Miller v. Hainy*, 4 Bibb (Ky.) 405; *Gill v. Corbin*, 4 J. J. Marsh. (Ky.) 392; *Bailey v. Smock*, 61 Mo. 213; *Green v. Chandler*, 25 Tex. 148.

If a vendor represents his title to be good, it is the same as saying his title is perfect for the entire tract, unaffected by any gaps in the chain of title, or any flaw or incumbrance whatever. *Smith v. Robertson*, 23 Ala. 312.

Case lies against a grantor for a fraudulent representation that lands sold by him are free and clear of incumbrances, although, in the deed of conveyance, there is a covenant against incumbrances. *Ward v. Wiman*, 17 Wend. (N. Y.) 193.

As to Other Facts.—Rescission may be had on the ground that the vendor, who was making a public sale as administrator, under an order of the court, stated falsely that he had au-

thority to do so under a will. *Stark v. Henderson*, 30 Ala. 438.

1. *Pritchett v. Munroe*, 22 Ala. 501; *Foster v. Kennedy*, 38 Ala. 359; 81 Am. Dec. 56; *Negley v. Wilson*, 14 Ind. 215; *Casey v. Allen*, 1 A. K. Marsh. (Ky.) 465; 10 Am. Dec. 750; *Whiting v. Hill*, 23 Mich. 399; *Johnson v. Taber*, 10 N. Y. 319; *Miner v. Medbury*, 6 Wis. 295.

If the party complaining makes an examination of the land himself, and relies upon it, rather than upon the statements of the one with whom he contracted, he will not be heard. *Hall v. Thompson*, 1 Smed. & M. (Miss.) 443; and so if he employs counsel and relies upon his statements. *Saltonstall v. Gordon*, 33 Ala. 149.

2. *Foster v. Gressett*, 29 Ala. 393. Misrepresentations, to be noticed, must be material, and must mislead the party to his damage. *Wilson v. Strayhorn*, 26 Ark. 28; *Coffee v. Newsom*, 2 Ga. 442; *Morgan v. Snapp*, 7 Ind. 537; *Holland v. Anderson*, 38 Mo. 55; *Langdon v. Green*, 49 Mo. 363.

But the statements need not be the only inducement. *James v. Hodsden*, 47 Vt. 127. If a material inducement, it makes no difference whether or not, under other circumstances, it would affect the market value of the land. *Masterton v. Beers*, 6 Robt. (N. Y.) 368.

Where an incumbrance was concealed by the vendor from the vendee, but was removed by the vendor before decree, upon a bill for rescission filed by the vendee, the court refused to rescind the contract. *Davidson v. Moss*, 5 How. (Miss.) 673.

3. In *Read v. Walker*, 18 Ala. 332, the court, by Chilton, J., said: "Where a vendor makes a false representation as to the existence of a fact which constitutes a material inducement to the contract, and upon which the vendee reposed, and had a right to rely, and without the existence of which he would not have entered into the contract, then, as the ignorance of the party making such representation, as to its being false, does not avert the injury, it should not destroy the remedy." To the same effect are *Lanier v. Hill*, 25 Ala. 554; *Sherwood v. Salmon*, 5

Misrepresentations may be taken advantage of in several forms of action.¹ These actions are not affected by the death of the original parties,² but must be promptly brought.³ The general rule of damages applies.⁴

2. After the Contract is Made—*a. RIGHT TO USE AND OCCUPATION*—(See also *LANDLORD AND TENANT*, vol. 12, p. 658).—The vendor, as he holds the legal title, is *prima facie* entitled to the possession of the land.⁵ This right may, however, be given

Day (Conn.) 445; 5 Am. Dec. 167; Oswald v. McGehee, 28 Miss. 340; Rimer v. Dugan, 39 Miss. 477; 77 Am. Dec. 687; Belknap v. Sealey, 2 Duer (N. Y.) 570; Champlin v. Laytin, 6 Paige (N. Y.) 189; Hammond v. Pennock, 5 Lans. (N. Y.) 358; Roosevelt v. Dale, 2 Cow. (N. Y.) 129; Fisher v. Probart, 5 Hayw. (Tenn.) 75.

1. See *infra*, this title, *Remedies*.

2. Greenlee v. Gaines, 13 Ala. 198; 48 Am. Dec. 49; Stewart v. Iglehart, 7 Gill & J. (Md.) 132; 28 Am. Dec. 202.

3. In Patten v. Stewart, 24 Ind. 339, the court, by Elliot, C. J., said: "A party who seeks the aid of the court to compel the rescission of a contract for fraud, must show that he has exercised at least reasonable diligence in ascertaining the facts, if readily within his power, and has been prompt in seeking his remedy within a reasonable time after the facts constituting the fraud are discovered. The relief is granted to the vigilant, but denied to the negligent." See also Comstock v. Ames, 1 Abb. App. Dec. (N. Y. Supreme Ct.) 411.

If, after the discovery of a fraud, the purchaser accepts a conveyance, he cannot set up the fraud as a defense, in an action for the purchase-money. Vernol v. Vernol, 63 N. Y. 45.

For the general principles of waiver, see McLean v. Clark, 47 Ga. 24.

4. Damages.—The measure of damages is generally the difference in value between the property as it exists, and as it was represented to be. Woolman v. Wirtsbaugh, 22 Neb. 490.

Where the vendor represents that the land contains so many acres, on a bill in equity, filed by the vendee, for abatement of the purchase-money, on account of deficiency in the quantity of the land, the true rule is, to allow the purchaser compensation for the deficiency, according to the average value of the lands sold at the time of purchase. Stow v. Bozeman, 29 Ala. 397.

5. In Williams v. Forbes, 47 Ill. 150,

the court, by Walker, J., said: "In the absence of an agreement to the contrary, the purchaser of real estate, who does not receive a deed, but simply a contract for a conveyance at a future day, is not entitled to the possession of the land thus purchased. The principle is well recognized, that the owner of the fee, as a general rule, is entitled to the possession of the land, as against all persons not in under some valid agreement from him. And not only so, but when vacant and unoccupied, the fee draws to it, in contemplation of law, the possession. The mere fact that a person enters into a contract for the purchase of land, does not entitle him to enter upon and hold it. It is true, the purchaser may acquire the right by the terms of the agreement or otherwise. But in the absence of some agreement to enter, his possession in such case would be unauthorized, and the vendor might recover possession."

In Chappell v. McKnight, 108 Ill. 575, the court, by Walker, J., said: "The mere purchase of land does not authorize the purchaser to enter into possession without license from the seller. Such license may be shown to have been express, or it may be implied from circumstances. . . . A mere contract for a sale of real property does not authorize an entry by the purchaser. An agreement or covenant to convey the title at a future time does not authorize the purchaser to enter without a license. This must be so on principle. The doctrine is uniformly recognized, and of general application, that the fee draws to it not only the right of, but the constructive, possession. These rights at law accompany the fee, and must be recognized and enforced at law."

In Druse v. Wheeler, 22 Mich. 442, the court, by Campbell, J., said: "There is no right of possession secured under a contract for the sale or exchange of land before the conveyance, unless directly provided for. In many cases

to the vendee by an agreement of the parties, either expressly made or resulting by implication.¹ If the vendee thus enters by license, his possession is not adverse, but is really that of his vendor.² He does not hold as a tenant and cannot be compelled

such provision is made but it is not implied from the agreement to sell." See also *Suffern v. Townsend*, 9 Johns. (N. Y.) 35; *Erwin v. Olmstead*, 7 Cow. (N. Y.) 229; *Smith v. Patten*, 1 S. & R. (Pa.) 84; *Baum v. Dubois*, 43 Pa. St. 260.

In *Irvin v. Bleakley*, 67 Pa. St. 28, the court, by Thompson, C. J., said: "The law is, where the contract is silent on the subject of possession, the vendor retains it, until he has received his purchase-money."

A vendee of land, holding only a bond for title, cannot resist recovery at law when the vendor sues for possession. His remedy is by a bill to redeem; and a purchaser of the vendee is in no better condition. *Chapman v. Glassell*, 13 Ala. 50; 48 Am. Dec. 41.

A vendee, in a contract for the sale of land, cannot recover possession from the vendor in an action at law. His only remedy at law is for damages for a breach of contract. *Hawkins v. Wilson*, 1 W. Va. 117. But see, *contra*, *Drake v. Barton*, 18 Minn. 463, where the court, by Ripley, C. J., said: "Upon a sale of real property the purchaser, if the contract is silent on the subject, is entitled to possession, and the vendor to interest on the purchase-money."

1. *Chappell v. McKnight*, 108 Ill. 570.

If the contract reserves to the vendor the right of re-entry, in case of default in payments, and a right of distress for arrears of interest, and provides that, on such default, the purchaser may be regarded as a tenant holding over wrongfully, and that suit may be brought for the recovery of damages for waste, the vendee has the right of possession by necessary implication. *Martin v. Scofield*, 41 Wis. 167.

In *Miller v. Ball*, 64 N. Y. 293, the court, by Earl, J., said: "It may be stated, as a general rule, that in all cases where the contract for the sale of land is silent as to the possession, the land being vacant, and the vendee has paid the entire consideration, and fully performed on his part, and all that remains for the vendor to do is to give the deed, there must be an implied

agreement or license that the vendee may at once take possession and have the use of the land." See also *Sherman v. Savery*, 2 Fed. Rep. 505.

Where a purchaser has a right to the possession, and relinquishes it to the vendor, by mistake or through the latter's misrepresentation, he may recover in an action for use and occupation. *Hull v. Vaughan*, 6 Price 173; *Winterbottom v. Ingham*, 7 Q. B. 611; 33 E. C. L. 611.

The defendant and another person conveyed to the plaintiff an undivided moiety of several houses, of which they were seised as devisees in trust. Of one of these houses the defendant had long been in possession, and continued to occupy it after the conveyance. It was held that such occupation did not itself entitle the plaintiff to sue him for use and occupation. *Tew v. Jones*, 13 M. & W. 12.

Where a contract requires payment of the purchase price before entry and erection of improvements by the vendee, but the latter, nevertheless, enters and makes improvements with the knowledge of the vendor, and thereafter continues to occupy the premises without objection, a presumption by the court that the condition in respect to payment before entry is waived, is justifiable. *Minneapolis, etc., R. Co. v. Chisholm* (Minn. 1893), 57 N. W. Rep. 63.

2. In *Hale v. Gladfelder*, 52 Ill. 97, the court, by Walker, C. J., said: "The relation of vendor and purchaser is such that, when the latter enters into possession under the contract to purchase, the possession is that of the vendor; by the purchase he recognized the vendor's title, and like a tenant, in all proceedings for the recovery of possession by the vendor, he is estopped from disputing his title. He enters and holds under the title of the vendor, and his occupancy is subservient and subordinate to that title. And from this relation and for the same reason, his possession becomes as fully that of the vendor, as does that of a tenant become that of a landlord."

Where possession is given upon the

to pay rent,¹ unless, perhaps, the contract was void or is not carried out for some reason other than the inability or unwillingness of the vendor, in which case he is, by some authorities, regarded

payment of part of the purchase-money, and interest is paid upon the remainder, twenty years possession by the purchaser is no bar in ejectment, because such possession is not adverse. *Doe v. Edgar*, 2 Bing. N. Cas. 498; 29 E. C. L. 402.

Although the vendee goes beyond his rights, as in cutting timber, such acts do not make his possession adverse. *Doe v. Caperton*, 9 C. & P. 112; 38 E. C. L. 59. See also *Harral v. Leverly*, 50 Conn. 46; 47 Am. Rep. 608; *Jarboe v. McAtee*, 7 B. Mon. (Ky.) 279.

1. *Fall v. Hazelrigg*, 45 Ind. 576; 15 Am. Rep. 278. If the vendor cannot make title, or for any other reason cannot or will not comply with his contract, he cannot recover rent for the occupation of the vendee, *Hearn v. Tomlin*, Peake 192; *Thompson v. Bower*, 60 Barb. (N. Y.) 463; even though the occupation was profitable to the vendee. *Kirtland v. Pounsett*, 2 Taunt. 145; *Winterbottom v. Ingham*, 7 Q. B. 611; 53 E. C. L. 611; *Blackburn v. Smith*, 2 Ex. 783; *Vanderheul v. Storrs*, 3 Conn. 203.

In *Doe v. Cochran*, 2 Ill. 209, the court, by Smith, J., said: "We think it cannot be denied that, in the case of a parol purchase of land, if the vendee enters into possession, and refuses afterward to affirm the contract, he would be liable to the vendor for use and occupation, and could not dispute his title by setting up an outstanding title in a third person."

In *McNair v. Schwartz*, 16 Ill. 24, the court, by Treat, J., said: "If a party acquires the possession of land under a contract of sale, and afterwards refuses to perform the contract, the vendor cannot maintain assumpsit against him for use and occupation, but must resort to an action of ejectment to recover mesne profits. The relation between the parties is that of vendor and vendee, and not of landlord and tenant. The holding is under a purchase and not under a demise."

In *Greenup v. Vernor*, 16 Ill. 26, the court, by Treat, C. J., said: "There is nothing in the mere circumstance of a vendor remaining in possession of premises after a sale from which a

tenancy can be implied, so far as to enable the vendee to maintain an action for use and occupation."

In *Jones v. Tipton*, 2 Dana (Ky.) 295, the court, by Robertson, C. J., said: "The law will not imply a contract to pay rent when the occupant held as a vendee, because he held the land as his own; and, therefore, the relation of landlord and tenant, so far as rent may be involved, cannot be inferred." *Rogers v. Wiggs*, 12 B. Mon. (Ky.) 504; *Gould v. Thompson*, 4 Met. (Mass.) 224; *Hogsett v. Ellis*, 17 Mich. 365; *Smith v. Stewart*, 6 Johns. (N. Y.) 46; *Carson v. Baker*, 4 Dev. (N. Car.) 220; 25 Am. Dec. 706; *Jones v. Jones*, 2 Rich. (S. Car.) 542; *Hough v. Birge*, 11 Vt. 190; 34 Am. Dec. 682.

If the relation of vendor and vendee no longer exists, as where the contract has been abandoned and the vendee notified that he must pay rent, he will be liable for that accruing subsequently. *Howard v. Shaw*, 8 M. & W. 118; *Dwight v. Cutler*, 3 Mich. 566; 64 Am. Dec. 105.

The converse of the rule is true where a tenant makes a contract to purchase the land demised; he will be liable for rent up to the time of the contract, but not after that. *Nestal v. Schmid*, 39 N. J. L. 686.

Where it was stipulated clearly that, until conveyance, the vendee should pay the vendor at the rate of a fixed sum per annum, in half yearly payments, it was held that a tenancy was created and that the payments might be recovered as rent. *Saunders v. Musgrave*, 6 B. & C. 524; 13 E. C. L. 243.

But a mere stipulation for interest, until the completion of the contract, does not have that effect. *Davidson v. Ernest*, 7 Ala. 817; *Dwight v. Cutler*, 3 Mich. 566; 64 Am. Dec. 105; *Clough v. Hosford*, 6 N. H. 234; *Smith v. Stewart*, 6 Johns. (N. Y.) 46.

If the contract provides that the vendee may take possession, and that upon payment of the price it shall become his, but in the case of default, he shall pay for the use of the same, a relation of landlord and tenant is created. *Fairbank v. Phelps*, 22 Pick. (Mass.) 535. And see LANDLORD AND TENANT, vol. 12, p. 662.

as a tenant at will.¹ As, however, he is the equitable owner, if he holds under a valid contract, he cannot be turned out of possession unless in default,² when he loses all right and cannot successfully defend a possessory action brought by his vendor.³

If a vendee, by express or implied agreement, has the right of possession, he may take actual possession either by himself or by a licensee, against whom he may maintain trespass, in case the license is abused.⁴ He may also let the premises and recover for use and occupation by suit.⁵

b. RIGHTS OF VENDOR IN POSSESSION.—If the vendor remains

1. *Whittier v. Stege*, 61 Cal. 238; *Dwight v. Cutler*, 3 Mich. 566; 64 Am. Dec. 105.

In *Woodbury v. Woodbury*, 47 N. H. 22; 90 Am. Dec. 555, the court, by Sargent, J., said: "If the purchaser refuses to complete the contract, the vendor has the right, we think, to treat him as a trespasser or as a tenant at will, at his election." *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 489; 7 Am. Dec. 396.

Thus, where the contract, being in parol, was void by the Statute of Frauds, but there was no default and no revocation by the vendor, and the vendee planted crops and was then turned out of possession, it was held that, being a tenant at will, the vendee was entitled to the crops as emblements and could bring an action for their conversion. *Harris v. Frink*, 49 N. Y. 24; 10 Am. Rep. 318.

If the vendee makes default of performance of his part, he is liable for rent. *Davidson v. Ernest*, 7 Ala. 817; *Smith v. Wooding*, 20 Ala. 324; *Seabury v. Doe*, 22 Ala. 207; 58 Am. Dec. 254; *Vanderhevel v. Storrs*, 3 Conn. 203; *Johnson v. Beaucamp*, 9 Dana (Ky.) 124.

Where the defendant, under a verbal agreement to purchase certain real estate of the plaintiff, went into possession thereof, but failed to pay at the time stipulated, and afterward voluntarily abandoned the premises, though there was no agreement to pay rent, it was held that he sustained the relation to the plaintiff of tenant at will. *Patterson v. Stoddard*, 47 Me. 355; 74 Am. Dec. 490; *Clough v. Hosford*, 6 N. H. 234; *Alton v. Pickering*, 9 N. H. 494, 498; *Ayer v. Hawks*, 11 N. H. 148; *Hough v. Birge*, 11 Vt. 190; 34 Am. Dec. 682.

Where the contract was not completed, owing to the destruction of a

house by fire, it was held that a recovery for use and occupation might be obtained. *Gould v. Thompson*, 4 Met. (Mass.) 224.

A vendee who obtains the possession by fraud, is liable as a trespasser for rents and profits. *Mosley v. Miller*, 13 Bush (Ky.) 408. And see preceding note.

2. *Whittier v. Stege*, 61 Cal. 238.

3. In *Whiteman v. Castlebury*, 8 Tex. 443, the court, by Hemphill, C. J., said: "It will be seen that it is the settled doctrine that the vendee, if he be in default, cannot defend himself in the possession of the land, against the suit of the vendor."

The rule is the same if the vendor holds the vendee's note for the unpaid part of the purchase-money. *Williams v. Murphy*, 21 Minn. 534.

But being rightfully in possession, ejectment will not lie against him unless there be a demand for possession. *Doe v. Jackson*, 1 B. & C. 448; 8 E. C. L. 191; *Right v. Beard*, 13 East 210; *Hegan v. Johnson*, 2 Taunt. 148; *White v. Livingston*, 10 Cush. (Mass.) 259.

Where it was agreed between the parties, that if the purchaser should make default, then the agreement should be void, and the vendor was to be at liberty "to immediately enter into possession and occupancy of the premises, and was to be forever discharged from the agreement," it was held that if the contract was broken by the purchaser, the vendor had a right to enter without notice or demand of possession. *Stone v. Sprague*, 20 Barb. (N. Y.) 513.

The rule of the text applies unless it be agreed, at the time possession is delivered, that the vendee shall quit in case payment is not made on a certain day. *Doe v. Sayer*, 3 Camp. 8.

4. *Martin v. Scofield*, 41 Wis. 167.

5. *Hull v. Vaughan*, 6 Price 157.

in possession after the sale, he must manage the estate in such a way as not to injure the purchaser.¹ He is not liable for ordinary deterioration, is not bound to keep the premises in good repair or guard against the decay which is due to time and ordinary use,² and, it has been held, need not use even reasonable care.³ He is, however, liable if he willfully injures the estate by removing trees, shrubs, or articles of personal property permanently annexed to it.⁴

c. RIGHTS OF VENDEE IN POSSESSION.—If the vendee is in possession, he is treated as owner of the property. He may mortgage it⁵ or create an easement upon it.⁶ The estates or rights thus created are complete as against himself, but are liable to be defeated by the assertion of the vendor's rights if they have been infringed upon.⁷ A vendee in possession must, however, do nothing to diminish the security of his vendor, either by committing waste⁸ or removing annexations of a permanent character.⁹

1. **Liability for Rents and Profits.**—A vendor who has retained the title and possession, but has bound himself to convey on payment of the price, is accountable to the vendee for rents and profits, to the same extent as a mortgagee in possession. *Ashurst v. Peck* (Ala. 1894), 14 So. Rep. 541.

2. In *Hellreigel v. Manning*, 97 N. Y. 61, the court, by Earl, J., said: "A party agreeing to sell and convey premises at a future day, does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in good repair or to guard against the decay which is due to time and ordinary use."

3. *Hellreigel v. Manning*, 97 N. Y. 56. See, *contra*, *Lysaght v. Edwards*, 2 Ch. Div. 507, where Jessel, M. R., in giving judgment, said: "There is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he willfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it."

4. *Magennis v. Fallon*, 2 Moll. 588; *Stow v. Russell*, 36 Ill. 23; *Smith v. Price*, 42 Ill. 399.

Growing timber is a part of the realty, and passes with it under the conveyance. Oftentimes it constitutes the chief value of the land. It is part of the inheritance, and its spoliation is waste. *Weakland v. Hoffman*, 50 Pa. St. 513; 88 Am. Dec. 560.

5. *Baker v. Bishop Hill Colony*, 45 Ill. 264.

6. *Whittington v. Simmons*, 32 Ark. 377.

As to build a dam across a creek upon the land and draw off water in a mill race. *Baldwin v. Pool*, 74 Ill. 97.

7. **Restricting Use of Premises.**—Where real estate is sold with the understanding that it can be used for business purposes, the vendee cannot be restricted from selling liquors thereon. *Woodhaven Junction Land Co. v. Solly*, 26 N. Y. Supp. 150; 74 Hun (N. Y.) 637.

8. *Taylor v. Porter*, 1 Dana (Ky.) 421; 25 Am. Dec. 155; *Williams v. Rogers*, 2 Dana (Ky.) 375; *Lowry v. Cox*, 2 Dana (Ky.) 469. See also *Jennison v. Stone*, 33 Mich. 99, where the act of waste consisted in removing timber.

But one in possession of land, under a contract to purchase which has become forfeited, is not responsible to a subsequent purchaser for timber cut by him on the land before the latter's purchase. *Walker v. Cole*, 5 Tex. Civ. App. 179.

9. In *Smith v. Moore*, 26 Ill. 393, the court, by Walker, J., said: "The adjudged cases are numerous, and seem to be uniform, with the exception of *Raymond v. White*, 7 Cow. (N. Y.) 319, that a purchaser, under an executed contract, occupying the relation of mortgagor to the premises, has no authority to remove annexations of a permanent character from the land. And this seems to be the settled doctrine, whatever be the reason or justice of the rule. At the ancient common law, all additions to the freehold became a part of it, and could not be removed by the tenant, or anyone but the owner of the fee, or by his license. But in *Poole's Case*, 1 Salk. 368, the

If the contract is rescinded, he is not responsible for the ordinary wear and tear of the property and the decay of buildings and other improvements.¹ If he permanently annexes personal property to the land, it remains a part of the land and cannot be removed by him.²

If the vendee, under the contract, is entitled to the possession, but allows the vendor to remain in occupation, the former is entitled to the rents and profits.³

rule was relaxed in favor of trade fixtures, which has since obtained and been recognized by the courts, both of *Great Britain* and the *United States*. But we apprehend the true reason why a purchaser, before the completion of the contract, has no authority to remove improvements which he may have placed upon the land, is not because he is a mortgagor, but because the law presumes they were annexed with the design of being permanent. The exception in favor of trade fixtures is made, because the annexations are supposed to be accessory to the calling of the tenant, and not to the land. That they were made, not with the design of being permanent, but of being severed at the end of the term. Whilst with the purchaser the presumption is, that they are made with the design of their permanent engagement in connection with the land, and as an accessory to it. He makes them in view of their becoming his, when he shall have acquired the absolute ownership of the land by conveyance. But until that time, he has only the same right to them which he has to the freehold. In any event, the doctrine seems to be too well settled to disturb." See also *Raymond v. White*, 7 Cow. (N. Y.) 319.

1. Sugden on Vendor and Purchaser (8th Am. ed.), p. 747. In *Taylor v. Porter*, 1 Dana (Ky.) 421; 25 Am. Dec. 155, the court, by Underwood, J., said: "The vendee in possession is the *quasi* tenant of the vendor where the contract is executory. But still the vendee holds so far in his own right as to incur no legal obligation to make repairs, or to warrant or insure against casualties. How can it be told, that the same kind of casualty, or one more destructive, might not have happened, if the vendor had continued in possession, and not made the sale? Would he keep the property in better repair than his vendee? If

casualties happened while he was possessed and the owner, or if he failed to repair and the property went to destruction, the loss would be his. There is no certainty that the property would be safer remaining in the hands of the vendor, than in the possession of the vendee; and, therefore, unless the injury can be traced to some culpable act or omission of the vendee, producing the loss in the value of the improvements, we perceive no ground on which to charge him. If he set fire to them and consumed them, or if he removed and sold them, in these and similar cases, as the deterioration would result from his voluntary act, he should be held responsible, on the rescission of the contract, for the value of the property he has thus destroyed, or used. But when, without his fault, a loss happens, it should fall on the vendor who has been faithless to his contract."

In *Williams v. Rogers*, 2 Dana (Ky.) 376, the court, by Robertson, J., said: "For the natural wear and tear, or such deterioration only as may have resulted from the prudent and ordinary use, he should not be required to account, but should be held responsible only for waste, or any damage which shall have been the consequence of his improvidence, culpable negligence, or wantonness; or from his having made an unusual, or unexpected, or extraordinary use of the land, or any of its appurtenances."

2. *Smith v. Moore*, 26 Ill. 392; *Oakman v. Dorchester Mut. F. Ins. Co.*, 98 Mass. 57. But where the purchaser, under an oral contract of sale, built a frame house, and the vendor afterward repudiated the contract and took possession, it was held that the purchaser could maintain replevin for the building. *Waters v. Reuber*, 16 Neb. 99; 49 Am. Rep. 710.

3. *Mason v. Chambers*, 3 T. B. Mon. (Ky.) 323.

If the contract is not ultimately carried into effect, the vendee may recover for improvements made in good faith, in case the failure did not happen through his own fault.¹ If it was through his fault, or if he made the improvements knowing that through a defect of title, or for some other reason, the contract could not be consummated, there can be no recovery.²

d. PAYMENT OF TAXES AND ASSESSMENTS.—The question of who is primarily liable to pay taxes and assessments, depends

1. 2 Sugden on Vendors and Purchasers (8th Am. ed.), p. 747; Bright v. Boyd, 1 Story (U. S.) 494; In Goodwin v. Lyon, 4 Port. (Ala.) 314, the court, by Collier, J., said: "Where it appears that a contract for the sale and purchase of lands was made, upon the faith of which the vendee took possession and made valuable and permanent improvements, though he cannot coerce its specific execution in equity, either because the agreement is imperfect or its precise terms cannot be shown, the bill should be retained, to decree a pecuniary compensation equivalent to the improvements. If equity did not afford this redress, the vendee would sustain an injury for which he would be remediless, or else have a remedy at law, at best doubtful and inadequate."

The following cases also support the text: Glass v. Abbott, 6 Bush (Ky.) 622; Williams v. Rogers, 2 Dana (Ky.) 375; Lowry v. Cox, 2 Dana (Ky.) 469; Ewing v. Handley, 4 Litt. (Ky.) 370; 14 Am. Dec. 140; Parkhurst v. VanCortlandt, 1 Johns. Ch. (N. Y.) 273; Albea v. Griffin, 2 Dev. & B. Eq. (N. Car.) 9.

The measure of the amount which may be recovered, is the enhancement of the value of the property and not the cost of the improvements. Smoot v. Smoot, 12 Lea (Tenn.) 274; Smithson v. Imnan, 58 Tenn. 88; Tyler v. Fickett, 75 Me. 211. But see McCracken v. McCracken, 88 N. Car. 272, which held that, if the vendor fails to carry out a parol contract for the sale of land, the vendee can recover nothing for improvements made by him upon the land, the defendant making no use of them, and not objecting to their removal.

2. In Kenney v. Brown, 3 Ridgw. P. C. 578, the court, by the Lord Chancellor, said: "As to the equity arising from lasting and valuable improvements, I do not consider a man, who is conscious of a defect in his title, and

with that conviction in his mind expends a sum of money in improvements, as entitled in any sort to avail himself of it. If the person really entitled to the estate will encourage the possessor of it to expend his money in improvements, or he will look on and suffer such an expenditure without apprising the party of his intention to dispute his title, and will afterwards endeavor to avail himself of such fraud, upon the ground of fraud, the jurisdiction of a court of equity will clearly attach upon the case. But does it follow from thence, that if a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, that, therefore, he shall retain it in his hands against the lawful proprietor? If such a rule should prevail, it will certainly fully justify a proposition which I once heard stated at the bar of the court of chancery, that the common equity of this country was, to improve the right owner out of the possession of his estate."

The following cases support the statement of the text: Boeken v. Alderman, 26 Kan. 738; Patrick v. Marshall, 2 Bibb (Ky.) 45; 4 Am. Dec. 670; Ormsby v. Hunton, 3 Bibb (Ky.) 298; Barlow v. Bell, 1 A. K. Marsh. (Ky.) 246; 10 Am. Dec. 731; Howe v. Logwood, 3 A. K. Marsh. (Ky.) 389; Pugh v. Bell, 1 J. J. Marsh. (Ky.) 404; Baltimore v. McKim, 3 Bland (Md.) 453; Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 602; 7 Am. Dec. 559.

A fraudulent possessor is never allowed for beneficial improvements. Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 416; Long v. Finger, 74 N. Car. 502.

In Rainer v. Huddleston, 4 Heisk. (Tenn.) 226, the court, by Nicholson, C. J., said: "It is well settled that, when a *bona fide* possessor of land has made improvements thereon, and the owner comes into a court of equity for an account of the rents and profits, the

upon the terms of the statute providing for their levy and collection. Unless there be special provisions to the contrary, it is the one who holds the legal title.¹ As between the parties, however, the one in possession—whether vendor or vendee—is liable,² unless

defendant will be allowed to deduct therefrom the full amount of all ameliorations and improvements which he has beneficially made upon the estate." See also *McKim v. Moody*, 1 Rand. (Va.) 58.

Where the vendee refuses to carry out the contract, the vendor not being in fault, the former cannot offset the value of his improvements against the latter's claim for use and occupation. *Guthrie v. Holt*, 9 Baxt. (Tenn.) 527. See also *IMPROVEMENTS*, vol. 10, p. 242.

1. *Burroughs on Taxation* (1877), § 98; *Perry on Trusts* (4th ed.), § 331.

In *Latrobe v. Baltimore*, 19 Md. 21, the court, by Cochran, J., said: "That taxes assessed upon a trust estate constitute a legal cause of action against the holder of the legal title, we do not doubt, for at law the legal estate in the hands of a trustee has the legal incidents and obligations of an absolute title, subject only to the claims in equity of the *cestui que trust*."

The following cases also support the text: *Miner v. Pingree*, 110 Mass. 47; *Wright v. Cradelbaugh*, 3 Nev. 341; *Greene v. Mumford*, 4 R. I. 313; *Webb v. Burlington*, 28 Vt. 188.

In *Willard v. Blount*, 11 Ired. (N. Car.) 624, the court, by Pearson, J., said: "Land, then, is taxed according to its fee-simple value, and whoever is owner of land for the time being is bound to pay the tax. If the estate is divided by giving a particular estate to one—the remainder to another—as, if an estate is limited to A for life or for ten years, remainder to B and his heirs, the valuation is assessed without reference to this division, and each must pay the tax, during the time he is owner and enjoys possession and pernanacy of the profits."

Under a statute, providing that "the owner of property on the first day of April, in any year, shall be liable for the taxes of that year, and the purchaser of property on the first day of April shall be considered as the owner on that day, a vendor who sells real estate after the first day of April, in the absence of a special contract to the contrary, is liable for taxes for that year. *McClure v. Campbell*, 25 Neb. 57.

2. *Cooley on Taxation* (2d ed.), p. 467; *Lathers v. Keogh*, 109 N. Y. 583.

In *Hall v. Denckla*, 28 Ark. 515, the court, by Bennett, J., said: "The land was sold in 1859 for taxes of 1858. Lyon bought the land and took possession October 5, 1857. By law he was bound for the taxes, and it was an attempted fraud to suffer them to be sold and to buy them in. That would be to take advantage of his own wrong. A vendee is bound to pay all tax assessments on land after sale. But it is urged that the vendor, by terms of his bond, was bound, upon payment of the purchase-money, to make and execute 'a good and sufficient deed, clear of all incumbrances,' and that this could not be done while the taxes accruing after making the bond and before the execution of the deed, remained unpaid. These taxes, however, arose after, and were liens or incumbrances subsequent to the sale. The obligation of the vendor was to convey the property clear of any incumbrance placed thereon by himself or on his account, and not those arising on the account of the vendee. Taxes against the property existing at the time of the sale; mortgages made by the vendor, whether before or after; judgments against him or any former owner, he, of course, would have to meet and satisfy; but not mortgages made by the vendee, nor judgments against him or other liens created by his act, or failure to discharge his liabilities. The vendor is not responsible for anything done or omitted in relation to the title by the vendee, nor is he bound to covenant against liens arising by reason of his failure to discharge his duty." In *Fitzgerald v. Spain*, 30 Ark. 100, the court, by Williams, J., said: "A vendee in possession under a title bond, in the enjoyment of rents and profits, or having power to enjoy them, is so far bound to pay taxes, as to preclude him from acquiring title, directly or indirectly, from or under a sale for taxes, which accrued while he was so under obligation to pay."

In July, 1864, A sold his real estate to B upon the following terms: A was to give B possession on the last day of March, 1865, and to give a good and sufficient title unincumbered. There

it is otherwise stipulated,¹ and, if the one not in possession is compelled to pay them, he has a remedy over against the other. A vendor who has thus been forced to pay taxes may withhold conveyance until reimbursed.² He is liable himself in any event, however, for taxes due which had become a lien previous to the contract of sale.³

were to be several payments, the last to be on the last day of March, 1865. In November, 1864, a township county tax was levied on the land in the name of A, and in January, 1865, other taxes were levied. In December, 1865, A paid all these taxes, and afterward sought to recover the amounts paid from B. The court said that A "was liable for the taxes, and that they could have been recovered from him by due course of law. He was the legal owner of the estate when they were levied, and he was the equitable or real owner during the same period, receiving the rents and profits up to the last day of March, 1865, when he was to give a good and sufficient title, and deliver possession. The title was to be unincumbered, and this could only be done by his paying these liens, which he finally did. He has, therefore, no claim, either legal, equitable, or moral, upon this defendant for the liens so paid him." *Densmore v. Haggerty*, 59 Pa. St. 189.

The vendee in possession is liable for all taxes assessed on the land, although the vendor agrees to give him, at a certain time, a good deed. *Farber v. Purdy*, 69 Mo. 601.

Where the land is vacant, a vendee who has fully performed everything to be done on his part, must pay the taxes. *Sherman v. Savery*, 2 Fed. Rep. 505.

1. The law determines the taxes to be paid by each party, when real estate is sold, in the absence of any special agreement between the parties concerning them. *Everett v. Dilley*, 39 Kan. 73.

In an agreement to exchange real estate for bank stock, the stipulation, "taxes of 1875 to be paid by owners respectively," applies to the property each is selling, and not to what each is receiving. *Morrison v. Wasson*, 79 Ind. 477.

A purchaser, on accepting the deed of an ungraded lot in a city, said to the vendor: "You have to pay for the filling in;" to which the reply was: "All right, I will pay it." In an action by the purchaser, to recover the amount of an assessment subsequently laid for the

filling, and paid by the plaintiff, it was held that the defendant was liable, whether the proceedings under which the assessment was laid were regular or not. *McCormick v. Cheevers*, 124 Mass. 262.

Where the owner of a lot subject to a street assessment, conveys a part by a warranty deed, and subsequently conveys the remainder by a warranty deed, except as to such assessment, the liability for such assessment rests on the part last conveyed. *Michaels v. Keane* (Wash. 1894), 36 Pac. Rep. 681.

A contract made August fourth, provided that the deed which was executed August twenty-third should convey certain property, "free and clear from all incumbrances," except certain mortgages, and that "the calculations and adjustments of the exact amounts, to be paid as to rents, interest, etc., shall be made the same as if this contract were actually carried out on September first, at 12 M." An annual tax was assessed at the time of the execution of the contract, but was not confirmed until August twenty-ninth. On the day of the execution of the deed, an adjustment of rents, interest, gas charges, and insurance premiums was made without regard to any taxes. It was held that the vendor was under no obligation as to this tax. *Lathers v. Keogh*, 109 N. Y. 583.

2. *Cooley on Taxation* (2d ed.), p. 467; *Bradford v. Union Bank*, 13 How. (U. S.) 64; *Farber v. Purdy*, 69 Mo. 601.

3. *Rundell v. Lakey*, 40 N. Y. 513; *Cogburn v. Hunt*, 56 Miss. 718; *Sivley v. Summers*, 57 Miss. 712; *Sims v. Gray*, 66 Mo. 613; *Schaefer v. Cansey*, 8 Mo. App. 142; *Ellis v. Foster*, 7 Heisk. (Tenn.) 131; *Staunton v. Harris*, 9 Heisk. (Tenn.) 579.

Where a party who purchased land at a clerk and master's sale, has afterward been compelled to pay the taxes then due upon the property, such payment not being considered voluntary or officious in the sense of the law, the purchaser may recover of the former owner the amount so expended in

The one who thus pays taxes due, as between the parties, by the other, has only a personal remedy; he has no lien on the land.¹

e. ACQUIRING ADVERSE INTERESTS.—The relation between the vendor and purchaser is so far confidential, that neither can assert against the other an adverse title to the property.² Where a vendee or vendor, not in possession, thus attempts to set up an adverse title, the case rests upon the general principles of estoppel, and facts must exist to sufficiently bring it within them.³

The relation of a vendee in possession to his vendor, is closely analogous to that of landlord and tenant. Having been put into possession, he is estopped to deny the title of the vendor under whom he holds,⁴ unless such a step is necessary to prevent eviction,

assumpsit. *Childress v. Vance*, 1 Baxt. (Tenn.) 406.

1. *Ballance v. Forsyth*, 13 How. (U. S.) 18; *Baily v. Doolittle*, 24 Ill. 577; *Williams v. Townsend*, 31 N. Y. 411. 2. *Carne v. Mitchell*, 10 Jur. 912; *Graham v. Hackwith*, 1 A. K. Marsh. (Ky.) 423; *Trask v. Vinson*, 20 Pick. (Mass.) 109.

Parties who have obtained possession of lands from their grantor, cannot afterward repudiate his title, and all releases thereafter procured by them to cure defects in the title of such grantor must be held to have been obtained in support of, and not for the destruction of, such title. *Wilkinson v. Green*, 34 Mich. 221.

A, having taken possession under B, is not at liberty to repudiate his title afterward; and all releases obtained by A to cover defects in the title, must be held to have been obtained in support of B's title, and not for its destruction. *Farmers' and Mechanics' Bank v. Bronson*, 14 Mich. 369.

In *Cromwell v. Craft*, 47 Miss. 60, the court, by Tarbell, J., said: "No doctrine is better settled than that, having recognized a title by purchase and the acceptance of possession thereunder, the purchaser shall do nothing to the prejudice thereof, so long as the relation continues." See also *Aston v. Robinson*, 49 Miss. 353.

In *Kirkpatrick v. Miller*, 50 Miss. 521, the court, by Simrall, J., said: "If, in good faith, the purchaser has laid out his money to extinguish an incumbrance, or to procure a conveyance of paramount title, while he cannot assert such incumbrance or conveyance to defeat the title accepted from his vendor, yet, since the outlay was necessary for the support and protection of his right and possession, the vendor shall

pay it back. The doctrine rests upon this footing; the vendor is under a covenant to warrant and defend the title to the vendee, his heirs and assigns. Such covenant includes the idea of quiet enjoyment. But the vendee, by timely interposition, has bought in a title or incumbrance which would have swept away his possession, and has thereby kept the covenant of the vendor unbroken. He has done what was necessary for his own safety, and what was incumbent primarily on the vendor. If he had waited until a recovery had, then he could have pursued his covenant, and recovered the price paid for the land." See also *Wade v. Thompson*, 52 Miss. 367.

In *Austin v. McKinney*, 5 Lea (Tenn.) 499, the court, by Freeman, J., said: "If a vendee is in possession, either by deed or by contract to convey, and has not been evicted, but purchases in a better outstanding title, it inures to the benefit of the vendor, and all he can ask is to be reimbursed his outlay in obtaining the title, not exceeding the value of the land." See also *Casey v. Hanrick*, 69 Tex. 44.

An after-acquired title in the name of the vendee, will inure to the benefit of the vendor. The former is, however, entitled to recover what he paid for it with interest, if it was needed to protect and perfect his title. *Thredgill v. Pintard*, 12 How. (U. S.) 24; *Lewis v. Boskins*, 27 Ark. 61; *Peay v. Capps*, 27 Ark. 160; *Stephens v. Black*, 77 Pa. St. 138.

3. ESTOPPEL, vol. 7, p. 1.

4. In *Roe v. Doe*, 9 Wall. (U. S.) 290, the court, by Swaine, J., said: "If a contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. The relation of landlord and tenant does

in which case he may attorn to a stranger.¹ These principles hold, however, only in cases involving the right of possession;

not subsist between the parties. The characteristic feature of that relation is wanting. The vendee pays nothing for the enjoyment of the property. The case comes within the category of a license. In such cases the vendee cannot dispute the title of the vendor, any more than the lessee can question the title of his lessor. The assignee of the vendee is as much bound by the estoppel as the vendee himself."

In *Ormond v. Martin*, 37 Ala. 602, the court, by Walker, J., said: "Where a party enters into the possession of land, under a bond conditioned to make titles when the purchase-money is paid, his possession, so long as the purchase-money remains unpaid, is held to be in subordination to the title of the vendor, and in an action by the latter for the recovery of the land, the vendee cannot claim the protection of the Statute of Limitations on the ground of adverse possession under color of title. But when the vendee has complied with the terms of the contract on his part, by paying the purchase-money, such a bond is color of title; and if he thereafter remain in possession, claiming the land as his own, for the period prescribed by the Statute of Limitations, the legal title will be barred." See also *Harris v. King*, 16 Ark. 122; *Harral v. Levery*, 50 Conn. 46; 47 Am. Rep. 608.

He who has the title to land, is to be deemed to be in the seisin and possession of it, and to continue so until ousted thereof by an actual possession in another under a claim of right. The possession of one who enters disclaiming title, is to be considered as a possession by the consent of him who has the title; nor will a continuance of this possession avail to mature a title under the Statute of Limitations, until the character of the possession has been changed, either by a declaration to that effect, communicated to him who has the title, or by the exercise of acts of ownership, inconsistent with a tenancy by the consent of him who has the title. *Stamper v. Griffin*, 20 Ga. 312. See also *Greeno v. Munson*, 9 Vt. 37; 31 Am. Dec. 605.

In *Ripley v. Yale*, 18 Vt. 220, the court, by Williams, C. J., said: "While there subsists any contract, express or implied, for the purchase of the title, between the parties in and out of possession, the possession cannot be adverse.

The extent of the possessor's claim is measured by his contract; he cannot dispute the title of the person under whom he purchases, but holds subservient to him; and until he does some unequivocal act, to manifest a repudiation of the contract and bring this home to the knowledge of the other party, he cannot be considered as holding adverse to the person under whom he took possession; at least, nothing short of this unequivocal act and notice can be considered as constituting an adverse possession in him."

But see, *contra*, *Bright v. Rochester*, 7 Wheat. (U.S.) 548, where the court, by Marshall, C. J., said: "The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon, in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it."

In *Green v. Dietrich*, 114 Ill. 636, the court, by Scott, J., said: "The vendee is under no obligation to maintain his vendor's title, and there is no policy of law that forbids the vendee in possession to buy an outstanding title to the premises, and assert it against his vendor, otherwise it might be asserted by the owner, or a stranger might buy it, and it would be lost to both." To the same effect is *Jackson v. Johnson*, 5 Cow. (N. Y.) 74; 15 Am. Dec. 433.

A vendee in possession, whose vendor conveys to another in violation of his contract, is absolved, and may deny the title he entered under, and purchase and defend under any other claim. *Logan v. Steele*, 7 T. B. Mon. (Ky.) 102; 86 Am. Dec. 83. This applies to a purchase at tax sale, although the one buying in the title was not bound to pay the tax. *Johnston v. Smith*, 70 Ala. 108; *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369.

1. ESTOPPEL, vol. 7, pp. 25, 27.

they have no application, for instance, where suit is brought to recover the purchase-money, where want of title may be a complete defense.¹

f. FURNISHING ABSTRACT—(See also *ABSTRACT OF TITLE*, vol. I, p. 46; *TITLE (REAL PROPERTY)*, vol. 26, p. 20).—It is a common custom, in the carrying out of sales of land, to furnish an abstract of title.² In *England* it may be required by the vendee, but in the *United States* the law is otherwise.³ Even if it is customary to furnish one, it cannot be legally demanded, unless provided for in the contract,⁴ as in case the parties stipulate that furnishing it shall be a condition precedent.⁵ The difference in the law in this regard, in the two countries, probably proceeds out of the fact that in *England*, the burden of proving title is on the vendor, while in the *United States*, invalidity of title is a matter of defense, to be alleged and proved by the purchaser.⁶

1. A covenant, by the vendors, that they would execute to the purchaser, on a certain day "a good and sufficient conveyance" of a certain lot of land, was held to bind the vendors to convey a good title to the purchaser; and the title of the vendors having been extinguished before the conveyance by sale under a mortgage, although the mortgage existed and was upon record at the time of making the contract, it was held that the purchaser had a right to treat the contract as rescinded, without demanding a conveyance; and that this failure of the vendor's title was a good defense to an action brought to enforce payment of a judgment, obtained upon a note given in part payment of the first installment of the purchase-money; such judgment having been rendered before the extinguishment of the vendor's title by a sale under the mortgage, and consequently at a time when the purchaser had no valid defense. *Burwell v. Jackson*, 9 N. Y. 535.

2. *Abstracts of Title*.—In *New York*, it is customary for the abstract to be made at the vendor's expense. *Connelly v. Pierce*, 7 Wend. (N. Y.) 131; *Carpenter v. Brown*, 6 Barb. (N. Y.) 149.

3. *ABSTRACT OF TITLE*, vol. I, p. 46.

In *England*, it is customary to give an abstract of title to the vendee, but this is not the custom in the *United States*. It is common, however, to recite the claim of title in the preamble of the deed. *Espy v. Anderson*, 14 Pa. St. 308.

4. In *Alabama*, however, an abstract may be demanded in the absence of

special agreement. *Wade v. Killough*, 5 Stew. & P. (Ala.) 450; *Chapman v. Lee*, 55 Ala. 623.

Where a contract contains the following stipulation, "title to be good, or the money to be refunded, party of the first part to furnish abstract of title to said land," and an abstract is furnished which fails to show good title, money paid by the purchaser may be recovered, even though, as a matter of fact, the title is perfect. *Boas v. Farrington*, 85 Cal. 535.

A vendor, who has agreed to furnish an abstract as a condition precedent to a part payment of the purchase-money, is absolved from the necessity of doing so, if the purchaser notifies him that he is unable, for want of funds, to comply with the contract. *Johnston v. Johnson*, 43 Minn. 5.

5. It was held in *Howe v. Hutchison*, 105 Ill. 501, that if the furnishing of an abstract is made a condition precedent, failure in this regard will justify the purchaser in considering the contract at an end, and the vendor cannot legally demand an extension of time, in order to prepare a second abstract, the first one failing to disclose the title agreed upon.

Where the abstract is placed in the hands of a third party, and notice given to the purchaser that it may be seen there, and no objection is made at the time, the failure to furnish the abstract directly to the purchaser cannot be successfully claimed as a ground of rescission. *Papin v. Goodrich*, 103 Ill. 86.

6. *Martindale on Abstracts of Title* (2d ed.), § 5; *Blackburn v. Smith*, 2

If a "good and sufficient" or "merchantable" abstract is called for by the contract, the one furnished must be in orderly form for perusal, and certified by some person of recognized skill and financial responsibility.¹

If practicable, the abstract should deduce title from the *United States* or a state government. With the exception of titles derived from Indian tribes and foreign nations, and subsequently ratified by treaty or statute, the government patent or grant is regarded as the ultimate source of the title.² If impracticable to go back to the original source, as is frequently the case in the older communities, the abstract must begin at a point far enough remote to make sure that the Statute of Limitations has run against all adverse interests, bearing in mind that it is generally suspended to preserve the rights of persons under disability. A common period is forty years.³

g. PRODUCTION OF TITLE DEEDS.—While, owing to the registration system, the original title papers are now of minor importance, the right to them is in the vendee, on the completion of the contract, and he can compel their production by a suit in equity.⁴

h. PREPARATION OF THE DEED OF CONVEYANCE.—In *England*, the duty of preparing the deed and transferring the title rests upon the purchaser;⁵ in the *United States*, upon the vendor.⁶ Until

Exch. 792; *Daily v. Litchfield*, 10 Mich. 38; *Little v. Paddleford*, 13 N. H. 167. In *Espy v. Anderson*, 14 Pa. St. 312, the court, by Coulter, J., said: "The rule is *caveat emptor*. It is the duty, therefore, of a purchaser to examine for himself. The defendant is not bound to accept a doubtful title, but it is his business to show that it is doubtful or positively bad. In *England*, it is customary to give to the vendee an abstract of title, but that is not usual here. It is common, however, to recite the chain of title in the preamble to the deed."

1. Warvelle on Vendor and Purchaser, p. 328.

If the agreement be to furnish a "satisfactory" abstract, the word "satisfactory" applies to the abstract only, and constitutes no agreement as to title. This is very clearly so where only a quit-claim deed is called for. *Fitch v. Willard*, 73 Ill. 92.

A "perfect" abstract is one properly prepared, although it be of a defective title. *Blackburn v. Smith*, 2 Exch. 792.

2. A title derived from an Indian or Indian tribe, merely extinguishes the rights of the original grantor, but is inoperative for other purposes until confirmed by the government. Such title

is held subject to the laws of the Indians, and if they choose to again take the property and to make a different disposition of it, the courts cannot protect the rights before granted. *Jackson v. Porter*, 1 Paine (U. S.) 457; *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543; *Mitchel v. U. S.*, 9 Pet. (U. S.) 711; *U. S. v. Fernandez*, 10 Pet. (U. S.) 303; *U. S. v. Rillieux*, 14 How. (U. S.) 189.

Titles derived from foreign governments are inchoate until confirmed by our own. *U. S. v. Percheman*, 7 Pet. (U. S.) 51; *U. S. v. Clarke*, 9 Pet. (U. S.) 168; *Smith v. U. S.*, 10 Pet. (U. S.) 326; *U. S. v. Clarke*, 16 Pet. (U. S.) 228; *Les Bois v. Bramell*, 4 How. (U. S.) 449.

3. Martindale on Abstracts of Title (2d ed.), §§ 18, 19; *People v. Arnold*, 4 N. Y. 508.

4. *Wilson v. Rybolt*, 17 Ind. 391; 79 Am. Dec. 486.

5. Sugden on Vendors and Purchasers (8th Am. ed.), p. 241; *Knight v. Crockford*, 1 Esp. 191; *Baxter v. Lewis*, 4 Exch. Rep. 61; *Gibson v. Goldsmid*, 5 De G. M. & G. 757; 1 Jur. N. S. 1; *Webb v. Bethel*, 1 Lev. 44. See also *Taylor v. Longworth*, 14 Pet. (U. S.) 175.

6. *Taylor v. Longworth*, 14 Pet. (U.

a deed has been drawn and tendered, the vendee is not in default, and no suit can be maintained against him,¹ unless the require-

S.) 175; *Byers v. Aiken*, 5 Ark. 419; *Drennen v. Boyer*, 5 Ark. 497; *Arledge v. Rooks*, 22 Ark. 427; *Chatfield v. Williams*, 85 Cal. 518; *Buckmaster v. Grundy*, 2 Ill. 310; *Winton v. Sherman*, 20 Iowa 295; *Smith v. Haynes*, 9 Me. 128; *Hill v. Hobart*, 16 Me. 164; *Tinney v. Ashley*, 15 Pick. (Mass.) 546; 26 Am. Dec. 620; *Swan v. Drury*, 22 Pick. (Mass.) 485; *St. Paul Div. No. 1, Son of Temperance v. Brown*, 9 Minn. 157; *Johnston v. Beard*, 7 Smed. & M. (Miss.) 217; *Standifer v. Davis*, 13 Smed. & M. (Miss.) 48; *Fuller v. Hubbard*, 6 Cow. (N. Y.) 13; 16 Am. Dec. 423; *Hudson v. Swift*, 20 Johns. (N. Y.) 24; *Hackett v. Huson*, 3 Wend. (N. Y.) 249; *Christian v. Nixon*, 11 Ired. (N. Car.) 1, 3; *Hardy v. McKessom*, 7 Jones (N. Car.) 567; *Guthrie v. Thompson*, 1 Oregon 353; *Walling v. Kinnard*, 10 Tex. 508; 60 Am. Dec. 216; *Seely v. Howard*, 13 Wis. 336.

In *Cooper v. Brown*, 2 McLean (U. S.) 500, the court said: "The rule of the common law, as to the preparation of the deed by the vendee, has not, generally, been adopted in this country. It is not in force in this state (*Illinois*). The vendor who binds himself to make the conveyance must make it."

In *Headley v. Shaw*, 39 Ill. 354, the court, by Breese, J., said: "A party contracting to execute and deliver a deed, is bound to prepare the deed, if there be no agreement it shall be prepared by the other party, and the vendor must tender it to the vendee before he can demand the purchase-money. This seems to be the rule as established in all courts of law in this country." In *Connelly v. Pierce*, 7 Wend. (N. Y.) 131, the court, by Savage, C. J., said: "It may be considered the rule of this court, that when a party covenants to convey, he is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and having waited a reasonable time to have it drawn and executed has made a second demand. In *England*, the party entitled to the deed is bound to have it drawn and presented for execution; we have not gone so far; the party who is to give the deed, certainly should have it drawn at his own expense. . . . The purchaser, no doubt, may prepare the deed and tender it for execution."

In *Switzer v. Hummel*, 3 S. & R. (Pa.) 231, the court, by Tilghman, J., said: "In the present situation of the country, there is no difficulty in preparing a deed of conveyance, and therefore, no pretense for dispensing with what appears to be the plain meaning of the parties; that is to say, that when the seller covenants that he will convey the title to the purchaser (without any mention of such conveyance as the purchaser shall devise, etc.), he shall himself prepare and tender the deed of conveyance." But see, *contra*, *Wade v. Killough*, 5 Stew. & P. (Ala.) 450; *Chapman v. Lee*, 55 Ala. 623; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379; *Poulson v. Ellis*, 60 Pa. St. 134.

But, unless the contract so provides, a vendee has not the right to inspect the vendor's deed before paying the purchase-money. *Papin v. Goodrich*, 103 Ill. 86.

If a mortgage is to be given back for the purchase-money, the purchaser must draw and proffer the mortgage deed as a part of the necessary tender on his part. *Longfellow v. Moore*, 102 Ill. 289.

1. *Parker v. Parmele*, 20 Johns. (N. Y.) 130; 11 Am. Dec. 253; *Green v. Reynolds*, 2 Johns. (N. Y.) 207; *Smith v. Smeltzer*, 1 Hilt. (N. Y.) 287; *Johnson v. Wygant*, 11 Wend. (N. Y.) 48; *Adams v. Williams*, 2 W. & S. (Pa.) 227; *Brown v. Metz*, 5 Watts (Pa.) 164; *Davidson v. Van Pelt*, 15 Wis. 341.

In *Thomas v. Lanier*, 23 Ark. 639, the court, by Compton, J., said: "It is well settled that where, upon an agreement for the sale and purchase of land, the stipulations by which the vendor undertakes to make title, and the vendee to pay the purchase-money, are dependent, the vendor cannot maintain an action for the purchase-money until he has performed, or offered to perform, his part of the contract."

The plaintiff gave a bond to convey to the defendant a parcel of land, which the defendant had agreed to purchase, and the defendant gave a promissory note on demand, not negotiable, for the amount of the agreed consideration, but took from the plaintiff a receipt stating that if the bargain should be rescinded, the note should be given up, upon the defendant's giving up the

ment has been excused by the vendee's words or acts.¹ The vendor must tender a separate deed of each lot sold.²

X. COMPLIANCE WITH THE CONTRACT—1. In General.—The contract for the sale of land is completed by the execution and delivery of a deed by the vendor, and its acceptance by the purchaser.³ These acts annul the antecedent executory agreement, upon which no action can be brought afterward, even though the amount of land conveyed turns out to be less than was stated in the agreement.⁴ In order to have this effect, the deed must be operative.

bond. The bond, note and receipt bore the same date. It was held that these papers constituted one contract; that the contract was valid; and that an action would not lie on the note, without a previous tender of a deed of the land. *Hunt v. Livermore*, 5 Pick. (Mass.) 395.

A promise to pay a certain price for a lot of land "upon the presentation of the deed," implies tender of deed as a condition precedent to payment. *Welch v. Matthews*, 98 Mass. 131.

1. *Taylor v. Perry*, 5 Blackf. (Ind.) 599; *Jackson v. Speed*, 2 Duv. (Ky.) 426. As by giving notice of his refusal to carry out the contract. *Crary v. Smith*, 2 N. Y. 160.

Where there is a covenant for the sale and purchase of a farm, the conveyance to be made, and the consideration to be paid at a future day, if, previous to the stipulated day, the purchaser gives notice to the vendor that he has made up his mind to abandon the contract, and not accept a deed, it is enough to support an action of covenant by the vendor to allege such notice; and it is not necessary in such case to aver a tender of a deed or readiness to perform. *North v. Pepper*, 21 Wend. (N. Y.) 636.

2. *Van Eps v. Schenectady*, 12 Johns. (N. Y.) 436; 7 Am. Dec. 330.

3. In *Herbemont v. Sharp*, 2 McCord (S. Car.) 264, the court, by Huger, J., said: "In no case can a sale of lands be regarded as completed, until the purchaser has paid his money and the seller conveyed the land."

An assignment indorsed upon a deed is not sufficient. *Bentley v. Defourt*, 2 Ohio 221; 15 Am. Dec. 546.

The sale is made at the time the deed is executed and delivered, and notes for, and a mortgage to secure, the price are taken by the grantor, though an oral agreement was reached by the parties thereto. *Joseph v. Decatur*

Land Imp., etc., Co. (Ala. 1894), 14 So. Rep. 739.

4. *Haggerty v. Fagan*, 2 P. & W. (Pa.) 533; *McKenna v. Doughman*, 1 P. & W. (Pa.) 417; *Jones v. Wood*, 16 Pa. St. 25; *Cronister v. Cronister*, 1 W. & S. (Pa.) 442; *Slocum v. Bracy* (Minn. 1893), 56 N. W. Rep. 826.

In *Carter v. Beck*, 40 Ala. 606, the court, by Walker, C. J., said: "The acceptance of the defendant's deed by the plaintiff, was a complete execution of the antecedent agreement to convey, and annulled it; and no action at law can be sustained upon it."

In *Houghtaling v. Lewis*, 10 Johns. (N. Y.) 299, the court, by Thompson, J., said: "Articles of agreement for the conveyance of land, are, in their nature, executory, and the acceptance of a deed, in pursuance thereof, is to be deemed, *prima facie*, an execution of the contract, and the agreement thereby becomes void and of no further effect. Parties may, no doubt, enter into covenants collateral to the deed, or cases may be supposed when the deed would be deemed only a part execution of the contract, if the provisions in the two instruments clearly manifested such to have been the intention of the parties. But the *prima facie* presumption of law arising from the acceptance of a deed, is that it is an execution of the whole contract; and the rights and remedies of the parties, in relation to such contract, are to be determined by such deed, and the original agreement becomes null and void. This appears to be a sound and salutary rule."

Articles of agreement for the purchase of land become merged in the conveyance, and are thenceforth null and void; there being no allegation of fraud or mistake in the execution of the conveyance. *Creigh v. Beelin*, 1 W. & S. (Pa.) 83.

In *Shontz v. Brown*, 27 Pa. St. 131, the court, by Woodward, J., said: "A

If insufficient, the vendee is not precluded by it from afterward objecting to it on this ground.¹ If it merely fails to conform to the contract, he cannot afterward object if he said nothing at the time, or refused to carry out the contract upon another ground.² If the contract is not carried out through the refusal of the purchaser to accept a deed of such part of the land as the vendor can convey, the vendor may transfer the land to another, the purchaser's only remedy being a suit for damages against his vendor.³

2. Execution and Delivery of the Deed—(See also ACKNOWLEDGMENT, vol. 1, p. 143; DEEDS OF CONVEYANCE, vol. 5, p. 423).—The deed, having been prepared by the vendor,⁴ must be duly

title bond that looks to a future conveyance, is executed by a conveyance made in good faith and to the satisfaction of the parties—does the bond survive? Clearly not. When a condition is performed it is thenceforth merged and gone. The presumption of law is that the acceptance of a deed in pursuance of articles is a satisfaction of all previous covenants, and where the conveyance contains none of the usual covenants, the law supposes that the grantee agreed to take the title at his risk. And though, in special circumstances, a deed may be considered, not as a merger of prior articles, but only as part performance, yet the general rule is that a purchase is consummated by the conveyance; after which the parties have no recourse to each other except for imposition, or fraud, or upon the covenants in the deed.”

A covenant in an agreement to sell and convey land, that the premises “shall be free and clear from all incumbrances,” is merged in the deed delivered and accepted in accordance with the agreement, and the only remedy for breach of the contract is upon the covenant in the deed; and this is true, though the agreement is made by one person and the deed by another. *Carr v. Roach*, 2 Duer (N. Y.) 20.

But a guaranty of title is not merged in a subsequent conveyance which contains only a special warranty. *Drinker v. Byers*, 2 P. & W. (Pa.) 528.

A contract, by the vendor, to give immediate possession, is distinct from the covenants of the deed thereafter made, and is not merged therein. *Williams v. Frybarger* (Ind. App. 1894), 37 N. E. Rep. 302.

A deed of conveyance of real estate does not merge in a second deed between the same parties for the same

estate. *Kenrick v. Smick*, 7 W. & S. (Pa.) 41.

The title of the obligor, in a bond for the conveyance of real estate, is not affected by a deed of such estate tendered by him, and which was never accepted by the purchaser nor delivered to him. *Cole v. Gill*, 14 Iowa 527.

1. The mere fact that the defendants, who were entitled, by the condition of a contract, to a legal conveyance of real estate, accepted a paper purporting to be a deed, would not constitute a performance of such condition by the plaintiff. They would not be concluded from objecting to its sufficiency. *Thompson v. Richards*, 14 Mich. 172.

2. *Kenniston v. Blakie*, 121 Mass. 552; *Stryker v. Vanderbilt*, 25 N. J. L. 482.

Although a deed tendered may not conform to the terms of the contract, yet, if the vendee makes no objection to it, either for form or substance, but merely says that he is unable to pay for the land, he thereby waives all objections to the deed, and cannot take advantage of its failure to conform to the contract when he is sued for possession. *Moak v. Bryant*, 51 Miss. 560. See also *Morgan v. Stearns*, 40 Cal. 434; *Dresel v. Jordan*, 104 Mass. 407.

It has been held that, if the deed is objectionable in substance, or fails to conform to the agreement, the vendee must prepare a deed and tender it for execution before the vendor can be put in default. *Hackett v. Huson*, 3 Wend. (N. Y.) 249.

3. *Dorn v. Dunham*, 24 Tex. 366.

A purchaser cannot be required to accept a deed for a tract of land when the vendee is without title, reasonably free from doubt, to one-half thereof. *Black Hills Nat. Bank v. Kellogg* (S. Dak. 1893), 56 N. W. Rep. 1071.

4. See *supra*, this title, *Rights, Duties, and Liabilities of the Parties*—

executed by him and delivered.¹ He has, if no time is stipulated, a reasonable time after demand.² The delivery of the deed and the payment of the purchase-money are to be, unless otherwise stipulated, contemporaneous acts,³ and neither party is in default without performance or tender on the part of the other.⁴

After the Contract is Made—Preparation of the Deed of Conveyance.

1. *Smith v. Haynes*, 9 Me. 128.

The deed must be so made, witnessed, and acknowledged that it can be recorded. *Tapp v. Beverley*, 1 Leigh (Va.) 88.

The deed should be free from erasures. *Markley v. Swartzlander*, 8 W. & S. (Pa.) 172.

2. *Kime v. Kime*, 41 Ill. 397.

Where the contract was, on the part of one to convey, and on the other to pay at a future time, it was held that the former was bound on demand, and could not rightfully withhold the deed until the term of credit had elapsed. *Eveleth v. Scribner*, 12 Me. 24; 28 Am. Dec. 147.

In *More v. Smedburgh*, 8 Paige (N. Y.) 607, Walworth, Ch., said: "As a general rule, if a vendor receives payment of a part of the purchase-money, after the time of payment fixed by the terms of the agreement has expired, or if the vendee continues in possession, under the agreement, long after the time specified therein for giving the deed, a court of equity may consider a strict performance at the day as waived. And the party, who has thus waived a literal performance of the terms of the agreement, will not afterward be permitted to insist upon a forfeiture, without notice to the other party, and giving him a reasonable time to perform on his part." See also *Porter v. Montgomery*, 26 Minn. 118.

A promise to make a title in "a short time," is not fulfilled by tendering a deed nearly two years afterward, and after the purchaser had abandoned the land. *Hussey v. Roquemore*, 27 Ala. 281.

Where the vendor covenants to convey, "in a reasonable time after request," a request for the deed without the production of the bond will be good. *Hill v. Hobart*, 16 Me. 164.

The condition of a bond "that if, within one year from the date, upon request of the said B, etc., the said A B shall make and deliver to the said B a good and valid deed," etc., is broken by a refusal to convey within a reasonable time after such request, made at

any time within the year. *Brown v. Clough*, 39 Me. 566.

A vendee of land cannot entitle himself to a rescission of the contract, by tendering the purchase-money and demanding the title before the time stipulated by the contract for making the title. *Clements v. Loggins*, 2 Ala. 514.

3. See *Underwood v. Tew*, 7 Wash. 297; *Ishmael v. Parker*, 13 Ill. 324.

The covenants in a bond for title are mutually dependent. *Feemster v. May*, 13 Smed. & M. (Miss.) 275; 53 Am. Dec. 83; *Wiggins v. McGimpsey*, 13 Smed. & M. (Miss.) 532; *Mobley v. Keys*, 13 Smed. & M. (Miss.) 677.

Where land is sold to be paid for in carpenter's work, the deed to be given when the work is done, there is no ground on which to claim a conveyance until the work is completed. *Stansbury v. Taggart*, 3 McLean (U. S.) 457.

To entitle a purchaser of real estate to demand a deed, it is sufficient that he is ready and offers to comply with the contract on his part, and has the ability to perform it. *Smoot v. Rea*, 19 Md. 398.

4. *Papin v. Goodrich*, 103 Ill. 86; *Hogan v. Kyle* (Wash. 1894), 35 Pac. Rep. 399.

The seller must offer to convey a perfect title by a deed tendered, in order to entitle him to recover the purchase-money. *Small v. Reeves*, 14 Ind. 163.

Where a contract clearly expresses the intention that payment of the price of land shall precede the conveyance, an action for the price may be brought without a conveyance or tender thereof. *Loud v. Pomona Land, etc., Co.*, 153 U. S. 564.

In *Headley v. Shaw*, 39 Ill. 354, the court, by Breese, J., said: "A party contracting to execute and deliver a deed, is bound to prepare the deed, if there be no agreement it shall be prepared by the other party, and the vendor must tender it to the vendee before he can demand the purchase-money. This seems to be the rule as established in all courts of law in this country." See also *Longworth v. Conwell*, 2 Blackf. (Ind.) 469.

Hence, the vendee cannot claim that he is not in default on the ground that no time was given him for inspecting the deed.¹ He will not be held to have waived his right of objection to the deed, however, unless he has been given an opportunity for examination.² The deed becomes operative only on accept-

Where a bond has been executed by the vendor, to make a deed upon the payment of the purchase-money, he is not bound to make a deed until all the purchase-money is paid; and hence, if the purchase-money is payable in installments, falling due at different times, he may proceed in law or equity to collect any of the installments after they are due, except the last, without offering to make a deed. *Terry v. George*, 37 Miss. 539.

In *Robb v. Montgomery*, 20 Johns. (N. Y.) 20, the court, by Spencer, J., said: "I consider the distinction to be clearly settled between dependent and independent covenants or promises. In the first case, the conveyance and payment are to be simultaneous acts, and there then must be an existing capacity in the one who is to convey, to give a good title; in the other case, where the payments are to precede the conveyance, it is no excuse for non-payment that there is not a present existing capacity to convey a good title, unless the one whose duty it is to pay, offers to do so on receiving a good title, and then it must be made to him, or the contract will be rescinded."

But if the vendee is beyond the jurisdiction, no tender is necessary. *Watson v. Sawyers*, 54 Miss. 64. So, also, if the vendee has incapacitated himself from performing certain conditions precedent. *Miller v. Whittier*, 32 Me. 203; *Carpenter v. Brown*, 6 Barb. (N. Y.) 147.

If no place is fixed for the delivery of the deed, the vendor is bound to seek the vendee and tender it. Or, if the vendee appoints a place, the vendor may tender the deed there. *Franchot v. Leach*, 5 Cow. (N. Y.) 506. The tender need not be absolute. If the deed be duly executed, it may be tendered on condition that the vendee executes the purchase-money notes and mortgage as agreed. *Huff v. Lawler*, 45 Ind. 80. The vendee, in order to maintain a suit against his vendor, must tender the purchase price, make a demand for a deed, and give the vendor a reasonable time to make it, and present himself to receive it. *Eames*

v. Savage, 14 Mass. 425; *Newcomb v. Brackett*, 16 Mass. 161; *Fuller v. Hubbard*, 6 Cow. (N. Y.) 13; *Fuller v. Williams*, 7 Cow. (N. Y.) 54. And when the vendor dies the same demand must be made, and time allowed to his representatives. *Fuller v. Williams*, 7 Cow. (N. Y.) 54; 16 Am. Dec. 423.

1. Inspection of Deed.—In *Papin v. Goodrich*, 103 Ill. 86, it appeared that a vendor claimed to have his deed ready but refused to show it to the purchaser, who had the money with which to make payment, if on inspecting the deed it should prove to be satisfactory. The court said: "Had Papin, or those representing him, the right to inspect the deed of Goodrich for the property before paying the \$35,000? It has been seen that the contract contains no provision to that effect, and that even the execution of a deed is not expressly provided for, but is simply inferred as a conclusion of law; but that inference is also that the money is first to be paid. Until after that is done, possession is not to be given, and no legal duty arises to execute a deed. Clearly there can be no right to inspect a deed before there is a legal duty on the opposite party to have it made, and ready to be delivered. An offer was made to prove that there was a custom in Chicago to afford purchasers an opportunity to inspect the deed before requiring them to make payment. This was properly excluded by the court. There was no offer to prove that it was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it. *Turner v. Dawson*, 50 Ill. 85; *Packard v. Van Schoick*, 58 Ill. 81. Besides, it is impossible there could be a custom to allow a party to inspect a deed at a time when there is no legal duty to have such deed made and ready to be delivered."

2. The mere failure of the purchaser to object to the sufficiency of a deed, when informed by his vendor that the deed was ready for delivery on the appointed day, does not estop him from afterward insisting that the vendor was

ance.¹ In order to be good, either as a compliance with the contract or as a tender, the deed must be that of the vendor, and not that of a third person.² Conveying title to the purchaser, or to another at his request,³ must be regular in form,⁴ and convey

unable to comply with all the stipulations of his contract, when it is not shown that he ever saw the deed. *McKleroy v. Tulane*, 34 Ala. 78.

1. Thus, if delivered to a party to hold in escrow, and wrongfully placed by him on record, the rights of the vendor are not affected, even though the purchaser conveys the property, while in possession of the vendor, to a third party with notice. *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166.

But an offer by a vendor, to convey other lands of the same kind as those he has agreed to convey, is not a compliance with the contract. *Bell v. Hutchings*, 86 Ga. 562.

2. *Crabtree v. Levings*, 53 Ill. 526. If the vendor, on discovering that he has no title to a portion of the land, promises to "make a valid deed" thereto, the vendee is not bound to accept the deed of a stranger, which, though it conveyed a good title, might yet involve the trouble and expense of an inquiry to ascertain its validity; he has a right to stand on the terms of his contract. *Hussey v. Roquemore*, 27 Ala. 282.

But the title to the property need not be in the obligor's name at the time he makes the contract, if, at the time for closing it, he was ready to transfer a good and valid title and deed. *Flanagan v. Fox (City Ct.)*, 25 N. Y. Supp. 514.

A bond for "a deed of conveyance in fee of the legal title," means a "good and sufficient" conveyance with the usual covenants of the vendor, and not of a stranger. Equity will not, in contracts of this nature, compel a vendee to pay money when his vendor cannot make him a title. *Rudd v. Savelli*, 44 Ark. 145.

In *Dresel v. Jordan*, 104 Mass. 415, the court, by Wells, J., said: "The equitable rule is established by numerous authorities, that where time is not of the essence of the contract, and is not made material by the offer to fulfill by the other party, and request for a conveyance, the seller will be allowed reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. And in all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at

the time when, by the terms of his agreement or by the equities of the particular case, he is required to make the conveyance, in order to entitle himself to the consideration." But see *Bateman v. Johnson*, 10 Wis. 1.

A contract to convey, or cause it to be done, is the same, in legal effect, as a contract to convey by the obligor, unless it is stipulated that the title is to be made by a third party. *Gaar v. Lockridge*, 9 Ind. 92.

Where the agreement is that the deed shall be executed by another, it must be made by that other. *Carpenter v. Bailey*, 17 Wend. (N. Y.) 244.

Where the obligation is to be void if the principal obligor and E, his wife, in a convenient time after she comes of age, shall execute and deliver the title to certain lands which, in the condition, are recited as land of the wife, sold by the husband, the agreement binds the obligors to procure a conveyance in fee by the wife, and not merely her dower estate. *Pinkston v. Hine*, 9 Ala. 252.

3. *Athens v. Nale*, 25 Ill. 195. Under a bond to convey lands to the obligee, his heirs or assigns, a conveyance to a third party, upon the verbal request of the obligee to that effect, is a performance of the condition of the bond, and will be so held, notwithstanding that, after such conveyance, the obligee assigns the bond to a fourth party. *Burt v. Henry*, 10 Ala. 874.

Deed to Assignees.—The vendor in an agreement for the sale of land, is not required to search for the assignees of the purchaser to tender a deed of conveyance. It is sufficient if he tenders it to the purchaser. If the agreement is assigned, the assignee should make a demand of the vendor for a conveyance within a reasonable time; if they do not do so, they cannot claim specific performance. *Hedenberg v. Jones*, 73 Ill. 149.

The vendor, having given a bond for title, received the money, and placed the vendee in possession, has no concern with the subsequent transactions of the vendee, or those who represent him. He may refuse to convey to any one unless he shows a regular chain of assignments. *Wright v. Thompson*, 14 Tex. 558.

4. In *Hoffman v. Fett*, 39 Cal. 112,

the estate agreed upon.¹ It must be free from conditions and restrictions,² and must be executed by all the obligors,³ in favor of all the obligees.⁴ It is immaterial, so far as the requisites of the deed are concerned, whether it is to be made to the original vendee or his assignee.⁵

a. COVENANTS—(See also COVENANT, vol. 4, p. 463; IMPLIED COVENANTS, vol. 9, p. 960; INCUMBRANCES, vol. 10, p. 361; REAL COVENANTS, vol. 19, p. 973).—As to what covenants, if any, must be contained in the deed of conveyance, the decisions in the various states differ. A quitclaim deed passes all the right, title, and interest, as effectually, in one sense, as a technical deed of bargain and sale,⁶ and some authorities consider that it is

the court, by Temple, J., said: "If there was a sale, and the conditions of the sale have been fully performed on the part of the purchaser, it will be presumed that the vendor undertook to make such a conveyance as will render the sale effectual."

It must be sufficient under the statutes defining what is necessarily contained in a deed. *Parker v. McAllister*, 14 Ind. 12. See also *Moore v. Bickham*, 4 Binn. (Pa.) 1.

1. A tender by the plaintiff, of a deed conveying an estate by metes and bounds, but not containing the words, "all my right, title, interest and enjoyments," which words were in a previous agreement to convey, is sufficient. *Brown v. Bellows*, 4 Pick. (Mass.) 179.

A covenant to convey a farm of land means the whole farm, and will not be satisfied by a conveyance of part only. *Jones v. Gardner*, 10 Johns. (N.Y.) 266.

A covenant to convey land, together with a right to erect a dam and overflow land of the vendor, is not satisfied by a deed of the land making no mention of the easement. *Wilson v. McNeal*, 10 Watts (Pa.) 422.

2. *McGlynn v. Maynz*, 104 Mass. 263. An agreement to convey land subject to a mortgage, to be assumed by the grantee as part of the consideration, is not complied with by conveying subject to a condition that the grantee shall indemnify the grantor against the mortgage. *Dresel v. Jordan*, 104 Mass. 407.

3. *Johnson v. Collins*, 20 Ala. 435. Even though the title is in one alone. *Hill v. Hobart*, 16 Me. 164.

An agreement by tenants in common of land, to give "a good and sufficient warranty deed" thereof, is complied with by a deed in which each warrants

his title to his own share only. *Coe v. Harahan*, 8 Gray (Mass.) 198.

4. An agreement to execute and deliver a deed to A, B and C, is not satisfied by the tender of a deed in favor of A, B. & Co. *McMurray v. Fletcher*, 24 Kan. 574.

5. When the vendee has contracted for the purchase of land, and sold it to another, the latter will be entitled to receive from the first vendor the same kind of deed which he contracted to give his vendee, if the latter purchaser elects to resort to him for conveyance. *Gibbs v. Blackwell*, 37 Ill. 191.

6. COVENANTS.—*Butterfield v. Smith*, 11 Ill. 485; *Brady v. Spurck*, 27 Ill. 478; *Delavan v. Duncan*, 49 N. Y. 487; *Carter v. Wise*, 39 Tex. 273.

In *Morgan v. Clayton*, 61 Ill. 40, the court, by Scott, J., said: "A quitclaim deed will as effectually pass the title, and covenants running with the land, as a deed of bargain and sale, if the deed itself contains no words restricting its meaning."

In *Rowe v. Beckett*, 30 Ind. 162; 95 Am. Dec. 676, the court, by Gregory, J., said: "A quitclaim deed is as effectual to convey land, as a deed with full covenants."

In *Nicholson v. Caress*, 45 Ind. 485, the court, by Buskirk, J., said: "The general principle is well settled that a grantor, conveying by deed of bargain and sale, and by way of release or quitclaim of all his right and title to a tract of land, if made in good faith and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed; and that a deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seised or possessed at the

all that can be demanded under a contract which does not specify any particular kind of deed,¹ or which merely provides that the conveyance shall be by "good and sufficient deed."² But a quitclaim deed only passes the present title of the grantor, who can hold beneficially any after-acquired estate.³ Other authorities, therefore, require that there shall be tendered a general warranty,⁴

time, and does not operate to pass or bind an interest not then in existence. The principle deducible from the authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterward denying that he was so seised and possessed at the time he made the conveyance."

1. *Thayer v. Torrey*, 37 N. J. L. 339; *Van Eps v. Schenectady*, 12 Johns. (N. Y.) 436; 7 Am. Dec. 330; *Ketchum v. Evertson*, 13 Johns. (N. Y.) 359; 7 Am. Dec. 384; *Pugh v. Chesseldine*, 11 Ohio 109; 37 Am. Dec. 414.

In *Kyle v. Kavanagh*, 103 Mass. 356; 4 Am. Rep. 360, the agreement was that the vendor should give a good title. The purchaser insisted that, under this agreement, he was entitled to a warranty deed. The court thought otherwise, and said that, under the statute a deed of quitclaim passed all the estate which the grantor would convey by a deed of bargain and sale, and that if the grantor had in fact a good title, it was conveyed by his deed of quitclaim as effectually as by a deed of warranty; and cited *Gazley v. Price*, 16 Johns. (N. Y.) 267; *Ketchum v. Evertson*, 13 Johns. (N. Y.) 359; *Potter v. Tuttle*, 22 Conn. 512. See also *Freeman v. McGaw*, 15 Pick. (Mass.) 82; *Russell v. Coffin*, 8 Pick. (Mass.) 143.

2. *Brown v. Jackson*, 3 Wheat. (U. S.) 449; *Kyle v. Kavanagh*, 103 Mass. 356; 4 Am. Rep. 560; *Pray v. Pierce*, 7 Mass. 381; 5 Am. Dec. 59; *Thayer v. Torrey*, 37 N. J. L. 339; *Jackson v. Fish*, 10 Johns. (N. Y.) 456; *Gazley v. Price*, 16 Johns. (N. Y.) 269; *Hall v. Ashby*, 9 Ohio 96; 34 Am. Dec. 424.

In *Bagley v. Fletcher*, 44 Ark. 160, the court, by Smith, J., said: "In *England*, we understand the law to be that a deed of release can never operate technically as a conveyance *per se*, but only by way of enlargement of a previous estate. . . . But in this country, a quitclaim deed is a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim and estate of the grantor, as a deed of full covenants, although the grantee has no possession or prior interest in the land. It is almost the only mode in practice where the vendor does not wish to warrant the title." But see notes immediately following.

3. *Nicholson v. Caress*, 45 Ind. 479; *Johnston v. Mendenhall*, 9 W. Va. 112.

4. *Witter v. Biscoe*, 13 Ark. 422; *Clark v. Lyons*, 25 Ill. 90; *Linn v. Barkey*, 7 Ind. 70; *Bethel v. Bethel*, 92 Ind. 318; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 293; *Hedges v. Kerr*, 4 B. Mon. (Ky.) 528; *Dwight v. Cutler*, 3 Mich. 566; 64 Am. Dec. 105; *Allen v. Hazen*, 26 Mich. 143; *Johnston v. Piper*, 4 Minn. 192; *Holman v. Criswell*, 15 Tex. 394; *Varde-man v. Lawson*, 17 Tex. 10; *Bowen v. Thrall*, 28 Vt. 385; *Goddin v. Vaughn*, 14 Gratt. (Va.) 102; *Hoback v. Kilgores*, 26 Gratt. (Va.) 442; 21 Am. Rep. 317; *Kenny v. Hoffman*, 31 Gratt. (Va.) 442.

In *Church v. Brown*, 15 Ves. 263, the court, by Eldon, L. Ch., said: "If a man covenants to sell a fee-simple estate, free from all incumbrances, and says no more, it is clear that covenant carries *in gremio*, and in the bosom of it, the right to proper covenants. Why? Because that sort of engagement has, in all time, been carried into execution in a form and mode, which alters almost materially, substantially and importantly the effect of the mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants; the words operating warranties and obligations, which it was not understood between the person's contracting that the one was to undertake, and

and still others, either a general or special warranty deed.¹ Another class of decisions takes the view that all contracts should be construed in the light of surrounding circumstances and in view of local customs, and holds that the deed must contain the covenants usual in instruments passing the fee in use in the vicinity of the land.² Special agreements as to what covenants are to be contained in the deed are to be given full effect.³ If for "usual covenants" they call for a deed with covenants of seisin, that the

the other to have the benefit of; and accordingly, it is perfectly settled by the law what are the covenants as applied to the case of a vendor, who was himself a purchaser for valuable consideration."

In *Herryford v. Turner*, 67 Mo. 298, the court, by Hough, J., said: "It seems to be generally maintained by the authorities that, upon an agreement for the sale of lands, in the absence of express stipulations to the contrary, the vendor is to be considered as contracting for a general warranty."

In *Tarenner v. Barrett*, 21 W. Va. 681, the court, by Green, J., said: "The undisputed law is that, as a general rule, upon an agreement for the sale of land, the vendor, though nothing be said in the contract on the subject, is considered as contracting for a general warranty. 'With respect to the persons who are bound to enter into these covenants, it may be observed, in general, that all persons who convey lands whereof they are seised to their own use, are bound to enter into the usual covenants for the title of the land conveyed. But where the estate is sold by trustees under a will, a purchaser is not entitled to covenants for the title. And the same rule applies where an estate is sold under an order of a court of equity.'"

According to this line of authorities, an agreement for a "good and sufficient deed," entitles the vendee to a warranty deed. *Clute v. Robinson*, 2 Johns. (N. Y.) 595; *Van Eps v. Schenectady*, 12 Johns. (N. Y.) 436; 7 Am. Dec. 330; *Tremain v. Liming*, Wright (Ohio) 644.

So if the contract is for a "sufficient conveyance." *Clark v. Lyons*, 25 Ill. 90.

The rule applies only where the grantor sells his own land. A mortgagee or trustee, who offers to sell under a mortgage or deed of trust, is expected only to covenant against the

grantor's own acts. *Faircloth v. Isler*, 75 N. Car. 551.

1. In *Lloyd v. Farrell*, 48 Pa. St. 78; 86 Am. Dec. 83, the court, by Strong, J., said: "The purchaser of a perfect right is not entitled to anything more than a covenant against the acts of the grantor and his heirs—that is, a covenant of special warranty."

A contract for the sale of land, by which the vendor agrees to "make a sufficient title, as far as his claim extends on said lands," binds the vendor to warrant, especially against his own acts. *Gilchrist v. Buie*, 1 Dev. & B. Eq. (N. Car.) 346.

A covenant to make "a good and lawful deed, clear of all incumbrances," is satisfied by a deed of special warranty, where the parties express their meaning to be "only a warranty deed subject to all the demands of the Commonwealth." *Withers v. Baird*, 7 Watts (Pa.) 227; 32 Am. Dec. 754.

An agreement to convey by "warranty deed" has been construed to mean a special warranty deed. *Espy v. Anderson*, 14 Pa. St. 312.

In *Cadwalader v. Tryon*, 37 Pa. St. 322, the court, by Thompson, J., said: "The grant of a fee does not necessarily imply a general warranty of title. It does, however, include a special warranty, that is to say, against the grantors and his heirs."

2. *Dwight v. Cutler*, 3 Mich. 566; 64 Am. Dec. 105; *Allen v. Hazen*, 26 Mich. 146.

A purchaser, under a land contract, that does not specify what sort of deed he is entitled to, may demand a deed with customary covenants; but what is customary, is determined by the *lex rei sitæ*. *Gault v. Van Zile*, 37 Mich. 22.

3. A deed with a personal covenant to indemnify, is not a deed in performance of an agreement to convey free of incumbrances. *Young v. Paul*, 10 N. J. Eq. 401; 64 Am. Dec. 456.

grantor has a right to convey, against incumbrances, quiet enjoyment, and warranty.¹

The effect of agreements for warranty deeds is considered in the note.² Whatever the covenants of the deed are, they relate to the estate conveyed, and neither enlarge nor restrict it.³

XI. EFFECT OF THE CONVEYANCE—(See also IMPLIED COVENANTS, vol. 9, p. 960)—1. **In General**—*a*. **UPON THE PARTIES**.—The conveyance is the consummation of the contract. With it all rights of the vendor in the land cease, and by it there is vested in the purchaser the full legal and equitable title to the property, subject only to the vendor's lien for purchase-money.⁴ The former should deliver to the latter possession of the property. This may be done by the delivery of a key or other symbolic act, although no formality is necessary.⁵

If the vendor refuses to give up the possession, he may be proceeded against as a trespasser, or treated as a tenant at will, and sued for the rent. In such event he cannot, by parol evidence, show a reservation of possessory rights in himself.⁶ If he remains

1. Warvelle on Vendor and Purchaser, p. 419; 4 Kent's Com. 471; Wilson v. Wood, 17 N. J. Eq. 216; 88 Am. Dec. 231.

2. **Agreements Calling Expressly for Warranty Deed**.—The contract, "to give a good and sufficient deed of warranty of all and fully the promisor's interest in M lot, meaning all and fully the same right, title, and interest deeded to him by P, by deed dated May 28, 1835," requires only a conveyance, with warranty of the same title received from P, and not a warranty of P's title. Babcock v. Wilson, 17 Me. 372.

A contract to convey, by a "good and sufficient deed of general warranty," does not, by itself, include a covenant against incumbrances, nor bind the vendor to procure a release of his wife's dower. It amounts to no more than an engagement that it should bar the vendor and his heirs from claiming the land, and that he and his heirs should defend it, when assailed by a paramount title. Bostwick v. Williams, 36 Ill. 65; 85 Am. Dec. 385.

A stipulation that the vendor shall make a sufficient deed for conveying and assuring, containing the usual full covenants of warranty of title free from all liens and incumbrances, binds him to make deeds with substantial covenants of seisin, freedom from incumbrances, and general warranty. McKleroy v. Tulane, 34 Ala. 78.

An agreement to convey by war-

ranty deed is not satisfied by a deed of the grantor's "right, title, and interest," with a warranty to defend "the aforesaid premises." Such an agreement intends the usual covenants of seisin, and against incumbrances. Bowen v. Thrall, 28 Vt. 382.

Under an agreement to give a warranty deed, "such an one as he had taken from his vendor," which, in fact, contained only a warranty against the grantor's acts, and which was shown to the vendee without his discovering this fact, the vendee understanding that the agreement was for a warranty deed, and the vendor knowing that he so understood, the vendor must convey by a warranty deed, as that term is usually understood. Barlow v. Scott, 24 N. Y. 40.

"Where the contract provides for a warranty deed, this is generally understood as meaning the five covenants now usually inserted in deeds of bargain and sale." Warvelle on Vendor and Purchaser, p. 349.

But it has been held that an agreement to give a warranty deed, does not call for a covenant against incumbrances. Wilsey v. Dennis, 44 Barb. (N.Y.) 354.

3. Drury v. Holden, 121 Ill. 130; Lehndorf v. Cope, 122 Ill. 317.

4. See VENDOR'S LIEN, vol. 28.

5. Warvelle on Vendor and Purchaser, p. 197; Indiana Canal Co. v. State, 53 Ind. 575.

6. Jones v. Timmons, 21 Ohio St. 596.

in possession, his holding will not be treated as adverse, unless the ordinary presumption of license, raised by the fact of the relation of the parties, is rebutted by evidence.¹ Some authorities have held that even such evidence will not avail, if the vendor has made a warranty deed, but that the doctrine of estoppel will prevent him from asserting a title by adverse possession.²

The vendor of land is estopped by a covenant of warranty from setting up an after-acquired title to the land.³

b. UPON THIRD PARTIES.—The deed, in order to affect third parties, should be recorded, for it is generally provided by the recording acts of the various states that a deed shall only be valid

1. *Ellicott v. Pearl*, 10 Pet. (U. S.) 412; *Alden v. Gilmore*, 13 Me. 178; *Little v. Liby*, 2 Me. 242; 11 Am. Dec. 68; *Abbott v. Gregory*, 39 Mich. 68; *Farrar v. Fessenden*, 39 N. H. 277; *Jackson v. Sharp*, 9 Johns. (N. Y.) 167; 6 Am. Dec. 267; *Miller v. Shaw*, 7 S. & R. (Pa.) 136; *Schwallbach v. Chicago, etc., R. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740.

In *Jones v. Miller*, 3 Fed. Rep. 386, the court, by McCrary, C. J., said: "I do not say that in no case a grantor, who has given a warranty deed, can hold adversely to his grantee, but I am clearly of the opinion that such holding must be established by clear and undoubted testimony, showing a change in the relations of the parties toward the land."

In *Horbach v. Miller*, 4 Neb. 31, the court, by Gantt, J., said: "It is, however, insisted that there must not merely be possession, but that this possession must be under a claim of right for the whole statutory period. This is true, but the question is, what constitutes such a claim of right? In answer to this, it is only necessary to observe that the rule seems to be well settled that acts of notoriety, such as building a fence around the land, entering upon the land and making improvements thereon, are presumptive evidence and evincive of intention to assert ownership over and possession of the property; and taxation of the land for a series of years to the person claiming it, and the payment of taxes by him, are competent evidence tending to show ownership."

In *Huntington v. Whaley*, 29 Conn. 398, the court, by Sanford, J., said: "The doctrine of adverse possession is to be taken strictly. An adverse possession is not to be made out by inference, but by clear and positive proof.

Every presumption is in favor of possession in subordination to the title of the true owner."

In *Kennebeck Purchase v. Springer*, 4 Mass. 417; 3 Am. Dec. 227, the court, by Parsons, C. J., said: "The law upon this subject seems to be well settled. When a man is once seised of land, his seisin is presumed to continue until a disseisin is proved. When a man enters on land, claiming a right of title to the same, and acquires a seisin by his entry, his seisin shall extend to the whole parcel, to which he has right; for in this case an entry on part is an entry on the whole. When a man not claiming any right or title to the land shall enter on it, he acquires no seisin, but by the ouster of him who was seised, and he is himself a disseisor. To constitute an ouster of him who was seised, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. When a disseisor claims to be seised by his entry and occupation, his seisin cannot extend further than his actual exclusive occupation; for no further can the party seised be considered as ousted; for the acts of a wrong doer must be construed strictly, when he claims a benefit from his own wrong."

2. *Van Keuren v. New Jersey Cent. R. Co.*, 38 N. J. L. 165; *McCormick v. Herndon*, 67 Wis. 650. But see *Sherman v. Kane*, 86 N. Y. 57.

There is no estoppel if the conveyance was by quit-claim deed. *Dorland v. Magilton*, 47 Cal. 485.

3. *ESTOPPEL*, vol. 7, p. 11.

But if his heir acquires a subsequent title, he cannot be compelled to convey it, or to answer in damages, except so far as the heir may have assets of his ancestor's estate in his hands. *Upshaw v. McBride*, 10 B. Mon. (Ky.) 202.

against subsequent purchasers and incumbrancers for value, and without notice, from the time it is duly admitted to record.¹

2. Arising From Special Agreements.—(See CONDITION, vol. 3, p. 422; COVENANT (ACTION OF), vol. 4, p. 463.)

XII. DEFENSES—**1. Performance by Defendants.**—(See *supra*, this title, *Compliance with the Contract*.)

2. Failure to Perform on Part of the Plaintiff.—The mode of complying with the contract, and the duties of the parties, have been considered already.² Each must either perform, or offer to perform, everything that it is his duty to do, which does not depend upon some other act to be performed by another, which act is a condition precedent to it.³ This is necessary, not only that he may successfully resist a suit, but in order to lay a foundation for an action against the other party for breach of contract.

The performance must conform substantially to the terms of the agreement.⁴ It must be made at the proper time. This will be

1. Recording.—It is not essential to the validity of a deed that it be recorded. At common law, such a thing was unnecessary and the requirement is entirely statutory. An unrecorded deed is perfectly valid as between the parties to it, and is only postponed to the claims of those subsequently acquiring an interest in the land for value and without notice. See *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 169; *Ellison v. Wilson*, 36 Vt. 60; *Galland v. Jackman*, 26 Cal. 87; 85 Am. Dec. 172; *Wilkins v. May*, 3 Head (Tenn.) 176. And see, generally, DEEDS, vol. 5, p. 451; NOTICE, vol. 16, p. 787; RECORDING ACTS, vol. 20, p. 527.

Recordation is notice only to those who would otherwise be entitled to take advantage of the statute to protect themselves. *Dennis v. Burrutt*, 6 Cal. 670; *Leach v. Beattie*, 33 Vt. 195. It is notice only to those who are bound to search for it. It is not publication to the world at large. *Maul v. Rider*, 59 Pa. St. 167. It is constructive notice only to after purchasers under the same grantor. *Bates v. Norcross*, 14 Pick. (Mass.) 224. The subsequent purchaser must be in the same line of record title, for a purchaser is not bound to take notice of the registered lien or incumbrance created by any person, other than the one through whom he is compelled to designate his title. *Harper v. Bibb*, 34 Miss. 472; 69 Am. Dec. 397. And see *Digman v. McCollum*, 47 Mo. 372; *Odle v. Odle*, 73 Mo. 289; *Blake v. Graham*, 6 Ohio St. 580; 67 Am. Dec. 360.

2. See *supra*, this title, *Compliance with the Contract*.

3. In *Easton v. Montgomery*, 90 Cal. 318, the court, by Harrison, J., said: "The general rule, in the absence of special provisions, is, that the vendee is not entitled to a conveyance until the full payment of the purchase-money, and that the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other."

Where a covenant, in an agreement to convey land, provided that, on non-compliance by the purchasers with the terms as to payment, the seller should be free from any obligation to convey, and the purchasers forfeit all right thereto, time being made of the essence of the contract, it was held that the seller was authorized to avoid the contract or not, at his option, and was not bound to tender a deed except on payment of the price. *Freeman v. Griswold* (Cal. 1893), 34 Pac. Rep. 327.

If the vendor or his tenants commit waste, between the time of the agreement and the time for making the conveyance and delivery of possession, the vendor must tender compensation with the deed, or the purchaser may refuse to receive it. *Durrett v. Simpson*, 3 T. B. Mon. (Ky.) 517; 7 Am. Rep. 428.

4. *Davis v. Sabita*, 63 Pa. St. 90. The tender of all that was due, and payment into court, will not avail where the defendants failed to break and sow the land, as required by the contract. *Wallace v. Maples*, 79 Cal. 433.

Where one sells land to another, with a stipulation in the act of sale, that the

that named, if time is of the essence of the contract;¹ if not—as is generally the case²—within a reasonable time thereafter.³ If time is essential, the provision as to it may be waived by one who has knowledge of the facts.⁴

The principal acts to be performed by the vendor and purchaser, respectively, are the conveyance of the land, and the payment of the purchase price. As has been said already, if the contract is silent on the subject, the agreements to perform these acts are

vendee is to have a right of way and other servitudes belonging to the land, he cannot enforce the payment of the price, until he has complied with that obligation. *Fortier v. Burthe*, 19 La. Ann. 510; *Rucker v. Liddell*, 5 La. Ann. 577.

Where a party buys land on a proposed street, under an agreement that the vendor shall complete the street in accordance with plans and directions which may be designated by certain commissioners, and these plans and directions have already been prescribed, but with an express reservation of the right to alter them, and they are altered, the vendor sufficiently performs his contract by completing the street under the new plans and directions. *Gardner v. Boston Water Power Co.*, 9 Allen (Mass.) 466.

A tender of payment of a promissory note, two days before it becomes due, is a sufficient performance, by the obligee, of the condition of a bond to convey real estate on the payment of such note according to its tenor. *Eaton v. Emerson*, 14 Me. 335.

A, by a written agreement, in consideration of a sum of money, admitted to have been paid by B, agreed to execute to him "a good and sufficient deed" of a particular pew in a church. It appeared that the church was built pursuant to the articles of subscription, by the terms of which the pews were all to be leased in perpetuity, subject to an annual rent, and that the religious society gave no title to pews, other than such leases, reserving rent, and that B, at the time the agreement was made, had knowledge of these facts. It was held, notwithstanding, that B was not obliged to accept such lease as a performance of A's agreement. *Foot v. West*, 1 Den. (N. Y.) 544.

1. *Axford v. Thomas*, 160 Pa. St. 8.

2. SPECIFIC PERFORMANCE, vol. 22, p. 1043. Hence, a vendee who has been in possession, cannot sustain his refusal to take a deed, by the fact that it was

not tendered promptly. *Curran v. Rogers*, 35 Mich. 221.

But where, in an action by the vendor for the breach of a contract to purchase land, the vendee alleges that it incurred expenses on the faith of the vendor's promise to execute a deed on the date fixed in the contract, and that its scheme to resell the land at public auction miscarried owing to such default by the vendor, it is error not to submit to the jury the question whether the time fixed for the delivery of the deed was of the essence of the contract. *Cozart v. West Oxford Land Co.* (N. Car. 1893), 18 S. E. Rep. 337.

3. See *supra*, this title, *Compliance with the Contract*.

4. *Wheeler v. Mather*, 56 Ill. 241; 8 Am. Rep. 683; *Truesdail v. Ward*, 24 Mich. 117; *Robbins v. Morgan* (Minn. 1894), 57 N. W. Rep. 799; *Campbell v. Worthington*, 6 Vt. 448.

One who has waived a failure to comply with the requirements, may, nevertheless, put an end to the waiver, and make time material by demand of payment and notice of intended rescission; ordinarily, some such affirmative act is necessary to take advantage of the default. *Green v. Chandler*, 25 Tex. 148; *Scarborough v. Arrant*, 25 Tex. 129.

Under a contract for the sale of land, providing for surrender of possession on default, extension of the time of payment of the purchase price is not shown by the vendor's reply to a suggestion of the purchaser, after default, as to an alteration of the contract, in regard to payment which she might be able to make, that he presumed he would be only too glad to agree to it. *Shaw v. Kellogg*, 74 Hun (N. Y.) 256.

A vendor, who has agreed in writing to make title in thirty days, may show that the same day the vendee orally agreed to accept his bond for title instead. *Cooke v. Cook* (Ala. 1893), 14 So. Rep. 171.

mutual covenants.¹ Any given case is likely to be an exception to this rule, however, either because of the express stipulation of the parties, or an agreement implied from the terms used,² the whole matter being largely one of intention.³ The construction put by the courts upon a number of special agreements are given in the notes.⁴ In any case, however, in which time is not of the essence of the contract, mere neglect to act will not put the vendor or

1. See, *supra*, this title, *Compliance with the Contract*. And see *Boyd v. Robertson* (Tex. Civ. App. 1893), 23 S. W. Rep. 534.

2. Where no time is limited for the conveyance of the property, but the payment is to be made on a certain day, the payment is a condition to the conveyance, but not *vice versa*. *Baily v. Clay*, 4 Rand. (Va.) 346.

A contract to convey a title to land, within a reasonable time after the sale, is not a condition precedent; nor is it necessary to be performed, in order to enable a recovery on a bill single, given for the purchase-money, payable at a certain time. *Stone v. Gover*, 1 Ala. 287.

But see *Hardy v. McKesson*, 6 Jones (N. Car.) 554, in which it was held that, where the vendor and purchaser of a tract of land covenanted that the latter should pay a certain sum at a given day, and the seller to make title whenever the money was paid, the seller, in order to entitle himself to recover the purchase-money, is bound to aver his readiness and ability to make title on the day set for payment of the money.

3. Where the vendor of land executes his bond to make title on the payment of the note given by the purchaser for the purchase-money, in respect to the security taken by each being a consideration, the one for the other, they are mutually dependent one upon the other. But in respect to performance, or payment, or times of either, they may be dependent, conditional, or independent, one to the other, according to the intention of the parties, as manifested in the terms of the instruments evidencing the trade. *Scarborough v. Arrant*, 25 Tex. 129.

4. **Mutual Conditions.**—In the following cases, conveyance and payments have been held to be concurrent conditions. Neither the vendor nor purchaser can maintain his suit without performance or tender on his own part:

Where, by an agreement in writing, the purchaser promised to pay to the

vendor of land a sum of money on a certain day, if the latter would make him a satisfactory deed "for two lots," when the money was paid. *Ledyard v. Manning*, 1 Ala. 153.

Where a vendor binds himself to execute and deliver a certain deed, on condition that the purchaser shall make certain stipulated payments, and "as soon as the full sum shall be paid." *Hill v. Grigsby*, 35 Cal. 656.

Where an agreement was made for the sale and purchase of land, in which it was stipulated that five hundred dollars should be paid in cash, and a like sum by a note at ninety days, with a satisfactory indorsement, and the remainder secured by bond and mortgage. *Van Schaick v. Winne*, 16 Barb. (N. Y.) 89.

Where the vendor gave his bond for title, containing a condition to make title upon payment of the purchase-money. *Arther v. Pearson*, 32 Miss. 131.

Where the agreement is to sell land at a price to be determined at a future time by third persons, one fourth of the purchase-money to be paid in cash, on delivery of the deed of conveyance, and the remainder to be paid subsequently, secured by a mortgage of the land, and the deed to be executed on notice of the price fixed by such third parties. *Howe v. Huntington*, 15 Me. 350.

The following cases also present illustrations: *Smith v. McCluskey*, 45 Barb. (N. Y.) 610; *Halloway v. Davis*, *Wright* (Ohio) 129; *Tharin v. Fickling*, 2 Rich. (S. Car.) 361; *Breithaupt v. Thurmond*, 3 Rich. (S. Car.) 216.

In *Thomas v. Lanier*, 23 Ark. 640, the court, by Compton, J., said: "The stipulation to make title, on the one part, and the undertaking to pay the purchase-money, on the other, stand upon the same legal footing; and where the one is a condition precedent to the other, and the time and not the place of performance, is fixed, the vendor must seek the vendee, if within the state, but if he be absent from the state, then the vendor may proceed

against him, by attachment for the purchase-money."

When, upon a sale of land, a bond is given for a conveyance upon payment of the purchase-money, which is agreed to be paid by a series of notes, if the first notes are paid, the payment of the last note and the conveyance of the land, are mutual and dependent acts. *Headley v. Shaw*, 39 Ill. 354.

Independent Covenants.—In the following cases the payment and performance were held to be independent covenants:

The failure of one furnishes no defense to the other party, nor need any performance or tender be alleged or proven by the plaintiff, who sues to recover for a breach of contract on the part of the defendant. *Hageman v. Sharkey*, 1 How. (Miss.) 277; 29 Am. Dec. 627; *Hazlip v. Noland*, 6 Smed. & M. (Miss.) 294; *Armfield v. Tate*, 7 Ired. (N. Car.) 258.

Where three notes were given to secure payment of the purchase-money of land, and the first was paid before conveyance, it was held that the agreement to convey and the agreements to pay, were independent, and that suit could be brought upon the second and third notes, without conveying title. *Gibson v. Newman*, 1 How. (Miss.) 341.

A failure to convey was held to be no defense to an action on a negotiable note given for the purchase-money. *Woods v. Morgan*, 1 Morr. (Iowa) 238.

Conveyance a Condition to Payment.—Where a vendor agrees to sell land, performance to be at a future time, he must prepare a sufficient deed, and tender it to the purchaser, before he can ask a court for rescission or specific performance. *McWilliams v. Long*, 32 Barb. (N. Y.) 194; *Guthrie v. Thompson*, 1 Oregon 353.

The vendor cannot maintain an action for the purchase-money, without having tendered a proper conveyance, where he binds himself to make a deed when the purchaser requires it, and, after all the money becomes due, payment is offered and a deed demanded. *Davidson v. Van Pelt*, 15 Wis. 341.

Where, upon an oral agreement for the conveyance of land, the vendor assigned to the purchasers a title bond, and agreed to make, within one month, a good title, and a part of the consideration was paid in money, and notes were given for the residue, it was held that the making of the title was a condition precedent to the plaintiff's right

to recover in a suit upon the notes. *Lewis v. Davis*, 21 Ark. 235.

An action on purchase-money notes payable at different times, under an agreement for conveyance of land, will not lie, unless there is a conditional tender of the deed. *Hook v. Nebeker*, 1 Ind. 257; *Beecher v. Conradt*, 13 N. Y. 108. See also *Dennis v. Williams*, 40 Ala. 633.

Conveyance Held Not a Condition to Payment.—Where, by a written agreement, the purchaser is to pay a portion of the purchase-money on a given day, and he does not offer to do so, it is not necessary for the vendor to tender a conveyance, before bringing an action for that amount. *Devling v. Little*, 26 Pa. St. 502. And see *Harrington v. Birdsall* (Neb. 1893), 56 N.W. Rep. 961.

Where one purchases land, at a sheriff's sale in *South Carolina*, to which the defendant, in the execution, has no title, the sheriff may, by suit, compel him to pay the purchase-money, and he need not first have tendered the sheriff's titles. It is otherwise, if the sheriff has refused to make titles. *Moore v. Akin*, 2 Hill (S. Car.) 403.

Under a bond conditioned to convey title to land, if the obligee should duly pay the first installment of the purchase-money, and give a mortgage on the land to secure the payment of the remainder, the tendering of such a mortgage is not a condition precedent to the conveyance. *Russell v. Copeland*, 30 Me. 332.

A vendor, who has agreed to convey title upon payment of the purchase-money, need not give the deed until payment in full, and, therefore, can sue for installments, except the last, without making tender of a deed. *Terry v. George*, 37 Miss. 539.

Where a bond for a title recited that the obligor had, in consideration of a certain sum, for which the obligee had given his promissory note, sold a tract of land described in the bond; and the obligor bound himself to make a good warranty deed "when the purchase-money should be paid, or when a patent for the land should be obtained from the government," it was held, in an action upon the note, that the conveyance was not a condition precedent to payment. *Perry v. Rice*, 10 Tex. 367.

Payment a Condition to Conveyance.—In the following cases it was held that the purchaser must make or tender payment before he is entitled to a conveyance: *Byers v. Aiken*, 5 Ark. 419;

vendee in default; there must be a demand on the part of the other.¹ Some authorities call for a second demand.²

Mayers v. Rogers, 5 Ark. 417; *Drennen v. Boyer*, 5 Ark. 497; *Doe dem Miller v. Roe*, 39 Ga. 91; *Browning v. Clymer*, 1 Ind. 579; *Davis v. Heady*, 7 Blackf. (Ind.) 261; *Burrows v. Yount*, 6 Blackf. (Ind.) 458; 39 Am. Dec. 439; *Waterman v. Gibson*, 5 La. Ann. 672; *Sewall v. Wilkins*, 14 Me. 168; *Stockton v. George*, 7 How. (Miss.) 172; *Leftwich v. Coleman*, 3 How. (Miss.) 167; *Paine v. Brown*, 37 N. Y. 228; *Adams v. Wadhams*, 40 Barb. (N. Y.) 225; *Grace v. Regal*, 11 S. & R. (Pa.) 351; *Pinkus v. Hamaker*, 11 S. & R. (Pa.) 200; *Baum v. Dubois*, 43 Pa. St. 260; *Bridge v. Young*, 9 Tex. 401; *Gale v. Best*, 20 Wis. 44.

Where, by an agreement for the sale of land, the vendor was to give a deed, or a bond for a deed, on receiving the first payment of the purchase-money, and approved security for the remainder given, payment was held to be a condition to conveyance. *Appleton v. Chase*, 19 Me. 74.

The same rule was applied where, upon a sale of land, the purchaser paid a part of the price in cash, and gave two notes for the residue, payable in one and two years, and the vendor gave a bond for title when he should receive a patent from the *United States*, which did not arrive before the last note became due. *Duncan v. Jeter*, 5 Ala. 604; 39 Am. Dec. 342.

If the obligee of a bond obtains titles in his own name, for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffers the titles to the residue of the lands to be lost by non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond. *Skillern v. May*, 4 Cranch (U. S.) 137.

Payment Not a Condition to Conveyance.—When the defendant bound himself to convey, on or before a certain day, and the complainant agreed to pay at the time of the giving of the deed, the complainant is not in laches in not tendering payment, if the deed has not been executed or tendered. *Huffman v. Hummer*, 18 N. J. Eq. 83.

When, in a covenant to convey land, it is provided that the vendor is "to make a deed when called for," the purchaser may require a deed before the purchase-money is paid. But if the

purchaser has sought the aid of the court, and the purchase-money is not paid, the court may, in its discretion, permit the deed to be withheld until it has been paid or tendered. *Simmons v. Spruill*, 3 Jones Eq. (N. Car.) 9.

Warranty and Promise to Pay Independent Covenants.—Where land is sold with a covenant of warranty, and possession has been delivered, and the purchaser gives a note for the purchase-money, the promise to pay and the warranty are independent covenants, and the enforcement of the one is not dependent upon the performance of the other. *Norton v. Jackson*, 5 Cal. 263.

1. *Fuller v. Hubbard*, 6 Cow. (N. Y.) 1; 16 Am. Dec. 423; *Hackett v. Huson*, 3 Wend. (N. Y.) 249; *Connelly v. Pierce*, 7 Wend. (N. Y.) 129; *Dye v. Montague*, 10 Wis. 18.

Where a conveyance for a tract of land is, according to contract, to be made on demand, the pleadings should contain a request precisely alleged in point of time and place; the general allegation "that the defendant has often been required, etc.," being insufficient. *Bridges v. Hardgrove*, Sneed (Ky.) 131.

In debt on a bond to make title on payment of the purchase-money, by the purchaser against the vendor, for a failure to make title, the declaration is defective if it neither avers that "the vendee demanded a deed of the vendor," nor that "the vendee prepared a deed and tendered it to the vendor, and demanded its execution." *Johnston v. Beard*, 7 Smed. & M. (Miss.) 214. See also *Sheets v. Andrews*, 2 Blackf. (Ind.) 274; *Brown v. Hart*, 7 Blackf. (Ind.) 429; *Mullin v. Bloomer*, 11 Iowa 360.

When an equitable title to land, by reason of a contract for the same, is set up as against the legal owner, and it appears that payment for the land was to be made in bricks, it is incumbent upon the person claiming under such contract, to show an offer to perform it on his part, without waiting for a demand to be made. *Allen v. Woods*, 24 Pa. St. 76.

Want of title in the vendor will excuse demand for a deed from him. *Bowen v. Jackson*, 8 Blackf. (Ind.) 203; *Morange v. Morris*, 34 Barb. (N. Y.) 311.

2. *Johnston v. Beard*, 7 Smed. & M.

Tender, at least, must be always either made or excused, as by waiver,¹ or its being rendered impossible by the other party, or made unnecessary by his repudiation of the contract and refusal to perform his part of it,² or his known inability so to perform.³

The failure to make proper tender does not put an end to the contract so as to make it void; it gives the other party the right to rescind it, or to waive the default and continue it in force.⁴

It gives no such right, however, to the party in default. He cannot take advantage of his own wrong, but must abide by his agreement.⁵

(Miss.) 217; *Standifer v. Davis*, 13 Smed. & M. (Miss.) 48; *Connelly v. Pierce*, 7 Wend. (N. Y.) 131.

In *Lutweller v. Linnell*, 12 Barb. (N. Y.) 515, the court, by Welles, J., said: "Where a party covenants to convey, he is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it; and having waited a reasonable time to have it drawn and executed, has made a second demand."

In *Hudson v. Watson*, 26 Miss. 360, the court, by Handy, J., said: "The vendee should make demand for the deed from the vendor, who is entitled to a reasonable time thereafter to have the deed executed; after which the vendee should make a second demand, and in default thereof, the right of action to the vendee becomes complete." But this is a rule of evidence, and not of pleading. *Pearsoll v. Frazer*, 14 Barb. (N. Y.) 564.

1. The tender must be of a deed properly acknowledged. *Smith v. Smeltzer*, 1 Hilt. (N. Y.) 287.

If the obligee in a bond for a deed, on the last day of performance, says to the obligor that the money is ready for him whenever he will give a deed, but produces no money, and the other party replies that he will procure him a deed, but immediately goes away, this is no waiver of tender. *Drummond v. Churchill*, 17 Me. 325.

Implied Waiver.—Where the condition of an obligation is to make title on a day certain, and on a contingency which, if it happens, is more within the knowledge of the obligor than the obligee, in a plea of readiness to perform, it is necessary for the obligor to aver notice of contingent fact to the obligee, else the plea will be bad. *Williams v. Harper*, 1 Ala. 502.

2. *Skinner v. Tinker*, 34 Barb. (N. Y.) 333; *Crary v. Smith*, 2 N. Y. 60.

In *Gray v. Dougherty*, 25 Cal. 280, the court, by Sanderson, C. J., said: "If the vendor refuses to receive the purchase-money when tendered, thereby repudiating his contract, or by his own act prevents the vendee from performing his part of the agreement, or by any adversary steps makes it known that he does not intend to observe and perform his covenant, except upon compulsion, thus, in effect, refusing in advance of a demand, neither law nor equity imposes upon the vendee the observance of a ceremony thus made idle and fruitless."

In *Turner v. Berry*, 27 Ind. 163, the court, by Gregory, J., said: "When a party to an agreement gives notice to the other of his determination not to perform the contract on his part, performance by the party receiving such notice is unnecessary."

If the vendor offers to take the money tendered, but refuses to make the deed, this is a refusal of the offer, and it is a useless ceremony to count out the money after that. *Blunt v. Tomlin*, 27 Ill. 93.

Where a purchaser of real estate, being entitled to a conveyance in fee, demanded it of the vendor, who offered him a perpetual lease, reserving rent, and refused to give any other, it was held that the purchaser might sue at once on the agreement, without waiting to have a conveyance prepared, and presenting himself to receive it. *Foot v. West*, 1 Den. (N. Y.) 544.

3. The inability of a vendor to make title according to the condition of his bond, is sufficient to excuse the purchaser from preparing and tendering him a deed. *Johnson v. Collins*, 17 Ala. 318. See also *Holmes v. Holmes*, 12 Barb. (N. Y.) 137.

4. *Scarborough v. Emerson*, 25 Tex. 129; *Walker v. Emerson*, 20 Tex. 706; 73 Am. Dec. 207.

5. *Mancius v. Sergeant*, 5 Cow. (N.

The breach of a contract, in order to give rise to a cause of action, must be such as to affect the right of the party suing. Hence, a vendee cannot maintain an action against his vendor, for conveying the land wrongfully to a second purchaser with notice.¹

The breach of the vendee's agreement to pay the purchase price, exonerates the vendor from all obligation to him,² and entitles him to refuse to convey,³ and to recover possession of the land,⁴ without refunding any money that the purchaser may have paid in part performance of the contract.⁵ The acceptance of a worth-

Y.) 271; *Church v. Ayres*, 5 Cow. (N. Y.) 272.

In an agreement for the sale of land, the purchaser covenanted to pay, and the vendor to convey upon payment, it being agreed that, if the purchaser failed in his covenant, the contract should be void. On an action by the vendor for the purchase-money, no part of which had been paid, it was held that the vendor could recover, and that the contract was void only at the election of the vendor. This is true, if the contract contains only a general stipulation that if the purchaser does not pay it shall be void. *Canfield v. Westcott*, 5 Cow. (N. Y.) 270.

A condition, in a title bond, that the sale shall be null and void if the purchase-money is not paid when due, is for the benefit of the vendor alone, who may take advantage of it, or waive it at his election. *Caruthers v. McBurney*, 3 Sneed (Tenn.) 590.

The purchaser of land upon condition cannot take advantage of a breach of the condition by himself, to abandon the purchase. *Mundine v. Crenshaw*, 3 Stew. (Ala.) 87.

Where a bond for title, upon the payment of certain notes, contained a condition by which, if the obligee should fail to pay the sum specified in his notes by a certain time, he should forfeit all money which he had paid, and the bond should be void, it was held that, under this condition, the obligee could not annul the contract at his option, so as to defeat a recovery upon his notes; but the condition was to be considered as providing a penalty, to insure a prompt performance by the obligee. *Mason v. Caldwell*, 10 Ill. 196.

A clause, in a bond for conveyance of land, that "if said vendee fail to make good the above payments, in that case the above tract to revert back to the vendor," does not authorize the vendee to throw back the land on the vendor

and rescind the contract. *Barbour v. Brookie*, 3 J. J. Marsh. (Ky.) 511.

1. *Marshall v. Robert*, 22 Minn. 49.

2. Where a purchaser, who has advanced money in part performance of a contract for the purchase of land, refuses to pay the remainder, the vendor may rescind the contract, and convey the land to another. *Ketchum v. Everton*, 13 Johns. (N. Y.) 359; 7 Am. Dec. 384.

In *McPherson v. Johnson*, 69 Tex. 487, the court, by *Gaines, J.*, said: "The vendee in an executory contract, who has not paid the purchase-money, must, at least, offer to pay, in order to enforce the agreement. The vendor's right of action on his debt may be barred, and his privilege of election thereby lost, but the vendee is not relieved of his obligation to pay the debt if he would hold the land. The debt remains though the right of action be barred, and without an offer to pay it, the vendee, if in possession, cannot defeat the suit of the vendor for the recovery of the land; nor, if out of possession, can he recover against the vendor or any one holding under him."

3. For the first payment under an agreement for the purchase and sale of land, the vendee drew a draft, payable at the time of conveyance. The draft was dishonored at maturity, and the vendee was then insolvent. It was held that the vendor might rescind the contract, and refuse to convey; and having done so, the personal representative of the vendor could not revive the contract. *Todd v. Caldwell*, 10 Tex. 236.

4. *Williams v. Noiseux*, 43 N. H. 388.

Where the price of land is to be paid in installments, the vendor may sue for rescission of the sale at once, upon the failure of the purchaser to pay the first installment. *Thompson v. Kilcrease*, 14 La. Ann. 340.

5. *Simon v. Kaliske*, 6 Abb. Pr. N.

less note does not prevent the vendor from rescinding, unless he has made an agreement that it shall be in discharge of the price.¹

a. WAIVER OF THE BREACH.—A breach of contract may be waived by the innocent party,² but he must act with knowledge

S. (N. Y. Super. Ct.) 224; 37 How. Pr. (N. Y.) 249; Ketchum v. Evertson, 13 Johns. (N. Y.) 359; 7 Am. Dec. 384.

In *Rounds v. Baxter*, 4 Me. 454, the court, by Mellen, J., said: "It is a proverbial principle that a man is not permitted, in a court of justice, to take advantage of his own wrong or neglect. The principle is founded in the highest reason. If a man, after he has made a fair contract, and partially fulfilled it, may, without the consent, or any fault, on the part of him with whom he has contracted, rescind the agreement, excuse himself at once from all further concern about it, and recover back whatever he has paid, he may speculate, and disappoint and injure his neighbor, whenever his interest or his passions may dictate; and thus triumph over him in security, and enjoy, himself, a complete indemnity. Justice will not sanction such a proceeding. The cases in which one of the parties to a contract may lawfully disaffirm and rescind it, are those in which the other party has been in fault, or where, by the terms of the contract, a right to rescind it is reserved."

In *Green v. Green*, 9 Cow. (N. Y.) 51, the court, by Savage, C. J., said: "It may be asserted with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, has never been suffered to recover for what has thus been advanced or done."

1. Giving a receipt reciting that it is taken "as payment," is not conclusive evidence that such was the agreement between the parties. *Dunlap v. Shanklin*, 10 W. Va. 662.

2. Waiver.—*Griggs v. Woodruff*, 14 Ala. 9.

When the acts of a vendor of land are inconsistent with his intention to enforce strictly the conditions of the contract, as by accepting the residue of the purchase-money after the purchaser has broken the condition, he is consid-

ered thereby to have waived the condition. *Grigg v. Landis*, 21 N. J. Eq. 494.

Where a contract, in which time is of the essence, is fully performed by one party, he may require performance by the other after the time. *Robbins v. Morgan* (Minn. 1894), 57 N. W. Rep. 799.

Where a vendor received purchase-money notes, it being agreed that he should be allowed to declare a forfeiture in case there was any default in their payment, the fact that he transferred one of them to a *bona fide* holder, without knowledge that there had been a default in the payment of one of the others, operates as a waiver of his right to declare the forfeiture. *Inglehart v. Gibson*, 56 Ill. 81.

Upon the death of the vendor before the time for completion of the contract, his executors may waive his right to declare a forfeiture, because the contract was not performed within the time specified. *Williams v. Haddock* (Supreme Ct.), 29 N. Y. Supp. 199.

The purchaser cannot claim a termination of the contract by his failure to pay in full an installment of the price, part payment having been accepted, and both parties having treated the contract as subsisting. *Loud v. Pomona Land, etc., Co.*, 153 U. S. 564.

Where a vendor of land binds himself to convey title on the payment of the purchase-money by the purchaser, indulges him, after he has failed to pay at the stipulated time, by neglecting to demand the purchase-money for an indefinite time, he cannot elect to consider the contract as rescinded, either against the purchaser or his assignee, without making a demand for payment and being refused, though the condition in the bond declared it to be void if the money was not duly paid. *Stewart v. Gates*, 30 Miss. 100.

A vendor who refuses to rescind for non-payment at the agreed time, when an offer to that effect is made by the purchaser, waives the right of forfeiture until he demands payment. *Prophit v. Robinson*, 34 Miss. 141. See, as to what does not amount to a waiver, *Kountze v. Helmuth*, 140 N. Y. 432.

of the facts, and must intend that his act shall constitute a waiver.¹ The fact that the waiver has been relied on by the party in default, and that acts have been done by him on the faith of such reliance, is always material.²

3. Defects and Deficiencies in the Subject-Matter—*a*. DEFECTS OF TITLE—(See also TITLE (REAL PROPERTY), vol. 26, p. 20).—It is frequently claimed, by way of defense, that the title of the vendor is defective. The effect of such a condition of title depends upon the nature of the action and whether the contract is executed or executory.

When suit is brought by the vendor, seeking the specific performance of an executory agreement, invalidity of title furnishes a complete and perfect defense to the action.³ If the suit is by the vendee, defect of title is not a defense, unless such defect is fatal, in which case the vendor will not be compelled to do an unlawful act, by executing a conveyance purporting to grant that which is another's.⁴

Where the contract is executed, and the purchaser has entered into possession, he cannot, in the absence of fraud or misrepresentation, successfully defend, on the ground that the title is defective,

1. The fact that the obligee of a bond for a deed of land platted refused to accept it when it was tendered him, because the southerly boundary was described as "contemplated Field street," but agreed to take it with the word "contemplated" omitted, will not constitute a waiver of a misdescription in the deed of conveyance, the effect of which would be to restrict his land to the north line of "Field street," where his bond was for land extending to the middle of the street, unless he knew of such misdescription and intended to waive his rights under the bond. *Holds-worth v. Tucker*, 143 Mass. 369.

2. Where a vendor stated to the purchaser of real estate that he would not insist on the forfeiture stipulated in the contract, in case payments were not promptly made, it was held that the statement constituted a waiver of his right to declare a forfeiture; the purchaser in the meantime having made valuable improvements upon the land. *Blair v. Blair*, 48 Iowa 393.

3. SPECIFIC PERFORMANCE, vol. 22, p. 948. And see *Fisher v. Wilcox* (Supreme Ct.), 28 N. Y. Supp. 327.

In an action by the vendor of land for the price, where the defendant, by reason of probable defects of title, set up in his answer, requires the plaintiff to exhibit his title, and avers his willingness to take the land if the plaintiff ex-

hibits a perfect title, the court should not rescind the contract, but should require the plaintiff to exhibit such title as he has, and, if defective, require him to perfect it if he can, and give him a reasonable time in which to do so. *Bailey v. Conley* (Ky. 1894), 26 S. W. Rep. 391.

Where one contracts to give a deed without warranty, to land standing in his wife's name, he cannot enforce bonds given by the purchaser for the price, on tender of his and his wife's deed, subject to judgment liens discovered by the purchaser after giving the bonds. *Leach v. Johnson* (N. Car. 1894), 19 S. E. Rep. 239.

But where the vendors of land, having agreed to make a "good and sufficient conveyance," conveyed their interests, and stipulated that the vendees might retain part of the price till they perfected the title to an eighth of the land, by obtaining a deed from certain heirs, and the heirs were afterward paid for their interest, but died without having made a deed, it was held that when the vendees had had peaceful adverse possession long enough to perfect their title, the vendors were entitled to the balance of the price, without obtaining the deed from the said heirs. *Moyers v. Arthur* (Ky. 1894), 25 S. W. Rep. 276.

4. SPECIFIC PERFORMANCE, vol. 22, p. 944; *Bispham's Principles of Equity*

when suit is brought to recover the purchase-money,¹ but must look to the covenants in his deed.²

If the element of fraud is present, the defense is good, but in order that it be available, the vendee must do everything that he can to put the vendor in the same position as before the contract was made.³

If the contract is executory, and the possession is held under a title bond, instead of a deed, a defective title will be a sufficient defense to a suit on the purchase-money notes.⁴ The purchaser here, as in the case of fraud, must restore the land to the vendor.⁵

Knowledge, on the part of the purchaser, of defects of title, at the time of making the contract, will generally be construed as constituting a waiver of the right to complain.⁶

b. DEFICIENCIES IN QUANTITY.—Where the sale is in gross and the contract is executed, and there has been no fraud or

(5th ed.), § 380; *Moses v. McClain*, 82 Ala. 370; *Chartier v. Marshall*, 51 N. H. 400; *Morgan v. Bell*, 3 Wash. 554.

1. *Patton v. Taylor*, 7 How. (U. S.) 132; *Campbell v. Medbury*, 5 Biss. (U. S.) 33; *Hunter v. Bradford*, 3 Fla. 286; *McGehee v. Jones*, 10 Ga. 133; *Vining v. Leeman*, 45 Ill. 246; *Laforge v. Matthews*, 68 Ill. 328; *Wimberg v. Schwegeman*, 97 Ind. 528; *Timms v. Shannon*, 19 Md. 315; 81 Am. Dec. 632; *Edwards v. Bodine*, 26 Wend. (N. Y.) 114; *Leird v. Abernathy*, 10 Heisk. (Tenn.) 626; *Smith v. Jarvis* (Tex. Civ. App. 1894), 24 S. W. Rep. 854; *Tarlton v. Daily*, 55 Tex. 95; *Warren v. Clark* (Tex. Civ. App. 1894), 24 S. W. Rep. 1105; *Slocum v. Bracy* (Minn. 1893), 56 N. W. Rep. 826. And see *Pratsch v. Aberdeen Packing Co.* (Wash. 1894), 35 Pac. Rep. 123. But see *Cross v. Noble*, 67 Pa. St. 74.

But an intending purchaser of land is not necessarily guilty of laches in failing to examine the records, where the owner of an interest in the land expressly states to him, with the fraudulent purpose of inducing the purchase, that he has no interest therein, but the question of negligence, on the part of the purchaser, is for the jury. *Blakelee v. Sincepaugh*, 71 Hun (N. Y.) 412. And where a deed by a warrantor contains a stipulation of no warranty, and the buyer is not aware of the danger of eviction, he is entitled to recover the price paid. *Montgomery v. Marydale Land, etc., Co.* (La. 1894), 15 So. Rep. 63.

Failure of title in the vendor, is no defense to an action on a purchase-money note, and to foreclose the mort-

gage security, so long as the vendee holds the vendor's warranty deed and retains possession of the land. *Black v. Thompson* (Ind. 1894), 36 N. E. Rep. 643.

2. *Barkhamsted v. Case*, 5 Conn. 528; 13 Am. Dec. 92; *Laughery v. McLean*, 14 Ind. 108; *Hughes v. McNider*, 90 N. Car. 248. But where a deed provided that if title to any of the land should be defective, and the vendor should be unable to remove the defect after reasonable notice, such land should be quitclaimed to the vendor, and the vendee should have a credit therefor on the amount of the purchase-money, it was held that the vendee could enforce such provision, if the vendor's title to a part of the land was through a remote grantor, in whom the record failed to show title, though no one had asserted title thereto adverse to the vendor, for twenty years. *Ragsdale v. Meridian Land, etc., Co.* (Miss. 1893), 14 So. Rep. 193.

3. *Hunter v. Bradford*, 3 Fla. 269; *Lett v. Brown*, 56 Ala. 550; *Vining v. Leeman*, 45 Ill. 246.

4. *Hunter v. Bradford*, 3 Fla. 269; *Clark v. Croft*, 51 Ga. 368; *Davis v. M'Vickers*, 11 Ill. 327; *Shampson v. Shoemaker*, 68 Ill. 256; *Coburn v. Haley*, 57 Me. 347; *Harvey v. Morris*, 63 Mo. 475; *Howard v. Kimball*, 65 N. Car. 175; 6 Am. Rep. 739.

5. *Wyatt v. Garlington*, 56 Ala. 576.

6. *Beck v. Simmons*, 7 Ala. 71; *Williamson v. Raney*, 1 Freem. (Miss.) 112; *Gartman v. Jones*, 24 Miss. 234; *Carson v. Kelley*, 57 Tex. 379; *May v. Ivie*, 68 Tex. 379.

misrepresentation, it cannot be opened upon the ground of a deficiency in the quantity of the land sold.¹

If the quantity be fraudulently misrepresented, an abatement in the price may be had in case of deficiency;² and some authorities have applied the same rule, in case of mistake so gross as to warrant the conclusion that the grantee would not have contracted had he known the truth.³

If the sale is by the acre, an abatement in the price may be had in case the acreage is short.⁴

XIII. REMEDIES—(See also **ACTIONS**, vol. 1, p. 178; **ASSUMPSIT**, vol. 1, p. 882; **COVENANT (ACTION OF)**, vol. 4, p. 463)—**1. Specific Performance**.—The specific performance of a contract is left to the sound discretion of the chancellor, guided by general principles of equity.⁵ But where a contract relating to the sale of land is fair and definite in all its terms, and is supported by a sufficient consideration, specific performance will be decreed as a matter of course.⁶

1. Deficiency in Quantity.—*Terrell v. Kirksey*, 14 Ala. 209; *Josselyn v. Edwards*, 57 Ind. 212; *Child v. Burton*, 6 Bush (Ky.) 617; *Tyson v. Hardesty*, 29 Md. 309; *Kerr v. Kuykendall*, 44 Miss. 137; *Perkins v. Webster*, 2 N. H. 287; *Marvin v. Bennett*, 26 Wend. (N. Y.) 169; *Rogers v. Olshoffsky*, 110 Pa. St. 147; *Rich v. Ferguson*, 45 Tex. 396; *Caldwell v. Craig*, 21 Gratt. (Va.) 132; *Cunningham v. Millner*, 82 Va. 526; *Gillilan v. Hinkle*, 8 W. Va. 262. And see *Terry v. Barbour*, 5 Tex. Civ. App. 474. But see *Hosleton v. Dickinson*, 51 Iowa 244; *Jenks v. Fritz*, 7 W. & S. (Pa.) 201; 13 Am. Dec. 227. And see *Ragsdale v. Meridian Land, etc., Co.* (Miss. 1893), 14 So. Rep. 193, where there was a special contract. Such is the case where the conveyance is by metes and bounds, although the supposed acreage is recited. *King v. Brown*, 54 Ind. 368. See also *Melick v. Dayton*, 34 N. J. Eq. 245.

In a conveyance of land sold by the tract, the words "more or less" will, under *Georgia Code*, § 2642, cover any deficiency which does not justify a suspicion of willful deception, or mistake equivalent thereto. *Estes v. Odom*, 91 Ga. 600.

2. *Tyler v. Anderson*, 106 Ind. 185. And see *Dibby v. Dickey*, 85 Me. 362.

3. *Melick v. Dayton*, 34 N. J. Eq. 245.

4. *English v. Arbuckle*, 125 Ind. 77.

But in a sale of one hundred and ninety-six acres, "more or less," a deficiency of one and thirty-seven hundredths acres, does not, in the absence of fraud, entitle the purchaser to a

deduction from the price. *The Chancellor v. French* (N. J. 1893), 27 Atl. Rep. 140.

A deficiency of a few acres, perhaps a dozen, or even fifty, in such a large parcel as eight hundred acres, "more or less," may be allowed by the words "more or less," but not a deficiency of four hundred acres. *Libby v. Dickey*, 85 Me. 362; *Board v. Wilson*, 34 W. Va. 609.

The price is not reduced, however, in the precise proportion of the deficient quantity to the quantity purchased. Natural differences and improvements are to be considered. The question is, how much more was to be given because of the supposed additional quantity? *Wilcoxson v. Calloway*, 67 N. Car. 463.

5. Specific Performance.—*Shriver v. Seiss*, 49 Md. 388; *Smoot v. Rea*, 19 Md. 398; *Shaw v. Livermore*, 2 Greene (Iowa) 338.

In such cases relief is not granted as a matter of right in either party, but is granted or withheld according to the circumstances. *Young v. Daniels*, 2 Iowa 126; 63 Am. Dec. 477.

Though the jurisdiction of the court to enforce specific performance, is said to rest in judicial discretion, it is exercised according to sound and fixed rules, and within certain definite limits, and is controlled largely by the circumstances of the individual cases. *Aston v. Robinson*, 49 Miss. 348.

6. *Popplein v. Foley*, 61 Md. 381; *Throckmorton v. Davidson*, 68 Iowa 643; *Sons of Temperance v. Brown*,

2. Reformation—(See REFORMATION OF INSTRUMENTS, vol. 20, p. 713).—Where, in reducing the contract to writing, through some mistake, inadvertence, or fraud, it fails to express the real agreement of the parties, a court of equity will reform the instrument so that it shall truly represent the contract as agreed upon.¹

3. Rescission—(See RESCISSION, vol. 21, p. 24).—All contracts and transactions in the transfer of land, may be rescinded where either of the parties was laboring under disability,² or where the contract was the result of mistake, accident, or surprise,³ or was

9 Minn. 157; McClure v. Otrich, 118 Ill. 320; Johnson v. Dodge, 17 Ill. 433; Hester v. Hooker, 7 Smed. & M. (Miss.) 768; Clement v. Reid, 9 Smed. & M. (Miss.) 535.

When a contract respecting lands is in writing, is certain and fair in all its parts, founded on an adequate consideration, and capable of being specifically performed, specific performance is a matter of right, and it is as much a matter of course for a court of equity to decree it, as for a court of law to award damages for its breach. Chambers v. Alabama Iron Co., 67 Ala. 353; Bogan v. Daughdrill, 51 Ala. 312.

But he who asks specific performance should show the facts which make such decree equitable, and the failure to do this justifies a refusal of the decree, Fowler v. Marshall, 29 Kan. 665; for specific performance is never enforced by a court of equity, unless the contract is fair, certain, reasonable, and capable of being performed. Shriver v. Seiss, 49 Md. 384.

The performance must be necessary; there must be a valuable consideration; it must be practicable, and the agreement must be certain and mutual. Aston v. Robinson, 49 Miss. 348.

If the party seeking specific performance, has been guilty of gross laches or inexcusably negligent in performing on his part, or if there has been a material change of circumstances affecting the rights of the parties, courts of equity will refuse to decree a specific performance. Young v. Daniels, 2 Iowa 126; 63 Am. Dec. 477.

Equity will not enforce a contract for the conveyance of land if it be unconscionable, unfair, obtained by the party seeking to enforce it by fraud or undue influence, or is not supported by an adequate consideration, or is ambiguous. Throckmorton v. Davidson, 68 Iowa 643. See also SPECIFIC PER-

FORMANCE, vol. 22, p. 941, where this subject is fully treated.

1. Reformation.—Clark v. Hart, 57 Ala. 390; Knapp v. White, 23 Conn. 529; Sanford v. Washburn, 2 Root (Conn.) 499; Pomeroy's Eq. Jur., § 870; Story's Eq. Jur., § 468; REFORMATION OF INSTRUMENTS, vol. 20, p. 713.

Where, through mistake or misapprehension of its true meaning, a contract departs from the intention of the parties, the power of a court of equity, to correct it and make it conform to the intention of the parties, is unquestionable. Pickett v. Merchant's Nat. Bank, 32 Ark. 346. Thus, where by mistake of a draughtsman, some of the terms of agreement are omitted in reducing to writing, it will be reformed by the court and enforced as reformed. Murphy v. Rooney, 45 Cal. 78.

But equity will exercise its power sparingly and with great caution, and only upon the clearest proof of the intention of the party, and of the action or mistake upon which the jurisdiction is invoked. Reese v. Wyman, 9 Ga. 430; Stricker v. Tinkham, 35 Ga. 176; 89 Am. Dec. 280.

2. Rescission.—Such as coverture, infancy, insanity, drunkenness, duress, stress of necessity, etc. See *supra*, this title, *Persons Under Disability*; DURESS, vol. 6, p. 57; INFANTS, vol. 10, p. 649; INSANITY, vol. 11, p. 149; INTOXICATION AS A DEFENSE TO CONTRACTS, vol. 11, p. 773; MARRIED WOMEN, vol. 14, p. 626.

If one deeply in debt, in order to obtain a loan, agrees to purchase a tract of land at more than double its value, and gives a mortgage upon other property to secure the loan and a part of the purchase-money, the vendor knowing of the purchaser's necessities, equity will rescind the contract. Hough v. Hunt, 2 Ohio 495; 15 Am. Dec. 569.

3. Dale v. Roosevelt, 5 Johns. Ch.

brought about by fraud,¹ or there has been a failure of consideration.²

4. Action to Recover Possession—(See EJECTMENT, vol. 6, p. 195). Where a vendee of land is placed in possession in pursuance of a contract of purchase, and fails to perform his portion of the agreement, an action of ejectment will lie against him at the suit of the vendor.³ And, conversely, the vendee in such contract may maintain an action of ejectment, to enforce specific performance by the vendor, whenever a bill in equity will lie for that purpose.⁴

(N. Y.) 174; *Hunter v. Goudy*, 1 Ohio 449; *MISTAKE*, vol. 15, p. 625.

Mutual mistake, in a contract to purchase school land, is ground for rescission, regardless of the motives of the party innocently making the representations relied upon, and afterward found to be untrue. *Culbertson v. Blanchard*, 79 Tex. 486. But where one with full knowledge, or means of full and accurate knowledge, executes a deed, a court of equity cannot release him. *Wier v. Johns*, 14 Colo. 493.

1. Where parties conspire together to perpetrate a fraud upon another, and thereby obtain the title to real estate, equity will set aside the conveyance and restore the title. *Castle v. Kemp*, 124 Ill. 307. And see *FRAUD*, vol. 8, p. 635. But unless fraud has been practiced, or some device or artifice resorted to by which one of the parties has been taken advantage of, equity will not rescind a contract for the sale and exchange of land. *Fuller v. Buice*, 80 Ga. 395.

2. *Curtis v. Clark*, 133 Mass. 509. And see generally, on this subject, *RESCISSIION*, vol. 21, p. 63 *et seq.*

Where a contract for the sale of land is executed by a conveyance, in which by oversight, a material part of the land is not embraced, and the vendor has no legal title to that part, but only at most an equitable right to obtain it, the purchaser is entitled to a rescission, unless the title is perfected before decree. *Winfrey v. Drake*, 4 Lea (Tenn.) 293.

3. Action To Recover Possession.—*Baker v. Gittings*, 16 Ohio 485; *Fears v. Merrill*, 9 Ark. 559; 50 Am. Dec. 226; *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26. And see EJECTMENT, vol. 6, p. 195.

It is immaterial that the vendor did not, before bringing suit, tender a deed. *Wright v. Moore*, 21 Wend. (N. Y.) 230.

The action of ejectment may be maintained by the vendor without any

previous notice to quit. *Baker v. Gittings*, 16 Ohio 485; *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Whiteside v. Jackson*, 1 Wend. (N. Y.) 418; *Wright v. Moore*, 21 Wend. (N. Y.) 230; *Den v. Webster*, 10 Yerg. (Tenn.) 513; *Smith v. Robinson*, 13 Ark. 533; *overruling*, on this point, *Fears v. Merrill*, 9 Ark. 559; 50 Am. Dec. 226.

The case of a vendor and vendee is an exception to the general rule, and though the latter enters into possession, under a contract of purchase, with the consent of the former, yet the vendor may maintain ejectment without previous notice to quit. *Jackson v. Miller*, 7 Cow. (N. Y.) 747. But it seems there must have been some previous demand of possession, *Venable v. McDonald*, 4 Dana (Ky.) 336; some notice, express or implied, of the vendor's election to avoid the contract and make reclamation. *Dennis v. Warder*, 3 B. Mon. (Ky.) 175.

In *Jackson v. Rowan*, 9 Johns. (N. Y.) 330, it was held that the vendee was entitled to notice to quit or a demand of possession before suit brought.

In *Harle v. McCoy*, 7 J. J. Marsh. (Ky.) 318; 23 Am. Dec. 407, it was held that one entering upon land, under an executory contract of purchase, cannot be evicted from possession by the vendor, unless he shall, by some act, have converted his possession into a tortious one, as by denying the title of his vendor, or refusing to quit upon sufficient notice or demand; and that mere non-payment of the purchase-money will not be sufficient.

4. *Henderson v. Hays*, 2 Watts. (Pa.) 148; *Hawn v. Norris*, 4 Binn. (Pa.) 77. But where the plaintiff cannot enforce specific execution of his contract against the defendant, he cannot recover in ejectment. *Vincent v. Huff*, 4 S. & R. (Pa.) 298.

A letter by an uncle, inviting an unmarried nephew to come to this country from Germany, and promising, if he

5. Action for Purchase-Money.—The vendor of land may recover the purchase-money in an action of assumpsit.¹ Similarly, if the contract is rescinded, the purchaser may recover the part payments previously made, in a suit for money had and received,² but

proved obedient and followed all his directions, to make him the heir of his whole estate, is not such a contract whereof specific execution should be enforced. *Stein v. North*, 3 Yeates (Pa.) 324.

1. *Pomeroy v. Winship*, 12 Mass. 514; 7 Am. Dec. 91; *Shepard v. Little*, 14 Johns. (N. Y.) 210.

Where the vendor, in an action for the purchase price of land, tenders a deed, and alleges ability and readiness to make title, the answer of the vendee, which merely denies that the vendor is able to make a good and sufficient deed, is defective, in that it neither points out a defect in the title, nor makes an averment requiring an exhibition of title. *Burchett v. Dailey* (Ky. 1893), 23 S. W. Rep. 874.

2. *Bryson v. Crawford*, 68 Ill. 362; *Eaton v. Redick*, 1 Neb. 305; *Reddington v. Henry*, 48 N. H. 273; *Beaman v. Simmons*, 76 N. Car. 43; *Colburn v. Northern Pac. R. Co.* (Mont. 1893), 34 Pac. Rep. 1017.

If the vendor is unable, through his own actions or operation of law, to perform, the vendee need not tender the purchase-money and demand a deed to enable him to bring the action. *Wilhelm v. Fimple*, 31 Iowa 131; 7 Am. Rep. 117.

Where the vendor, in a deed with covenant of seisin, has neither title nor possession of the land described, the grantee may immediately, on discovering such facts, sue for the price paid, though the grantor has in the meantime acquired title to the land. *Rombough v. Koons* (Wash. 1893), 34 Pac. Rep. 135.

The vendee may recover money paid in anticipation of performance by the vendor, where the title is doubtful. *Zorn v. McParland* (Super. Ct.), 28 N. Y. Supp. 485.

Upon failure of title, the vendee is not entitled to have other land of the vendor set aside to him, but should look to the covenant of warranty for money compensation. *Wilbarger County v. Robinson*, 5 Tex. Civ. App. 10.

The existence of liens on land subject to a contract of sale, is sufficient proof of the vendor's default to author-

ize the purchaser to rescind the contract, and sue for money paid under the contract, without making a formal tender of performance on his part. *Ziehen v. Smith* (Rockland County Ct.), 24 N. Y. Supp. 922; 2 Misc. Rep. 487; following *Morange v. Morris*, 3 Keyes (N. Y.) 48; *Hewison v. Hoffman* (C. Pl.), 4 N. Y. Supp. 621.

Where a vendor has executed a bond to convey title to land which is subject to a mortgage, for the payment of which a third party is liable primarily, of which the vendee has notice, and which is not due for more than a year after the time when a deed is due under the contract, he will, upon being sued by the vendee to recover the purchase-money paid, be allowed to perfect his title within a reasonable time, and having acted with due diligence, and so perfected it, and tendered a proper conveyance thereof, even after suit brought, but before trial, he is entitled to a judgment. *Bell v. Sternberg* (Kan. 1894), 36 Pac. Rep. 1058.

Interest on the part payments may be recovered. *Gillet v. Maynard*, 5 Johns. (N. Y.) 85; 4 Am. Dec. 329.

In *Baston v. Clifford*, 68 Ill. 67, the cases where the action may be sustained are thus stated by the court, speaking through McAllister, J: "The cases wherein the vendee may maintain an action to recover back money paid by him, under a contract, for the purchase of real estate, where the contract has been rescinded, are: *First*. Where the rescission is voluntary, and with the mutual consent of the parties, and without default on either side. *Second*. Where the vendor cannot, or will not, perform the contract on his part. *Third*. Where the vendor has been guilty of fraud in making the contract. . . . *Fourth*. Where, by the terms of the contract, it is left in the purchaser's power to rescind it by any act on his part, and he does it. . . . *Fifth*. Where neither party is ready to complete the contract at the stipulated time, but each is in default."

If no land exists corresponding to the description, the purchase-money paid may be recovered by the vendee. *D'Utricht v. Melchor*, 1 Dall. (U. S.)

not if the vendor is in no default, and is ready and willing to perform the contract on his part.¹

The agreement for consideration may be enforced, even though not made in writing,² or though a different consideration was recited in the deed, or it was there stated that it had been paid,³ a promise to pay the price of the land not being within the Statute of Frauds.⁴

6. Other Remedies.—The other remedies open to the vendor and purchaser have been considered already, under the various heads of this title.

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428; *Wilson v. Jordan*, 3 Stew. & P. (Ala.) 92.

Although an action of covenant would lie for the breach, assumpsit may be brought to recover the purchase-money. *Bellows v. Cheek*, 20 Ark. 424.

Where the defendant agreed to convey to the plaintiff certain lots, on payment of \$5,000 cash, \$1,000 of which was paid on the execution of the contract, but the plaintiff made no tender of the balance, or any part of it, it was held that the plaintiff could not recover back the \$1,000 paid, without showing a rescission or abandonment of the contract by consent of the parties. *Way v. Johnson* (S. Dak. 1894), 58 N. W. Rep. 552. But where land unlawfully sold, is recovered, the purchaser is en-

titled to have a bond and mortgage given his vendor for the purchase price canceled. *Williams v. Washington* (S. Car. 1894), 19 S. E. Rep. 1.

1. *Baston v. Clifford*, 68 Ill. 67.
2. *Strong v. Kamm*, 13 Oregon 172.
3. *Elder v. Hood*, 38 Ill. 533; *Speer v. Speer*, 14 N. J. Eq. 240; *Bratt v. Bratt*, 21 Md. 578; *Clapp v. Tirrell*, 20 Pick. (Mass.) 247; *Bowen v. Bell*, 20 Johns. (N. Y.) 338; 11 Am. Dec. 286; *Hebbard v. Haughian*, 70 N. Y. 54; *White v. Miller*, 22 Vt. 380.

4. *Warvelle on Vendor and Purchaser*, p. 913.

Among the text books consulted in the preparation of this article were the following: *Dart on Vendors and Purchasers*; *Devlin on Deeds*; *Elphinstone*

I. VENDOR'S IMPLIED LIEN FOR PURCHASE-MONEY OF LAND—1. Definition.—The implied lien of the vendor of land for the unpaid purchase-money has been recognized from an early period by the English chancery courts, and has been adopted in some of the states of the Union. It may exist in the absence of distinct agreement or separate security, and even though the deed of conveyance recites that the consideration has been paid.¹

2. Origin and Principle of the Doctrine.—There is a great diversity of opinion as to the origin² and grounds of the doctrine. It

on Interpretation of Deeds; Hilliard on Vendors and Purchasers; Martindale on Abstracts; Rawle on Covenants; Sugden on Vendors and Purchasers; Tiedeman on Real Property; Warvelle on Vendor and Purchaser; Washburn on Real Property; Williams on Real Property.

1. In the leading English case of *Mackreth v. Symmons*, 15 Ves. 329, Lord Eldon defined the doctrine as follows: "Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case, for the whole consideration; in the other, for that part of the money which was not paid."

This implied, equitable lien should be distinguished carefully from the vendor's lien by express contract or reservation. See *infra*, this title, *Vendor's Lien by Express Reservation*.

In *White v. Downs*, 40 Tex. 225, the court, by Gray, J., said: "The vendor's lien, however, properly understood, is not, in all respects, the same as the express lien often reserved in deeds of conveyance for payment of purchase-money, nor as strict mortgages or deeds of trust for it, nor yet as the security held by a vendor who has only given a bond for the title. These are often confounded with the vendor's lien, because security of the purchase-money is common to all of them. But the vendor's lien arises wholly from inference or implication which is invisible and cannot be recorded; the

others are from express contract, visible to all, and may be recorded. All of the same consequences do not, therefore necessarily result, as to assignees or holders of the debt secured by the vendor's lien, nor as to purchasers of the land liable to it, as between the original parties and privies, as do often occur in the cases of express lien by contract."

For other illustrations of the differences between the two kinds of liens, see *Carpenter v. Mitchell*, 54 Ill. 126, where it was held that the express lien by contract was not waived by the grantor's taking other security; and *Markoe v. Andras*, 67 Ill. 34, which decided that such a lien passed in equity, by an assignment of the note which it secured to the assignee. That the rule is otherwise in the case of the implied lien, see *infra*, this title, *In Whose Favor the Lien Exists; Waiver of Lien*.

2. The earliest recorded English case is *Heard v. Botelers*, Cary 35, decided in the reign of Queen Elizabeth. The case of *Chapman v. Tanner*, 1 Vern. 267, decided in 1684, shows that at that time the doctrine was recognized as binding in equity. See also *Bond v. Kent*, 2 Vern. 281. The earliest reported American case is *Garson v. Green*, 1 Johns. Ch. (N. Y.) 308.

In *Mackreth v. Symmons*, 15 Ves. 329, Lord Eldon said: "I take it to have been the settled doctrine at the time of the decision of *Blackburn v. Gregson*, 1 Bro. C. C. 420; which case so far shook the authority of *Fawell v. Heelis*, Ambler 724, as to relieve me from any apprehension that Lord Bathurst's doctrine can be considered as affording the rule to be applied as between the vendor and vendee themselves, and persons claiming under them." The Lord Chancellor further observed that: "The doctrine is probably derived from the civil law as to goods, which goes

has been asserted to rest on a natural equity; ¹ a supposed intention of the parties; ² a constructive trust arising out of the injustice of allowing the vendee to hold the land without paying therefor; ³ and on the ground that it was a contrivance of the English court of chancery to evade the unjust rule of the common law,

further than our law; by which, though the right of stoppage *in transitu* is founded upon natural justice and equity, yet, if possession, either actual or constructive, was taken by the vendee, the lien is gone."

1. *Chapman v. Tanner*, 1 Vern. 267; *Warren v. Fenn*, 28 Barb. (N. Y.) 333. In the latter case Potter, J., said: "It has become one of the best established principles of natural equity, that estates are to be regarded as unconscientiously obtained when the consideration is not paid." See also *Hiscock v. Norton*, 42 Mich. 320; *Beal v. Harrington*, 116 Ill. 113; *Phillips v. Schall*, 21 Mo. App. 38; *Pratt v. Clark*, 57 Mo. 191; *Bennett v. Shipley*, 82 Mo. 448; *Barrett v. Lewis*, 106 Ind. 120; *Poe v. Paxton*, 26 W. Va. 607; *Pintard v. Goodloe*, *Hempst. (U. S.)* 527.

This explanation of the grounds of the doctrine has not, however, been generally accepted. In the important case of *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449, Gray, C. J., rejected it altogether, and observed: "It was forcibly argued by counsel in *Blackburn v. Gregson*, 1 Bro. C. C. 420, and not answered by the court. 'As to the general question of the lien, it is called a natural lien; but it certainly is not so with respect to personality, which, if once delivered, it is conclusive, though concealed from all mankind; and there seems as much natural equity in the case of personality as realty.'"

2. This theory has never received much support. It is summarily disposed of, by Gibson, C. J., in *Kauffelt v. Bower*, 7 S. & R. (Pa.) 76; 10 Am. Dec. 428, who said: "The implication that there is an intention to reserve a lien for the purchase-money, in all cases in which the parties do not, by express acts, evince a contrary intention, is, in almost every case, inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purport to be a conveyance of everything that can pass." See also *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449; 3 Pomeroy's Eq. Jur. (3d ed.), § 1250.

3. The generally accepted opinion appears to be that the lien is based upon the doctrine of trusts, and is itself a species of constructive trusts. *Blackburn v. Gregson*, 1 Bro. C. C. 420; *Mackreth v. Symmons*, 15 Ves. 329; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Moreton v. Harrison*, 1 Bland (Md.) 491; 2 Story's Eq. Jur. (13th ed.), § 1218 *et seq.*; 1 Perry on Trusts (4th ed.), § 232.

In *Blackburn v. Gregson*, 1 Bro. C. C. 420, Lord Loughborough, said: "Lord Bathurst doubted whether there was such an equitable lien. *Fawell v. Heelis*, Ambl. 724. It becomes, therefore, of great consequence that it should be spoken of. It struck me always that there was such a lien, and that it was so from the foundation of the court. A bargain and sale must be for money paid; otherwise, it is in trust for the bargainor. If an estate is sold, and no part of the money paid, the vendee is a trustee; then, if part be paid, is it not the same as to that which is unpaid?"

On the other hand, Gray, C. J., in *Ahrend v. Odiorne*, 118 Mass. 264; 19 Am. Rep. 449, took a diametrically opposite view and said: "The theory that a trust arises out of the unconscientiousness of the purchaser, would construe the nonperformance of every promise, made in consideration of a conveyance of property to the promisor, into a breach of trust; and would attach the trust, not merely to the purchase-money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed *cestui que trust*."

So, also, in Pomeroy's Equity Jurisprudence we find the following statement: "Notwithstanding the weight of authority in support of this opinion (that the lien is a trust), it is the one, as it seems to me, having the least foundation of fact, of principle, or of analogy. It is an instance of the tendency, frequently mentioned in previous chapters, to refer all equitable rights and interests to the doctrine of trusts, a tendency which has produced much unnecessary confusion throughout the whole domain of equity jurisprudence."

freeing land from the claims of simple contract creditors, and to charge the land as security for the unpaid purchase-money.¹

It is agreed that the implied lien is of a purely equitable nature, and has no existence until established by the decree of a court in the particular case.²

3. How Far Adopted in the United States.—In the *United States*, the doctrine of a vendor's implied lien exists in more than half of the states.³ In several states it has been recognized by statute. In those states where it does not exist now, it has either

There is, in fact, not a single element really in common between this or any other equitable lien and a trust." 3 Pomeroy's Eq. Jur. (2d ed.), § 1250, n. 1.

1. This is the explanation of the doctrine offered by the court in *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449, where Gray, C. J., after examining the theories mentioned in the text, said: "The most plausible foundation of the English doctrine, would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land in the hands of the vendee as security for the unpaid purchase-money. And the restriction of the doctrine to real estate suggests the inference that the court of chancery was induced to interpose, by the consideration, that, by the law of *England*, real estate could neither be attached on *mesne* process, nor, except in certain cases or to a limited extent, taken in execution for debt." This view is also supported by the American editors of the *Leading Cases in Equity* (4th Am. ed.) 500.

It is interesting to note, as showing the diversity of opinion on the subject, that Mr. Pomeroy (3 Eq. Jur. (2d ed.), § 1250), rejects all of the theories above stated, and considers the lien to be "one of the many instances to be found in the early English jurisprudence, whether legal or equitable, of the higher importance, consideration and value given to real than to personal property."

2. *Gilman v. Brown*, 1 Mason (U.S.) 191; *Hutton v. Moore*, 26 Ark. 382; *Campbell v. Rankin*, 28 Ark. 406; 3 Pomeroy's Eq. Jur. (2d ed.), § 1260.

3. **The Lien Exists in—Alabama.**—*Roper v. McCook*, 7 Ala. 318; *Burns v. Taylor*, 23 Ala. 255; *Bradford v. Harper*, 25 Ala. 337; *Griffin v. Camack*, 36 Ala. 695; 76 Am. Dec. 344; *Dennis v. Williams*, 40 Ala. 633; *Wood v. Sullens*, 44 Ala. 686; *Gordon v. Bell*,

50 Ala. 213; *Terry v. Keaton*, 58 Ala. 667; *Dugger v. Tayloe*, 60 Ala. 504; *Flinn v. Barber*, 61 Ala. 530; *Barnett v. Riser*, 63 Ala. 347; *Thurman v. Stoddard*, 63 Ala. 336; *Chapman v. Lee*, 64 Ala. 483; *Burgess v. Greene*, 64 Ala. 509; *Shorter v. Frazer*, 64 Ala. 74; *Carver v. Eads*, 65 Ala. 190; *Walker v. Carroll*, 65 Ala. 61; *Ware v. Curry*, 67 Ala. 274; *Wilkinson v. May*, 69 Ala. 33; *McCarty v. Williams*, 69 Ala. 174; *Hooper v. Armstrong*, 69 Ala. 343; *Walker v. Struve*, 70 Ala. 167; *Tedder v. Steele*, 70 Ala. 347; *Donegan v. Hentz*, 70 Ala. 437; *Prickett v. Sibert*, 71 Ala. 194; *Stringfellow v. Ivie*, 73 Ala. 209; *Preston v. Ellington*, 74 Ala. 133; *Williams v. McCarty*, 74 Ala. 295; *Dickerson v. Carroll*, 76 Ala. 377; *McDonald v. Elyton Land Co.*, 78 Ala. 382; *Kelly v. Karsner*, 81 Ala. 500; *Betts v. Sykes*, 82 Ala. 378; *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718; *Chapman v. Peebles*, 84 Ala. 283; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Jackson v. Stanley*, 87 Ala. 270; *Weaver v. Brown*, 87 Ala. 533; *Davis v. Smith*, 88 Ala. 596; *Jones v. Lockard*, 89 Ala. 575; *Burton v. Henry*, 90 Ala. 281; *Cordova Coal Co. v. Long*, 91 Ala. 538; *Hopkins v. Miller*, 92 Ala. 513.

Arkansas.—*Shall v. Biscoe*, 18 Ark. 142; *Scott v. Orbison*, 21 Ark. 202; *Harris v. Hanks*, 25 Ark. 517; *Refeld v. Ferrell*, 27 Ark. 534; *Campbell v. Rankin*, 28 Ark. 401; *Turner v. Horner*, 29 Ark. 440; *Holman v. Patterson*, 29 Ark. 357; *Lavender v. Abbott*, 30 Ark. 172; *Johnson v. Nunnerly*, 30 Ark. 153; *Swan v. Benson*, 31 Ark. 728; *Blevins v. Rogers*, 32 Ark. 258; *Nail v. Speigle*, 33 Ark. 63; *Mayes v. Hendry*, 33 Ark. 240; *Stroud v. Pace*, 35 Ark. 100; *Martin v. O'Bannon*, 35 Ark. 62; *Young v. Harris*, 36 Ark. 162; *Harris v. Hanie*, 37 Ark. 348; *Chapman v. Liggett*, 41 Ark. 292; *Waddell v. Carlock*, 41 Ark. 523;

Rodman v. Sanders, 44 Ark. 504; Richardson v. Green, 46 Ark. 270; Springfield, etc., R. Co. v. Stewart, 51 Ark. 285; Chapman v. Chapman, 55 Ark. 542.

California.—Salmon v. Hoffman, 2 Cal. 138; 56 Am. Dec. 322; Truebody v. Jacobson, 2 Cal. 269; Cahoon v. Robinson, 6 Cal. 225; Walker v. Sedgwick, 8 Cal. 398; Sparks v. Hess, 15 Cal. 186; Williams v. Young, 17 Cal. 403; Taylor v. McKinney, 20 Cal. 618; Baum v. Grigsby, 21 Cal. 172; 81 Am. Dec. 153; Burt v. Wilson, 28 Cal. 632; 87 Am. Dec. 142; Gallagher v. Mars, 50 Cal. 23; Wells v. Harter, 56 Cal. 342; Fitzell v. Leaky, 72 Cal. 477; Bancroft v. Cosby, 74 Cal. 583; Avery v. Clark, 87 Cal. 619; 22 Am. St. Rep. 272; Gessner v. Palmateer, 89 Cal. 89. See also *California Civil Code* 1872, § 3046.

Colorado.—Francis v. Wells, 2 Co'o. 660; Schiffer v. Adams, 13 Colo. 582. See also Fallon v. Worthington, 13 Colo. 559; 16 Am. St. Rep. 231.

Dakota.—*Dakota Civ. Code* (1883), § 1801.

District of Columbia.—Ford v. Smith, 1 McArthur (D. C.) 592.

Florida.—Bradford v. Marvin, 2 Fla. 463; Woods v. Bailey, 3 Fla. 41; Wooten v. Bellinger, 17 Fla. 300.

Illinois.—Dyer v. Martin, 5 Ill. 146; School Trustees v. Wright, 11 Ill. 603; Keith v. Horner, 32 Ill. 524; McLaurie v. Thomas, 39 Ill. 201; Boynton v. Champlin, 42 Ill. 57; Wilson v. Lyon, 51 Ill. 166; Kirkham v. Boston, 67 Ill. 599; Wing v. Goodman, 75 Ill. 159; Moshier v. Meek, 80 Ill. 79; Andrus v. Coleman, 82 Ill. 26; 25 Am. Rep. 289; Henson v. Westcott, 82 Ill. 224; Small v. Stagg, 95 Ill. 39; Manning v. Frazier, 96 Ill. 279; Ryhiner v. Frank, 105 Ill. 326; Chicago, etc., Land Co. v. Peck, 112 Ill. 408; Sidwell v. Wheaton, 114 Ill. 267; Beal v. Harrington, 116 Ill. 113; Strong v. Strong, 126 Ill. 301; Gruhn v. Richardson, 128 Ill. 178.

Indiana.—Lagow v. Badollet, 1 Blackf. (Ind.) 416; Evans v. Goodlet, 1 Blackf. (Ind.) 246; 12 Am. Dec. 258; Deibler v. Barwick, 4 Blackf. (Ind.) 339; McCarty v. Pruett, 4 Ind. 226; Merritt v. Wells, 18 Ind. 171; Mattix v. Weand, 19 Ind. 151; Cox v. Wood, 20 Ind. 54; Yaryan v. Shriner, 26 Ind. 364; Nichols v. Glover, 41 Ind. 24; Haskell v. Scott, 56 Ind. 564; Fouch v. Wilson, 60 Ind. 64; 28 Am. Rep. 651; Anderson v. Donnell, 66 Ind. 150; Martin v. Cauble, 72 Ind. 67; Higgins v. Kendall, 73 Ind. 522; Richards v.

McPherson, 74 Ind. 158; McClellan v. Coffin, 93 Ind. 456; Barrett v. Lewis, 106 Ind. 120; Otis v. Gregory, 111 Ind. 504; Yettey v. Fitts, 113 Ind. 34; Stroh v. Good, 113 Ind. 93; Brower v. Witmeyer, 121 Ind. 83; Nysewander v. Lowman, 124 Ind. 584; Hawes v. Chaille, 129 Ind. 435.

Iowa.—Pierson v. David, 1 Iowa 23; Grapengether v. Fejervary, 9 Iowa 163; 74 Am. Dec. 336; Hays v. Horine, 12 Iowa 61; 79 Am. Dec. 518; Rakestraw v. Hamilton, 14 Iowa 147; Patterson v. Linder, 14 Iowa 414; Tupples v. Viers, 14 Iowa 515; Porter v. Dubuque, 20 Iowa 440; McDole v. Purdy, 23 Iowa 277; Johnson v. McGrew, 42 Iowa 555; Jordan v. Wimer, 45 Iowa 65; Kendrick v. Eggleston, 56 Iowa 128; 41 Am. Rep. 90; Gnash v. George, 58 Iowa 492; Webster v. McCollough, 61 Iowa 496; Cutler v. Ammon, 65 Iowa 281; Erickson v. Smith, 79 Iowa 374. The doctrine has, however, been criticised, Pierson v. David, 1 Iowa 23; and now, by a statute, the lien must be reserved in the deed in order to avail against a conveyance by the grantee. *Iowa Code* of 1873, § 1940; Stuart v. Harrison, 52 Iowa 511; Tinsley v. Tinsley, 52 Iowa 14; Dean v. Scott, 67 Iowa 233; Prouty v. Clark, 73 Iowa 55.

Kentucky.—Fowler v. Rust, 2 A. K. Marsh. (Ky.) 294; Thornton v. Knox, 6 B. Mon. (Ky.) 74; Muir v. Cross, 10 B. Mon. (Ky.) 277; Tiernan v. Thurman, 14 B. Mon. (Ky.) 224; Gritton v. McDonald, 3 Metc. (Ky.) 252; Burrus v. Roulhac, 2 Bush (Ky.) 39; Ledford v. Smith, 6 Bush (Ky.) 129; Emison v. Risque, 9 Bush (Ky.) 24; Bybee v. Smith, 88 Ky. 648. But it is now provided by statute that the "grantor shall not have a lien against bona fide creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid." *Kentucky Gen. Stat.* 1873, p. 589; *Kentucky Gen. Stat.* 1883, ch. 63, art. 1, § 24; Ross v. Adams, 13 Bush (Ky.) 370; Ashbrook v. Roberts, 82 Ky. 298; Brown v. Ferrell, 83 Ky. 417.

Louisiana.—The *Louisiana Rev. Civ. Code* of 1870, provides that the vendor shall have a privilege "on the estate by him sold, for the payment of the price, or so much of it as is unpaid, whether it was sold on or without a credit," and that the privilege shall extend to the beasts and agricultural implements attached to the estate. Arts. 3249, 3250. But no privilege has any effect against third persons," unless

recorded in the manner required by law in the parish where the property to be affected is situated." Art. 3274. See also *Louisiana Rev. Laws* 1884, §§ 2876-2878; *Pedesclaux v. Legaré*, 32 La. Ann. 380; *Succession of Clay*, 34 La. Ann. 1131; *Labouisse v. Rope Co.*, 43 La. Ann. 245.

Maryland.—*Moreton v. Harrison*, 1 Bland (Md.) 491; *Iglehart v. Armiger*, 1 Bland (Md.) 519; *Ringgold v. Bryan*, 3 Md. Ch. 488; *White v. Casenave*, 1 Har. & J. (Md.) 106; *Ghiselin v. Fergusson*, 4 Har. & J. (Md.) 522; *Pratt v. VanWyck*, 6 Gill & J. (Md.) 495; *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Repp v. Repp*, 12 Gill & J. (Md.) 341; *Carr v. Hobbs*, 11 Md. 285; *Hummer v. Schott*, 21 Md. 307; *Hall v. Jones*, 21 Md. 439; *Bratt v. Bratt*, 21 Md. 578; *Carrico v. Farmers', etc.*, Nat. Bank, 33 Md. 235; *Dance v. Dance*, 56 Md. 433; *Thompson v. Corrie*, 57 Md. 197; *Christopher v. Christopher*, 64 Md. 583; *Baltimore, etc., Turnpike Co. v. Moale*, 71 Md. 353; *Walsh v. McBride*, 72 Md. 45; *Maryland Pub. Gen. Laws* 1888, art. 16, § 193.

Michigan.—*Sears v. Smith*, 2 Mich. 243; *Converse v. Blumrich*, 14 Mich. 109; 90 Am. Dec. 230; *Payne v. Avery*, 21 Mich. 524; *Merrill v. Allen*, 38 Mich. 487; *Palmer v. Sterling*, 41 Mich. 218; *Hiscock v. Norton*, 42 Mich. 320; *Ortmann v. Plummer*, 52 Mich. 76; *Dunton v. Outhouse*, 64 Mich. 419; *Waterfield v. Wilber*, 64 Mich. 642; *Richards v. Shingle, etc.*, Co., 74 Mich. 57; *Balow v. Farmers' Mut. F. Ins. Co.*, 77 Mich. 540; *Wisconsin Marine, etc., Bank v. Filer*, 83 Mich. 496; *Donovan v. Donovan*, 85 Mich. 63; *Strong v. Ehle*, 86 Mich. 42.

Minnesota.—*Selby v. Stanley*, 4 Minn. 65; *Daughaday v. Paine*, 6 Minn. 443; *Duke v. Balme*, 16 Minn. 306; *Dawson v. Girard Ins., etc., Co.*, 27 Minn. 411; *Hammond v. Peyton*, 34 Minn. 529; *Peters v. Tunell*, 43 Minn. 473; 19 Am. St. Rep. 252; *Law v. Butler*, 44 Minn. 482.

Mississippi.—*Stewart v. Ives*, 1 Smed. & M. (Miss.) 197; *Dunlap v. Burnett*, 5 Smed. & M. (Miss.) 702; *Trotter v. Erwin*, 27 Miss. 772; *Servis v. Beatty*, 32 Miss. 52; *Littlejohn v. Gordon*, 32 Miss. 235; *Richardson v. Bowman*, 40 Miss. 782; *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267; *Dodge v. Evans*, 43 Miss. 570; *Pitts v. Parker*, 44 Miss. 247; *Tucker v. Hadley*, 52 Miss. 414; *Rutland v. Brister*, 53 Miss. 683; *Parker v. McBee*, 61

Miss. 134; *Cummings v. Moore*, 61 Miss. 184; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485; *Tate v. Bush*, 62 Miss. 145; *Lissa v. Posey*, 64 Miss. 352; *Bell v. Blair*, 65 Miss. 191.

Missouri.—*McKnight v. Bright*, 2 Mo. 110; *Marsh v. Turner*, 4 Mo. 253; *Delassus v. Poston*, 19 Mo. 425; *Davis v. Lamb*, 30 Mo. 441; *Bledsoe v. Games*, 30 Mo. 448; *Pratt v. Clark*, 57 Mo. 189; *Davenport v. Murray*, 68 Mo. 198; *Pearl v. Hervey*, 70 Mo. 160; *Orrick v. Durham*, 79 Mo. 174; *Bennett v. Shipley*, 82 Mo. 448; *Zoll v. Carnahan*, 83 Mo. 35; *Bronson v. Wanzer*, 86 Mo. 408; *Christy v. McKee*, 94 Mo. 241; *Melcher v. Derkum*, 44 Mo. App. 650.

Nevada.—*Reese v. Kinkead*, 18 Nev. 126. And see *Toombs v. Consolidation Poe Min. Co.*, 15 Nev. 444.

New Jersey.—*Brinkerhoff v. Van Sciven*, 4 N. J. Eq. 251; *Herbert v. Scofield*, 9 N. J. Eq. 492; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Corlies v. Howland*, 26 N. J. Eq. 311; *Graves v. Coutant*, 31 N. J. Eq. 763; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Butterfield v. Okie*, 36 N. J. Eq. 482; *Acton v. Waddington*, 46 N. J. Eq. 16.

New Mexico.—*Bates v. Childers*, 4 N. Mex. 347.

New York.—*Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398; 10 Am. Dec. 343; *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316; *White v. Williams*, 1 Paige (N. Y.) 502; *Warner v. Van Alstyne*, 3 Paige (N. Y.) 513; *Shirley v. Congress Steam Sugar Refinery Co.*, 2 Edw. Ch. (N. Y.) 505; *Warren v. Fenn*, 28 Barb. (N. Y.) 333; *Dubois v. Hull*, 43 Barb. (N. Y.) 26; *Smith v. Smith*, 9 Abb. Pr. N. S. (Buffalo Super. Ct.) 420; *Chase v. Peck*, 21 N. Y. 581; *Gaylord v. Knapp*, 15 Hun (N. Y.) 87; *Hazeltine v. Moore*, 21 Hun (N. Y.) 355; *Turkes v. Reis*, 14 Abb. N. Cas. (N. Y. Super. Ct.) 26; *Seymour v. McKinstry*, 106 N. Y. 230.

Ohio.—*Williams v. Roberts*, 5 Ohio 35; *Brush v. Kinsley*, 14 Ohio 20; *Mayham v. Coombs*, 14 Ohio 428; *Neil v. Kinney*, 11 Ohio St. 58; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115; *Whetsel v. Roberts*, 31 Ohio St. 503; *Unger v. Deiter*, 32 Ohio St. 210; *Hume v. Dixon*, 37 Ohio St. 66; *Ogle v. Ogle*, 41 Ohio St. 359.

Oregon.—*Pease v. Kelly*, 3 Oregon 417; *Gee v. McMillan*, 14 Oregon 268; 58 Am. Rep. 315; *Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. (U. S.)

never been adopted, or, having at one time existed, has been abrogated by statute or condemned by the courts. In a few states the question has not yet been finally decided. In the courts of

574; 4 Fed. Rep. 577; First Nat. Bank v. Salem Capital Flour Mills Co., 39 Fed. Rep. 89. In the case of *Kelly v. Ruble*, 11 Oregon 75, a majority of the court doubted the existence of the lien.

Rhode Island.—*Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Reynolds v. Hennessy*, 17 R. I. 154. But see *Perry v. Grant*, 10 R. I. 334.

Tennessee.—*Ross v. Whitson*, 6 Yerg. (Tenn.) 50; *Campbell v. Baldwin*, 2 Humph. (Tenn.) 248; *Marshall v. Christmas*, 3 Humph. (Tenn.) 616; 39 Am. Dec. 199; *Uzzell v. Mack*, 4 Humph. (Tenn.) 319; 40 Am. Dec. 648; *Norvell v. Johnson*, 5 Humph. (Tenn.) 489; *Brown v. Vanlier*, 7 Humph. (Tenn.) 239; *Choate v. Tighe*, 10 Heisk. (Tenn.) 621; *Durant v. Davis*, 10 Heisk. (Tenn.) 522; *Irvine v. Muse*, 10 Heisk. (Tenn.) 477; *Russell v. Dodson*, 6 Baxt. (Tenn.) 16; *Cate v. Cate*, 87 Tenn. 41.

Texas.—*Pinchain v. Collard*, 13 Tex. 333; *Wheeler v. Love*, 21 Tex. 583; *McAlpine v. Burnett*, 23 Tex. 649; *White v. Downs*, 40 Tex. 225; *Robinson v. McWhirter*, 52 Tex. 201; *Baker v. Compton*, 52 Tex. 252; *De Bruhl v. Maas*, 54 Tex. 464; *Salmon v. Downs*, 55 Tex. 243; *Hunt v. Makemson*, 56 Tex. 9; *Wooters v. Hollingsworth*, 58 Tex. 374; *Senter v. Lambeth*, 59 Tex. 259; *Porterfield v. Taylor*, 60 Tex. 264; *Russell v. Kirkbride*, 62 Tex. 455; *Houston v. Dickson*, 66 Tex. 79; *Hamblen v. Folts*, 70 Tex. 136; *Howe v. Harding*, 76 Tex. 17; 18 Am. St. Rep. 17; *Johnson v. Townsend*, 77 Tex. 639; *McMichael v. Jarvis*, 78 Tex. 671; *McCamly v. Waterhouse*, 80 Tex. 340; *Wright v. Campbell*, 82 Tex. 388.

Wisconsin.—*Willard v. Reas*, 26 Wis. 540; *Madden v. Barnes*, 45 Wis. 135; 30 Am. Rep. 703; *Carey v. Boyle*, 53 Wis. 574; 56 Wis. 145; *Evans v. Enloe*, 70 Wis. 345.

The Doctrine Has Not Been Adopted, nor Rejected in the Following States.—In *Connecticut*, it has not been adopted, and may be considered in doubt. *Watson v. Wells*, 5 Conn. 468; *Dean v. Dean*, 6 Conn. 285; *Meigs v. Dimock*, 6 Conn. 458; *Atwood v. Vincent*, 17 Conn. 575; *Chapman v. Beardsley*, 31 Conn. 115; *Hall v. Hall*, 50 Conn. 104.

In *Delaware*, it has not been adopted.

Budd v. Busti, 1 Harr. (Del.) 69; *Rice v. Rice*, 36 Fed. Rep. 860.

In *Georgia*, it has been abolished by statute, *Georgia Code* 1882, § 1997; *Jones v. Jones*, 56 Ga. 325; *Broach v. Smith*, 75 Ga. 159; though it formerly existed. *Mounce v. Byars*, 16 Ga. 469; *Still v. Griffin*, 27 Ga. 504.

In *Kansas*, it has been denied. *Simpson v. Munde*, 3 Kan. 172; *Brown v. Simpson*, 4 Kan. 76; *Smith v. Rowland*, 13 Kan. 245; *Greeno v. Barnard*, 18 Kan. 518.

In *Maine*, the doctrine has been rejected. *Gilman v. Brown*, 1 Mason (U. S.) 219; *Philbrook v. Delano*, 29 Me. 415.

In *Massachusetts*, it has been denied, *Gilman v. Brown*, 1 Mason (U. S.) 191; and rejected in *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449.

In *Nebraska*, it has been rejected. *Edminster v. Higgins*, 6 Neb. 265.

In *New Hampshire*, it has never been adopted for its existence was doubted. *Buntin v. French*, 16 N. H. 592; *Arlin v. Brown*, 44 N. H. 102.

In *North Carolina*, its existence is denied. *Womble v. Battle*, 3 Ired. Eq. (N. Car.) 182; *Henderson v. Burton*, 3 Ired. Eq. (N. Car.) 259; *Cameron v. Mason*, 7 Ired. Eq. (N. Car.) 180; *Smith v. High*, 85 N. Car. 93; *Moore v. Ingram*, 91 N. Car. 376; *White v. Jones*, 92 N. Car. 388; *Peck v. Culbertson*, 104 N. Car. 426; though the doctrine was adopted in the earlier cases.

In *Pennsylvania*, also, its existence is denied. *Kauffelt v. Bower*, 7 S. & R. (Pa.) 64; 10 Am. Dec. 428; *Hepburn v. Snyder*, 3 Pa. St. 72; *Stephen's Appeal*, 38 Pa. St. 9; *Hiester v. Green*, 48 Pa. St. 96; 86 Am. Dec. 569.

In *South Carolina*, it is denied. *Wragg v. Comptroller Gen'l*, 2 DeSaus. Eq. (S. Car.) 520.

In *Vermont*, it was adopted by the court in *Manly v. Hason*, 21 Vt. 271; 52 Am. Dec. 60; but was abolished by statute. *Vermont Gen. Stat.* 1862, ch. 65, § 33.

In *Virginia*, it has been abolished by statute, *Virginia Code* 1873, ch. 115, § 1; though it had formerly been recognized by the courts. *Tompkins v. Mitchell*, 2 Rand. (Va.) 428; *Kyles v. Tait*, 6 Gratt. (Va.) 44.

the *United States* the doctrine has been recognized wherever established by the local law of the particular state where the land is situated.¹

The same diversity of opinion which exists as to the true origin and reason of the doctrine, also exists as to its scope and operation, and even as to its soundness and wisdom.² There are few fixed rules regarding it, and they cannot be formulated so as to represent a general American doctrine.³ To ascertain the law of a given jurisdiction, it is necessary to examine carefully its decisions, and they are not always reconcilable.

4. When and to What Extent the Lien Exists.—As this lien does not, in any way, depend upon a specific agreement for its creation, it is presumed to exist in every case, unless an intention to the contrary is shown clearly; and the burden of repelling this presumption is on the vendee.⁴

In *West Virginia*, also, it has been abolished by statute. *West Virginia Code* 1870, ch. 75, § 1; *Poe v. Paxton*, 26 W. Va. 607; *McNeil v. Miller*, 29 W. Va. 480.

1. *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *M'Learn v. M'Lellan*, 10 Pet. (U. S.) 640; *Chilton v. Braiden*, 2 Black (U. S.) 458; *Galloway v. Finley*, 12 Pet. (U. S.) 264; *Cardova v. Hood*, 17 Wall. (U. S.) 1; *Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. (U. S.) 574; *Green v. Betts*, 1 Fed. Rep. 289; *First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. Rep. 89.

In *Rice v. Rice*, 36 Fed. Rep. 860, the court said: "It has been generally understood that the Supreme Court of the *United States* will not consider the lien as existing in any state, unless it has been previously adopted by the law, or is recognized by the courts of the state in which the land sought to be charged is situated."

2. In 3 *Pomeroy's Eq. Jur.* (2d ed.), § 1251, it is said: "No other single topic belonging to the equity jurisprudence, has occasioned such a diversity and even discord of opinion, among the American courts, as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in different states, and sometimes even in the same state, are directly conflicting. It is practically impossible to formulate any general rules representing the doctrine as established throughout the whole country." For a similar description of the condition

of the doctrine in the *United States*, see the opinion of Potter, J., in *Fisk v. Potter*, 41 N. Y. 64.

The lien has frequently been criticised, sometimes in jurisdictions where it exists, as being a "secret trust," and so not in accord with our registry system. *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 51; *Philbrook v. Delano*, 29 Me. 410; *Kauffelt v. Bower*, 7 S. & R. (Pa.) 64; 10 Am. Dec. 428; *Candlish v. Keen*, 13 Gratt. (Va.) 621; *Hammond v. Peyton*, 34 Minn. 529. The criticism of the lien, going as it does to the very basis of the doctrine, together with the fact, as shown by the foregoing table, that it has recently been abolished by a number of states, makes it doubtful whether the doctrine will ultimately survive.

3. This does not arise wholly from the fact that the decisions in the different states are conflicting, although that is the case. The very nature of this equitable right, depending as it does upon the peculiar facts and circumstances surrounding each particular case—upon whether the equity is established, and whether it is the highest equity, and whether it has not been waived or postponed to another equity, or lost by laches—render it impossible to formulate any settled rules. *Fisk v. Potter*, 41 N. Y. 64.

4. *Gilman v. Brown*, 1 Mason (U. S.) 191; *Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. (U. S.) 574; *Garson v. Green*, 1 Johns. Ch. (N. Y.) 308; *Clark v. Hall*, 7 Paige (N. Y.) 382; *Schnebly v. Ragan*, 7 Gill & J. (Md.) 125; 28 Am. Dec. 195; *Tompkins v. Mitchell*, 2 Rand. (Va.) 429; *Wilson v. Lyon*, 51 Ill. 166; *Fry v. Prewett*, 56

The lien is allowed only as security for the unpaid purchase-money and interest thereon.¹ It cannot be extended to cover

Miss. 783; *Allen v. Bennett*, 8 Smed. & M. (Miss.) 681; *Joiner v. Perkins*, 59 Tex. 300; *Carver v. Eads*, 65 Ala. 190; *Wilkinson v. May*, 69 Ala. 33; *Stringfellow v. Ivie*, 73 Ala. 213; *Dunton v. Outhouse*, 64 Mich. 419; 4 Kent's Com. (11th ed.) 152.

Where the vendor delivers possession to the purchaser without receiving the purchase-money, the vendor is entitled in equity to a lien for the purchase-money. *Walrath v. Abbott*, 27 N. Y. Supp. 529.

The rule stated in the text has been criticised often as a hardship to the vendee. In his judgment in *Mackreth v. Symmons*, 15 Ves. 329, Lord Eldon said: "What shall be sufficient to make a case, in which the lien can be said not to exist? It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way, so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist."

For a recent case, where it was held that the evidence of a contrary intent was sufficient to rebut the general presumption, see *Springfield, etc., R. Co. v. Stewart*, 51 Ark. 285.

In *Houston v. Dickson*, 66 Tex. 79, it was held that if the vendor has no valid right to, or interest in, the land, which will vest in the vendee, he cannot claim a lien. The same case also decided that the absence of knowledge that the law gives such a security, or a secret intention not to claim it, does not affect the right.

Statute of Frauds.—In *Gallagher v. Mars*, 50 Cal. 23, the vendee, when he received the conveyance, verbally agreed to reconvey the land to the vendor, if the purchase-money was not paid when demanded. This agreement was void under the Statute of Frauds, and was held not to prevent the enforcement of a vendor's lien.

It is important to notice that any right to charge land with the payment of purchase-money, dependent on the agreement of the parties, and not arising out of the implied lien, is within

the Statute of Frauds, and must be supported by written evidence. *Stringfellow v. Ivie*, 73 Ala. 209.

1. *Richardson's Succession*, 10 La. Ann. 616; *Davis v. Wheeler* (Tex. Civ. App. 1893), 23 S. W. Rep. 435. See, however, *Fietsam v. Kropp*, 6 Ill. App. 144, where a decree for a lien, which included in the amount due, not only the original purchase price, but a subsequent note given for unpaid interest thereon, was held erroneous.

Where, in lieu of the original notes given for the price of land, another is given, and it is afterward agreed that the grantee shall pay the interest upon the original notes in lieu of the latter, the grantor retains the equitable lien on the land for the payment of such interest. *Johnson v. Betterton* (Tex. Civ. App. 1894), 25 S. W. Rep. 1050.

Attorney's Fees.—It has been held that, where the note given for the purchase-money contains a stipulation by the vendee to pay the attorney's fees in case of a suit on the note, such fees can be recovered in a suit to enforce the vendor's lien. *Johnson v. Durner*, 88 Ala. 580; *Neese v. Riley*, 77 Tex. 348; *Tinsley v. Moore* (Tex. Civ. App. 1894), 25 S. W. Rep. 148.

Improvements by Vendor.—It has also been held that money, necessarily expended by the vendor for improvements, which, by the terms of the sale, the vendee was to make, may be regarded as unpaid purchase-money, for which the vendor may enforce a lien. *Grove v. Miles*, 71 Ill. 376.

Abatement of Lien.—The vendee is entitled to an abatement of the purchase price as to a portion of the land that had not come into his possession, and to which the plaintiff had no title at the time he made the conveyance. But he is not entitled to an abatement of the purchase price, where the description of the land is so indefinite that he will be presumed to know that it conveyed him no title to any land in the section. *Dykes v. Bottoms* (Ala. 1893), 13 So. Rep. 582.

Voluntary Conveyance.—A wife transferring her property to her husband, merely to enable him to raise funds thereon for his business, has no vendor's lien. *Reynolds v. City Nat. Bank*, 24 N. Y. Supp. 1134.

an indebtedness arising out of other transactions.¹ Nor does it exist in behalf of an uncertain or unliquidated demand. Thus, where the consideration for the sale of the land is an agreement to support the vendor for life, or to assume a debt or incumbrance, or to erect a building on the land, or to do certain other acts, the lien does not exist.² If, however, the land is sold for a definite

1. *Refeld v. Ferrell*, 30 Ark. 465; *Coombs v. Jordan*, 3 Bland (Md.) 284; 22 Am. Dec. 236; *O'Connor v. Smith*, 40 Ohio St. 214.

Taxes.—But the vendor may pay the taxes when the vendee has allowed them to become delinquent, and recover them as a part of the lien debt. *Brown v. Brown* (Mo. 1894), 27 S. W. Rep. 552.

2. *Harris v. Hanie*, 37 Ark. 348; *Bell v. Pelt*, 51 Ark. 433; *Vandoren v. Todd*, 3 N. J. Eq. 397; *Sears v. Smith*, 2 Mich. 243; *Payne v. Avery*, 21 Mich. 524; *Hiscock v. Norton*, 42 Mich. 320; *Patterson v. Edwards*, 29 Miss. 67; *Parish v. Hastings* (Ala. 1894), 14 So. Rep. 783; *McDonald v. Elyton Land Co.*, 78 Ala. 382; *Peters v. Tunell*, 43 Minn. 473; 19 Am. St. Rep. 252; 3 *Pomeroy's Eq. Jur.* (2d ed.), § 1251, n. 1.

But where, as a part of the price of certain property, the grantees agreed to satisfy a charge upon the property due the plaintiff's intestate, and failed to do so, equity will enforce a vendor's lien for that amount in favor of such intestate. *Waller v. Janney* (Ala. 1894), 14 So. Rep. 876.

A conveyed land, subject to a mortgage, by an absolute deed to B, as security for a debt. B renewed the mortgage in his own name, and afterward, without having his debt paid, reconveyed it to A, with the understanding that he was to sell it and pay B. A conveyed it to his wife, who conveyed it to C, who had no notice of any vendor's lien on the land. All the conveyances were subject to the mortgage given by B. It was held that the deed to B, though absolute on its face, was merely a mortgage, and that he was not entitled to a vendor's lien on the land. *Wenzel v. Schultz* (Cal. 1893), 34 Pac. Rep. 696.

An agreement to support the vendor for life, has been held too uncertain to raise a lien. *Chase v. Peck*, 21 N. Y. 581; *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Camp v. Gifford*, 67 Barb. (N. Y.) 434; *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh (Va.) 522; *Peters v. Tunell*, 43 Minn. 473; 19

Am. St. Rep. 252; *Meigs v. Dimock*, 6 Conn. 458.

An agreement to assume a debt, or incumbrance, or other collateral obligation of the vendor, does not create a lien. *Clarke v. Royle*, 3 Sim. 499; *Buckland v. Pocknell*, 13 Sim. 406; *Parrot v. Sweetland*, 3 Myl. & K. 655; *Chapman v. Beardsley*, 31 Conn. 115; *Lea v. Fabbri*, 45 N. Y. Super. Ct. 361; *Long v. Burke*, 2 Bush (Ky.) 90; *Patterson v. Edwards*, 29 Miss. 67. But see, *contra*, *Williams v. Crow*, 84 Mo. 298; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Elliott v. Plattor*, 43 Ohio St. 198. So, also, an agreement to erect a building on the land creates no lien. *McDonald v. Elyton Land Co.*, 78 Ala. 382. In this case the court said: "When the consideration of a deed is that the vendee shall enter into covenants to do specified acts, it has been held there is no lien, on the ground that the covenant is the consideration for which the vendor contracted, and having received that, he has been paid. In such case, the agreement, with the legal right to damages on breach, where the vendee is *sui juris*, is taken as payment." To the same effect, see *Buckland v. Pocknell*, 13 Sim. 406; *Dixon v. Gayfere*, 17 Beav. 421; *Arlin v. Brown*, 44 N. H. 102.

Delivery of Chattels.—On the same principle, when land is conveyed in consideration of the transfer and delivery to the vendor of chattels, choses in action, and the like, no lien exists. *Harris v. Hanie*, 37 Ark. 348; *Bell v. Pelt*, 51 Ark. 433.

In a recent *Alabama* case, however, it has been held that this rule does not prevail in that state, and that when the consideration is the delivery of chattels, which are capable of reduction to a money value, a lien exists for the collection of such value, upon a failure to deliver them in accordance with the terms of the contract. *Cordova Coal Co. v. Long*, 91 Ala. 538. See also *Neel v. Clay*, 48 Ala. 252; *Smith v. Vaughan*, 78 Ala. 201.

Complicated Agreement.—Where the

price in money, which it is agreed shall be paid in personal services, or in the note of a third person, or in a certain kind of chattels, the lien may be enforced.¹

Where the note for the purchase-money is given in part for land and in part for other considerations, the lien cannot be enforced, unless the party claiming it can show precisely how much of the note represents the price of the land.²

consideration for the conveyance of the land, was a complicated agreement, on the part of the vendee, to build a house and to take a lease of it, and to do certain other acts, it was held that the lien was not sufficiently definite to enable the court to enforce it. *Hiscock v. Norton*, 42 Mich. 320.

An agreement to serve as minister, has also been held not to create a lien. *Hudelson v. Wilson*, 40 Ill. App. 29. In this case the court, by Sample, J., commenting upon the case of *Harris v. Hanie*, 37 Ark. 348, said: "This case makes the distinction that is to be observed in all the authorities. The consideration must be a fixed amount, determinate in and of itself, without extrinsic proof to measure its value in money. If the consideration is for the performance of an act, the nonperformance of which gives rise to a claim for unliquidated damages, there is no lien."

Purchase-Money Inseparable.—For the same reason, where the purchase price of one parcel of land is so blended, in a mortgage, with that of another, that it cannot be separated, no lien, beyond the mortgage itself, can be enforced. *Ortmann v. Plummer*, 52 Mich. 76. And where land and chattels are sold for a gross sum, without any separation of their values so that the consideration for which the land was sold may be determined, no lien can be enforced on the land. *Suddeth v. Knight* (Ala. 1894), 14 So. Rep. 475.

Annuities.—So, also, where the consideration for the conveyance is the entering into covenants for the payment of annuities, a lien is not created. *Clarke v. Royle*, 3 Sim. 499; *Parrot v. Sweetland*, 3 Myl. & K. 655.

Exchange of Lands.—For various decisions relating to the lien arising on an exchange of lands, see *Drinkwater v. Moreman*, 61 Ga. 395; *Bryant v. Stephens*, 58 Ala. 636; *Betts v. Sykes*, 82 Ala. 378; *McDole v. Purdy*, 23 Iowa 277; *Hare v. Van Deusen*, 32 Barb. (N. Y.) 92; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485; *Beal v. Har-*

rington, 116 Ill. 113; *Bennett v. Shipley*, 82 Mo. 448; *Claybrooks v. Kelly*, 61 Tex. 634. The general rule is that, where a sum of money is due one party to the exchange for the excess in value of the land conveyed by him, he may enforce the lien to the extent of such excess.

Conveyances to Married Women.—With respect to the liens arising on conveyances to married women, see *Haskell v. Scott*, 56 Ind. 564; *Moore v. Worthy*, 56 Ala. 163; *Carver v. Eads*, 65 Ala. 190; *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718; *Davenport v. Murray*, 68 Mo. 198; *McLain v. Thompson*, 52 Miss. 418; *Martin v. Cauble*, 72 Ind. 67; *Ogle v. Ogle*, 41 Ohio St. 359.

1. *Young v. Harris*, 36 Ark. 162; *Winters v. Fain*, 47 Ark. 493; *Plowman v. Riddle*, 14 Ala. 169; 48 Am. Dec. 92; *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267; *Deason v. Taylor*, 53 Miss. 697.

In *Harvey v. Kelley*, 41 Miss. 490; 93 Am. Dec. 267, the note given for the purchase-money contained an agreement that it should be paid in lumber. In *Deason v. Taylor*, 53 Miss. 697, the note was drawn payable in *Mississippi* certificates of indebtedness; in both cases, however, it was held that the lien existed. These cases are to be distinguished from cases like *Harris v. Hanie*, 37 Ark. 348, where the agreement to deliver cotton was the real consideration, and not the mode of paying a fixed sum in money. See, however, *Hazeltine v. Moore*, 21 Hun (N. Y.) 355.

2. *Swain v. Cato*, 34 Tex. 395; *Sutton v. Sutton*, 39 Tex. 549; *Hicks v. Morris*, 57 Tex. 658; *Russell v. McCormick*, 45 Ala. 587; 6 Am. Rep. 707; *Stringfellow v. Ivie*, 73 Ala. 209; *Wilkinson v. Parmer*, 82 Ala. 367; *Peters v. Tunell*, 43 Minn. 473; 19 Am. St. Rep. 252; *McCandlish v. Keen*, 13 Gratt. (Va.) 615. *Contra*, *Cole v. Smith*, 24 W. Va. 287; *Clark v. Curtis*, 11 Leigh (Va.) 585. This rule has

The general rule, therefore, running through the cases, is that to create a lien there must be a fixed sum of money due from the vendee to the vendor, as the purchase-money for land conveyed; and the lien avails in favor of that debt, and that debt only.¹

5. What Property May Be Subjected to the Lien.—In general, the lien attaches to the interest of the vendor in the real estate, whatever the nature of that interest may be.² It attaches to an equitable, as well as a legal interest,³ to a lease-hold interest,⁴ to a right of way over the vendor's land,⁵ and to a preëmption claim upon public lands.⁶ In *England*, it has been held to attach to copyholds as well as freeholds.⁷ The lien is, moreover, superior to rights of dower⁸ and homestead,⁹ and may be enforced against the separate estate of a married woman.¹⁰

been put on various grounds; the true principle is, that the court will never enforce a lien, unless "it can accurately ascertain and define the amount of the charge to be imposed upon the land and enforced out of it." *Peters v. Tunnell*, 43 Minn. 475; 19 Am. St. Rep. 252.

1. *Peters v. Tunnell*, 43 Minn. 473; 19 Am. St. Rep. 252; and see cases cited *supra*.

2. Where one's interest as an heir, in an estate consisting of personal and real property, is sold, the vendor's lien attaches to the undivided interest in the lands of the estate, and, on partition, follows the tracts set apart to the purchaser. *Bergman v. Blackwell* (Tex. Civ. App. 1894), 23 S. W. Rep. 243.

3. *Johns v. Sewell*, 33 Ind. 1; *Fleece v. O'Rear*, 83 Ind. 200; *Dwenger v. Branigan*, 95 Ind. 221; *Barrett v. Lewis*, 106 Ind. 120; *Logwood v. Robertson*, 62 Ala. 523; *Ortmann v. Plummer*, 52 Mich. 76; *Russell v. Watt*, 41 Miss. 602; 93 Am. Dec. 270; *Jones v. Parker*, 51 Wis. 218; *Carey v. Boyle*, 53 Wis. 574; 56 Wis. 145; *Poe v. Paxton*, 26 W. Va. 607; *Ligon v. Alexander*, 7 J. J. Marsh. (Ky.) 288; *Iglehart v. Armiger*, 1 Bland (Md.) 526; *Warren v. Fenn*, 28 Barb. (N. Y.) 333; *Bledsoe v. Games*, 30 Mo. 448; *Loomis v. Davenport*, etc., R. Co., 3 McCrary (U. S.) 489. *Contra*, *Strider v. King*, 3 Cranch (C. C.) 67.

In *Ortmann v. Plummer*, 52 Mich. 76, the court, by Campbell, J., said: "The right of a vendor, to a lien, does not seem to be confined to the sale of a legal title or title in fee. The leading case of *Mackreth v. Symmons*, 15 Ves. 329, was one relating to what was treated as an equitable title. The doctrine has been applied to copyholds, and appears to be received as to all recognized titles. The lien on an equitable title may, no

doubt, be more uncertain, by reason of the danger that *bona fide* purchasers from the legal holder may intervene and destroy it. But subject to that risk (which is not confined to equitable estates) it may be upheld."

In most of the cases above cited, the equitable interest conveyed was that of a person who had purchased and paid for real estate, and had a right to a deed under a title bond or certificate. In all such cases, it has been held that the lien exists in favor of the equitable owner.

In *Russell v. Watt*, 41 Miss. 602; 93 Am. Dec. 270, the equitable interest was that of a daughter, to whom her father had made a parol gift of land. The daughter sold her interest, and was held to have a lien for the purchase-money. But see *Kelly v. Ruble*, 11 Oregon 75.

4. *Richardson v. Bowman*, 40 Miss. 782 (in this case the lease was for ninety-nine years); *Choate v. Tighe*, 10 Heisk. (Tenn.) 621; *Bratt v. Bratt*, 21 Md. 578 (a lease for ninety-nine years, renewable forever); *Turkes v. Reis*, 14 Abb. N. Cas. (N. Y. Super. Ct.) 26; *Cole v. Smith*, 24 W. Va. 287. *Contra*, *Cade v. Brownlee*, 15 Ind. 369; 76 Am. Dec. 95.

5. *Hempfield R. Co. v. Thornburg*, 1 W. Va. 261.

6. *Pierson v. David*, 1 Iowa 23.

7. *Winter v. Anson*, 3 Russ. 493.

8. *Boyd v. Martin*, 9 Heisk. (Tenn.) 382; *Noyes v. Kramer*, 54 Iowa 22; *Martin v. Smith*, 25 W. Va. 579; *Fisher v. Johnson*, 5 Ind. 492; *Nutter v. Fouch*, 86 Ind. 451.

9. *McHendry v. Reilly*, 13 Cal. 75; *Bradley v. Curtis*, 79 Ky. 327; *Claybrooks v. Kelly*, 61 Tex. 634.

10. *Kent v. Gerhard*, 12 R. I. 92; 34

The lien does not, however, attach to anything not real estate.¹ It cannot be enforced against the proceeds of the interest sold,² or against the rents and profits,³ or against anything which has become personalty by severance from the real estate.⁴ Nor does it extend to any land except that sold by the one seeking to enforce the lien,⁵ but it does extend to the whole and to every part of the latter.⁶

6. In Whose Favor the Lien Exists—*a. GENERALLY.*—The lien may be enforced, of course, by the vendor, and, upon his decease, by his personal representatives.⁷ This is the case, whatever the capacity in which the land was held by the vendor when conveyed. Thus, it may be enforced by guardians,⁸ and by mortgagees.⁹ So, also, it exists in favor of a partner, upon a sale of his interest in co-partnership lands to his co-partner, where there are no firm creditors;¹⁰ in favor of tenants in common, who sell their shares

Am. Rep. 612; *Chilton v. Braiden*, 2 Black (U. S.) 458; *Weinberg v. Rempe*, 15 W. Va. 829; *Jackson v. Rutledge*, 3 Lea (Tenn.) 626; 31 Am. Rep. 655; *Morrison v. Brown*, 83 Ill. 562.

1. But where land and chattels are sold for a lump sum, there will be a vendor's lien on the land for such part of the sum as represents the proportional value of the land. *Bergman v. Blackwell* (Tex. Civ. App. 1894), 23 S. W. Rep. 243.

2. *Mims v. Lockett*, 23 Ga. 237; 68 Am. Dec. 521.

3. *Little v. Brown*, 2 Leigh (Va.) 353; *Wilson v. Ewing*, 79 Ky. 549; *Wooten v. Bellinger*, 17 Fla. 289; *Collins v. Richart*, 14 Bush (Ky.) 621.

4. *Jamison v. Barelli*, 20 La. Ann. 452; *Manning v. Frazier*, 96 Ill. 279. In the latter case, the owner of land sold and conveyed to another all the coal, limestone, and other mineral in the land, with an express license to the grantee to dig and remove them, for which grant the purchaser agreed to pay a stipulated price per ton for the minerals removed, payable in quarterly payments. It was held that the grantor had a lien on the coal and mineral not mined and removed, for the purchase-money, and that he could enforce it by a sale of the mineral not taken from the ground. It was held, also, that the lien did not attach to the coal and mineral removed from the land, because such coal and mineral had, by severance, become personal property.

5. *Fietsam v. Kropp*, 6 Ill. App. 144; *Bishop v. Snell*, 37 Ala. 90. In the latter case, it was held that the lien did not extend to land received by the

vendee in exchange for the land bought. See, however, *Child v. Burton*, 6 Bush (Ky.) 617.

6. *Mims v. Lockett*, 23 Ga. 237; 68 Am. Dec. 521.

7. *Robinson v. Appleton*, 22 Ill. App. 351; *affirmed* in 124 Ill. 276; *Keith v. Horner*, 32 Ill. 534; *Evans v. Enloe*, 70 Wis. 345; *Leeper v. Lyon*, 68 Mo. 216; *Wright v. Heffner*, 57 Tex. 518. In *Tiernan v. Beam*, 2 Ohio 383; 15 Am. Dec. 557, the lien was enforced in favor of a devisee of the debt secured thereby. See also *Lavender v. Abbott*, 30 Ark. 172. And where a sale was made by an administrator, for the purpose of division among the heirs of the vendor, the heirs were allowed to maintain a bill to enforce the lien. *Knight v. Blanton*, 51 Ala. 333.

Where the widow and children of an intestate agree that the widow shall take a child's portion in lieu of dower, and join in conveying the land, receiving the purchaser's note in part payment, which is given to the widow as her distributive share, her heirs may enforce a vendor's lien on the land, since she did not convey a dower interest which terminated at her death, but, together with her children, conveyed a fee, in part payment of which the note was given. *Oglesby v. Birmingham*, 69 Miss. 795.

8. *Ferguson v. Shepherd*, 58 Miss. 804. In *Mississippi*, there is also a special statutory lien in favor of guardians and representatives of deceased persons. *Mississippi Rev. Code*, §§ 2048, 2115.

9. *Barrett v. Lewis*, 106 Ind. 120.

10. *Reese v. Kinkead*, 18 Nev. 126.

severally,¹ and in favor of one to whom money has been allowed as owelty in partition.²

Although, as it hereafter appears, the tendency in the *United States* is to confine the right to enforce the lien to the vendor, where, by agreement between the vendor and vendee, the purchase-money, or a portion thereof, is payable to a third person, that person is held to have a lien;³ but the mere lending of money to pay for land does not create a lien in favor of the lender,⁴ even if he takes a mortgage or note reciting such a lien.⁵

b. ASSIGNMENT OF LIEN.—In *England*, the prevailing opinion does not confine the right to enforce the lien to the vendor. Other parties may avail themselves of it by way of subrogation, or as assignees.⁶ In the *United States*, on the other hand, the tendency of the courts has been in the opposite direction. The English doctrine has been followed in some of the states,⁷ but in

1. Exchange, etc., *Bank v. Bradley*, 15 Lea (Tenn.) 279.

2. Baltimore, etc., *R. Co. v. Trimble*, 51 Md. 99.

3. Francis v. Wells, 2 Colo. 660; *Latham v. Staples*, 46 Ala. 462; *Young v. Hawkins*, 74 Ala. 370; *Carver v. Eads*, 65 Ala. 190; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Mitchell v. Butt*, 45 Ga. 162; *De L'Isle v. Moss*, 34 La. Ann. 164; *Thompson v. Thompson*, 3 Lea (Tenn.) 126; *Mize v. Barnes*, 78 Ky. 506; *Joiner v. Perkins*, 59 Tex. 300; *Johnson v. Townsend*, 77 Tex. 639; *Whetsel v. Roberts*, 31 Ohio St. 503; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485; *Nichols v. Glover*, 41 Ind. 24; *Tysen v. Wabash R. Co.*, 15 Fed. Rep. 763.

In *Mississippi*, a distinction has been drawn between a vendor and a grantor; the former may enforce the lien, if the note is payable to him, even if the land was not actually conveyed by him. *Perkins v. Gibson*, 51 Miss. 699; 24 Am. Rep. 644; *Rutland v. Brister*, 53 Miss. 683.

4. *Durant v. Davis*, 10 Heisk. (Tenn.) 522; *Gray v. Baird*, 4 Lea (Tenn.) 212; *Stagg v. Small*, 4 Ill. App. 192; *Gilman v. Dingeman*, 49 Iowa 308; *Stansell v. Roberts*, 13 Ohio 148; 42 Am. Dec. 103; *Marquat v. Marquat*, 7 How. Pr. (N. Y. Supreme Ct.) 417.

The rule is the same where one of two joint purchasers pays the whole purchase-money, and the estate is conveyed to them both. The one who pays has no lien. *Brown v. Budd*, 2 Ind. 442.

In *Carey v. Boyle*, 53 Wis. 574, A purchased one hundred and twenty acres of land for the benefit of B, and paid

the purchase-money, and had the deed made to B. The deed was left with A, and, upon B's paying back to A part of the consideration money, and giving A his notes for the remainder, the deed was delivered to B, and he took possession of the land. It was held that A had a lien for the amount of the unpaid notes, and the court, by Orton, J., laid down the rule as follows: "It must be understood that the extension of this equity, to a third person, is strictly confined to those who furnish or advance the purchase-money to the purchaser, in such manner that they can be said either to have paid it to the vendor personally, or caused it to be paid, on behalf or for the benefit of the purchaser; and to this extent they become parties to the transaction. It must not be a general loan, to be used by the purchaser to pay the consideration of the purchase, or to be used for any other purpose at his pleasure. In such case, the simple fact that the money can be traced into the land as having been paid by the purchaser to the vendor, as the whole or part of the purchase-money, gives the person who loaned it no such right." The rule in *Wisconsin*, allowing subrogation in cases like that stated above, is not, however, supported by the weight of authority in this country. See cases cited *supra*.

5. *Chapman v. Abrahams*, 61 Ala. 108; *Gray v. Baird*, 4 Lea (Tenn.) 212.

6. *Dryden v. Frost*, 3 Myl. & C. 330; *Lacey v. Ingle*, 2 Ph. 413; *Rayne v. Baker*, 1 Giff. 241; 2 Dart's Vendor and Purchaser (5th ed.) 732.

7. *The Lien Is Assignable in—Alabama*.—The following cases hold that a

most of them the lien is treated as a strictly personal right of the vendor, and is not assignable,¹ either by express language, or by

transfer of the notes by indorsement carries with it the lien. *Roper v. McCook*, 7 Ala. 318; *White v. Stover*, 10 Ala. 441; *Wells v. Morrow*, 38 Ala. 125; *Lang v. Wilkinson*, 57 Ala. 259; *Buford v. McCormick*, 57 Ala. 428; *Wilkinson v. May*, 69 Ala. 33.

A transfer of the note given for the purchase-money, by delivery only, without recourse to the vendor or liability on his part, does not carry the lien. *Bankhead v. Owen*, 60 Ala. 457; *Walker v. Carroll*, 65 Ala. 61; *Prickett v. Sibert*, 71 Ala. 194; *Preston v. Ellington*, 74 Ala. 133; *Weaver v. Brown*, 87 Ala. 533.

But now it is provided by statute that "the transfer of a bond, bill, or note, given for the purchase-money of lands, whether the transfer be by delivery merely, or in writing, expressed to be with or without recourse on the transferrer," passes to the transferee the lien of the vendor on the lands." *Alabama Code*, § 1764.

In *Jones v. Lockard*, 89 Ala. 575, the court, in applying the statute, held that one who merely advanced money by way of loan to pay the notes, and did not purchase them, could not enforce the lien.

Indiana.—*Fisher v. Johnson*, 5 Ind. 492; *Kern v. Hazlerigg*, 11 Ind. 443; 71 Am. Dec. 360; *Wiseman v. Hutchinson*, 20 Ind. 40; *Johns v. Sewell*, 33 Ind. 1; *Nichols v. Glover*, 41 Ind. 24; *Lowry v. Smith*, 97 Ind. 466; *Otis v. Gregory*, 111 Ind. 504.

Kentucky.—*Broadwell v. King*, 3 B. Mon. (Ky.) 449; *Honore v. Bakewell*, 6 B. Mon. (Ky.) 67; 43 Am. Dec. 147; *Ripperdon v. Cozine*, 8 B. Mon. (Ky.) 465; *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 285; *Johnston v. Gwathmey*, 4 Litt. (Ky.) 317; 14 Am. Dec. 135.

Mississippi.—Formerly the lien could not be assigned in *Mississippi*, but the rule has been changed by statute. See *Mississippi Code* of 1880, § 1124; Annot. Code 1892, § 3503; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485.

Missouri.—*Adams v. Cowherd*, 30 Mo. 458; *Sloan v. Campbell*, 71 Mo. 387; 36 Am. Rep. 493.

New Mexico.—*Bates v. Childers*, 4 N. Mex. 347.

Texas.—*Moore v. Raymond*, 15 Tex. 554; *Watt v. White*, 33 Tex. 421;

White v. Downs, 40 Tex. 225; *Cannon v. McDaniel*, 46 Tex. 303; *De Bruhl v. Maas*, 54 Tex. 464; *Brooks v. Young*, 60 Tex. 32.

In *Hicks v. Morris*, 57 Tex. 658, and *Oury v. Saunders*, 77 Tex. 278, it is held that equity will subrogate the lender who advances money to pay a lien creditor, to the rights of such creditor under the lien, as effectually as if he had become the assignee of the notes for the purchase-money.

1. In the Following States the Lien Cannot Be Transferred Either by Assignment or by Subrogation.—*Arkansas*.—*Shall v. Biscoe*, 18 Ark. 162; *Williams v. Christian*, 23 Ark. 255; *Hutton v. Moore*, 26 Ark. 382; *Jones v. Doss*, 27 Ark. 518; *Hecht v. Spears*, 27 Ark. 229; 11 Am. Rep. 784; *Carlton v. Buckner*, 28 Ark. 66; *Rogers v. James*, 33 Ark. 77. The lien, may, however, be assigned as collateral security. *Crawley v. Riggs*, 24 Ark. 563; *Carlton v. Buckner*, 28 Ark. 66; *Chapman v. Liggett*, 41 Ark. 292.

In *Rodman v. Sanders*, 44 Ark. 504, it was held that one who, at the request of the purchaser, paid the debt, and showed an intention to keep the lien alive for his protection, by retaining the purchase note and deed in his possession, with the assent of the debtor, was subrogated to the rights of the vendor.

California.—*Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; *Lewis v. Covilland*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227; *Ross v. Heintzen*, 36 Cal. 313; *Avery v. Clark*, 87 Cal. 619; 22 Am. St. Rep. 272. And see *California Civ. Code*, § 3047. If, however, the vendor is obliged to take up the note assigned by him, on account of non-payment, the lien is revived. *Bankcroft v. Cosby*, 74 Cal. 583.

Georgia.—*Wellborn v. Williams*, 9 Ga. 86; 52 Am. Dec. 427; *Webb v. Robinson*, 14 Ga. 216.

Illinois.—*Keith v. Horner*, 32 Ill. 524; *Carpenter v. Mitchell*, 54 Ill. 126; *Wing v. Goodman*, 75 Ill. 159; *Moshier v. Meek*, 80 Ill. 79; *Dayhuff v. Dayhuff*, 81 Ill. 499; *Elder v. Jones*, 85 Ill. 384; *Bonnell v. Holt*, 89 Ill. 71; *Stagg v. Small*, 4 Ill. App. 192; *Small v. Stagg*, 95 Ill. 39; *Gruhn v. Richardson*, 128 Ill. 178.

Maryland.—*Dixon v. Dixon*, 1 Md.

implication, upon an assignment of the debt secured thereby.¹ In jurisdictions where the lien is not assignable, it cannot be enforced by the vendor, after a transfer of the debt to which it is incident, either for the benefit of the assignee of the debt,² or for the benefit of the vendor himself,³ unless he continues to have a pecuniary interest in the debt.⁴ If, however, the vendor is obliged to take up a note which he has transferred, by reason of its non-payment, the lien is revived,⁵ and in several jurisdictions,

Ch. 220; *Iglehart v. Armiger*, 1 Bland (Md.) 519.

Minnesota.—*Hammond v. Peyton*, 34 Minn. 529.

Mississippi.—*Skaggs v. Nelson*, 25 Miss. 88; *Walker v. Williams*, 30 Miss. 165; *Stratton v. Gold*, 40 Miss. 778; *Lindsey v. Bates*, 42 Miss. 397; *Pitts v. Parker*, 44 Miss. 247; *Murphree v. Countiss*, 58 Miss. 716. See, however, the opinion of Tarbell, J., in *Perkins v. Gibson*, 51 Miss. 699; 24 Am. Rep. 644.

In *Lindsey v. Bates*, 42 Miss. 397, it was held that, if the vendor had assigned the note and was obliged to take it up, the lien revived in his favor. But the rule in *Mississippi* is now changed by a statute, which provides that the assignee of a claim for the purchase-money of land may enforce the vendor's lien "as the vendor could." See *Mississippi Code of 1880*, § 1124; Annot. Code 1892, § 3503; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485.

New York.—*White v. Williams*, 1 Paige (N. Y.) 502. In *Smith v. Smith*, 9 Abb. Pr. N. S. (Buffalo Super. Ct.), 420, it was held that, where the vendor continues to have a pecuniary interest in the payment of the debt, he may enforce the lien, even after an assignment of the debt.

Ohio.—*Jackman v. Hallock*, 1 Ohio 318; 13 Am. Dec. 627; *Tiernan v. Beam*, 2 Ohio 383; 15 Am. Dec. 557; *Brush v. Kinsley*, 14 Ohio 20; *Horton v. Horner*, 14 Ohio 437.

In *Tiernan v. Beam*, 2 Ohio 383; 15 Am. Dec. 557, it was held that one to whom the notes were devised, could enforce the lien.

Oregon.—*First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. Rep. 89.

Tennessee.—*Tharpe v. Dunlap*, 4 Heisk. (Tenn.) 674; *Durant v. Davis*, 10 Heisk. (Tenn.) 522; *Cowan v. Sharp*, 11 Heisk. (Tenn.) 450; *Green v. Demoss*, 10 Humph. (Tenn.) 371; *Bowlin v. Pearson*, 4 Baxt. (Tenn.) 341; *McWhirter v. Swaffer*, 6 Baxt. (Tenn.)

342; *Pillow v. Helm*, 7 Baxt. (Tenn.) 545.

In *Baum v. Grisby*, 21 Cal. 173; 81 Am. Dec. 153, Field, C. J., speaking on the question where a lien is held not to be assignable, said: "It is simply a right to resort to the property upon a failure of payment by the vendee. It does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded upon the natural justice of allowing a party to reach the property, which he has transferred, to satisfy the debt which constitutes the consideration of the transfer. It is, therefore, the personal privilege of the vendor. The assignee of a note given for the purchase-money, stands in a very different position. He has not parted with the property which he seeks to reach in consideration of the note he has received. He has never held the property and has, therefore, no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another." See also *Hammond v. Peyton*, 34 Minn. 529.

1. *Richards v. Leaming*, 27 Ill. 431; *Keith v. Horner*, 32 Ill. 524; *Wing v. Goodman*, 75 Ill. 159; *Elder v. Jones*, 85 Ill. 384.

As the lien arises out of the relation of vendor and vendee, the theory is that an assignment of the debt destroying the relation, destroys the lien. *Louisiana Nat. Bank v. Knapp*, 61 Miss. 490.

It is also considered that general principles of public policy and expediency are opposed to any extension of the privilege. *Hammond v. Peyton*, 34 Minn. 529.

2. *Elder v. Jones*, 85 Ill. 384; *Moore v. Glass* (Tex. Civ. App. 1894), 25 S. W. Rep. 128.

3. *Scott v. Mann*, 36 Tex. 157.

4. *Smith v. Smith*, 9 Abb. Pr. N. S. (Buffalo Super. Ct.) 420.

5. *Bancroft v. Cosby*, 74 Cal. 583;

where the lien is not generally assignable, it, nevertheless, has been held by the courts, or provided by statute, that, where the transfer is in payment, or as security for a debt of the vendor, the lien is preserved.¹

In those states where the lien is assignable, it may be enforced by the assignee in his own name and for his own benefit, provided he is rightfully the owner of the claim for the purchase-money.² But if the vendor assigns the notes for the debt "without recourse,"³ or by delivery only,⁴ or in any other manner by which his own liability is destroyed, the lien does not pass. Where there are several notes for the purchase-money, and some of them are afterward transferred by indorsement, the indorsement of each is, *pro tanto*, an assignment of the vendor's lien;⁵ and the same is true where there is an assignment of part of a note.⁶

c. SUBROGATION.—In jurisdictions where the lien is not assign-

Lindsey v. Bates, 42 Miss. 397; *Cotten v. McGehee*, 54 Miss. 510; *Rogers v. James*, 33 Ark. 77. And *a fortiori* the rule is the same in jurisdictions where the lien is assignable. *Kelly v. Payne*, 18 Ala. 371; *Preston v. Ellington*, 74 Ala. 133. And see *Smith v. Snowden* (Ky. 1894), 26 S. W. Rep. 805.

1. *Carlton v. Buckner*, 28 Ark. 66; *Chapman v. Liggett*, 41 Ark. 292; *Hallock v. Smith*, 3 Barb. (N. Y.) 272; *California Civ. Code*, § 3047; *Dakota Civ. Code*, § 1802.

In *Hallock v. Smith*, 3 Barb. (N. Y.) 272, the reason for this exception is stated thus: "If the note or bond is assigned or transferred to a third person, for his benefit, the security is gone forever. The reason is, that there is no peculiar equity in favor of the third person. But that does not apply where, as in this case, the transfer is only for the purpose of paying the debt of the vendor, so far as may be available, and is, therefore, for his benefit. There the equity continues." The same rule, of course, obtains wherever the lien is assignable. *Plowman v. Riddle*, 14 Ala. 169; 48 Am. Dec. 92.

2. *Wells v. Morrow*, 38 Ala. 125; *Burford v. McCormick*, 57 Ala. 428; and see cases cited above in this section.

In *Plowman v. Riddle*, 14 Ala. 169; 48 Am. Dec. 92, it was held that, where the note secured by the lien was transferred as collateral security, the lien could be asserted only by the transferee jointly with the vendor, and that a bill filed by the vendor alone could not be maintained.

3. *Bankhead v. Owen*, 60 Ala. 457; *Barnett v. Riser*, 63 Ala. 347; *Walker*

v. Carroll, 65 Ala. 61; *Schnebley v. Ragan*, 7 Gill & J. (Md.) 120; 28 Am. Dec. 195. This rule has, however, been changed in *Alabama* by statute, *Alabama Code*, § 1764; and does not prevail in *Texas*, *Neese v. Riley*, 77 Tex. 348.

4. *Prickett v. Sibert*, 71 Ala. 194; *Preston v. Ellington*, 74 Ala. 133; *Daily v. Reid*, 74 Ala. 415.

5. *Preston v. Ellington*, 74 Ala. 133. In *Robertson v. Guerin*, 50 Tex. 317, it was held that the assignee was entitled to priority of payment, out of the proceeds of the sale of the land, before the notes retained by the vendor, without regard to the time of their maturity. But it has been held in *Texas* that the fact that one of several notes, all of which constituted a vendor's lien, was assigned first, confers on the holder no right to priority of payment as against assignees of other notes, *Wooters v. Hollingsworth*, 58 Tex. 371; *Salmon v. Downs*, 55 Tex. 243; *contra*, *Griggsby v. Hair*, 25 Ala. 327; or even as against the vendor who has retained other notes, unless it was clearly the intention that the assignee should be first paid. *Salmon v. Downs*, 55 Tex. 243. See also *Whitehead v. Fisher*, 64 Tex. 638; *Andrews v. Hobgood*, 1 Lea (Tenn.) 693; *Davidson v. Allen*, 36 Miss. 419; *McClintic v. Wise*, 25 Gratt. (Va.) 448; 18 Am. Rep. 694; 2 W. & T. Lead Cases (4th Am. ed.), p. 2009. In most cases where the point has arisen the lien has been a reserved lien. See *infra*, this title, *Vendor's Lien by Express Reservation—Assignment*.

6. *Thomas v. Wyatt*, 5 B. Mon. (Ky.) 132.

able, even by an express contract, it necessarily follows that there can be no equitable assignment by way of subrogation.¹ Where the lien is assignable, on the other hand, subrogation is possible, and will be allowed wherever the equities demand it.²

7. Against Whom the Lien May Be Enforced.—The lien, once established, avails against the vendee himself, his heirs, devisees, and other immediate successors in interest; and against the rights of dower and homestead of his widow.³ It also avails against all

1. See note, *supra*.

2. **Subrogation.**—There are various classes of cases in which subrogation is allowed. A surety on a note for the purchase-money, who has paid the debt, may be subrogated to the lien of the vendor, *Lusk v. Hopper*, 3 Bush (Ky.) 179; but not before he has paid the debt in full. *McConnell v. Beattie*, 34 Ark. 113.

Also, where one sold land on which there was a mortgage, which the vendee agreed to pay, and the vendee died insolvent after conveying the property to another, leaving the original vendor to pay the mortgage debt, it was held that the latter had a vendor's lien against the last purchaser. *Lowry v. Smith*, 97 Ind. 466.

Again, where a purchaser of property pays off a lien thereon, and it is attempted to subject the property in his hands to other incumbrances existing at the time of his purchase, he will be subrogated to the rights of the owner as against another incumbrance. *Planter's Bank v. Dodson*, 9 Smed. & M. (Miss.) 527.

On the same principle, one who has paid off the vendor's lien is entitled, as against a judgment creditor of the vendee, to be subrogated to the vendor's rights and equities. *Peet v. Beers*, 4 Ind. 46.

In *Rodman v. Sanders*, 44 Ark. 504, a third person paid the purchase-money debt at the request of the debtor-vendee, and, at the time of payment, showed an intention to keep the lien alive for his own benefit, by retaining the purchase note and deed in his possession with the consent of the vendee. It was held that he was a purchaser of the incumbrance, and would be subrogated to the rights of the vendor.

In *Beck v. Tarrant*, 61 Tex. 402, it was held that one whose land is bound equally with that of another for the satisfaction of a vendor's lien, and who

pays off a judgment for the debt, is entitled to contribution from the other, and may be subrogated to all the rights of the vendor and enforce the lien.

It has been held that one who merely lends money to pay a lien creditor, may be subrogated to the rights of the latter under his lien, as effectually as if the purchase-money notes had been assigned to him, *Hicks v. Morris*, 57 Tex. 658; *Carey v. Boyle*, 53 Wis. 574; but it is believed that such is not the general doctrine, even in jurisdictions where the lien is assignable. *Chapman v. Abrahams*, 61 Ala. 108. In states where the lien is not assignable, the rule is quite the contrary. See note, *supra*, and cases there cited.

3. Shall *v. Biscoe*, 18 Ark. 142; *Chapman v. Liggett*, 41 Ark. 292; *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; *Mackreth v. Symmons*, 15 Ves. 329; *Simpson v. McAllister*, 56 Ala. 228; *Bankhead v. Owen*, 60 Ala. 457; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429.

Against Administrator of Vendee.—*Cahoon v. Robinson*, 6 Cal. 225.

Against Heirs.—*Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Warner v. Van Alstyne*, 3 Paige (N. Y.) 513; *Shirley v. Congress Steam Sugar Refinery Co.*, 2 Edw. Ch. (N. Y.) 505; *Solomon v. Skinner*, 82 Tex. 345.

Against Devisees.—*Edmonson v. Phillips*, 73 Mo. 57.

Against Widow's Dower.—*Fisher v. Johnson*, 5 Ind. 492; *Boyd v. Martin*, 9 Heisk. (Tenn.) 382; *Noyes v. Kramer*, 54 Iowa 22; *Martin v. Smith*, 25 W. Va. 579; *Williams v. Kinney*, 43 Hun (N. Y.) 8.

Against Homestead.—*McHendry v. Reilly*, 13 Cal. 75; *Bradley v. Curtis*, 79 Ky. 327; *Claybrooks v. Kelly*, 61 Tex. 634.

Coverture is no answer to a suit to enforce a vendor's lien. *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718; *Mims v. Macon*, etc., R. Co., 3 Ga. 342.

subsequent purchasers who have notice that the purchase-money is unpaid,¹ or who are not purchasers for a valuable consideration.² In other words, the lien may be enforced against all persons claiming under the first vendee, whether as purchasers or incumbancers, who paid no value, even although they had no notice of the non-payment of the purchase-money, and also against all such persons who had notice of the vendor's claim, although they paid value.³ That the lien does not prevail as against a subsequent *bona fide* purchaser, or mortgagee of the legal title for value and without notice, is also well established.⁴

1. Purchasers with Notice.—Graves v. Coutant, 31 N. J. Eq. 763; Whetsel v. Roberts, 31 Ohio St. 503; Merritt v. Wells, 18 Ind. 171; Watson v. Wells, 5 Conn. 468; Thornton v. Knox, 6 B. Mon. (Ky.) 74; Swan v. Benson, 31 Ark. 728 (here, the purchasers knew that part of the original purchase-money was not paid, and it was held sufficient notice); Chapman v. Liggett, 41 Ark. 292; Woodall v. Kelly, 85 Ala. 368; 7 Am. St. Rep. 57; Stroh v. Good, 113 Ind. 93; Beal v. Harrington, 116 Ill. 113; Koch v. Roth (Ill. 1894), 37 N. E. Rep. 317; Thomas v. Bridges, 73 Mo. 530; Orrick v. Durham, 79 Mo. 174 (here a lien was reserved in the deed, and it was held that "a purchaser is bound to take notice of all liens shown to exist by his vendor's title deeds"); Christopher v. Christopher, 64 Md. 583; Mitchell v. Dawson, 23 W. Va. 86.

Disposition of Proceeds of Sale.—But upon a sale of the land to enforce a vendor's lien, the subsequent purchaser from the vendee is entitled to the surplus, after satisfying the judgment and costs. Llano Improvement, etc., Co. v. May (Tex. Civ. App. 1894), 24 S. W. Rep. 40.

2. Volunteers.—Bailey v. Tindall, 59 Tex. 540; Tucker v. Hadley, 52 Miss. 414; McLain v. Thompson, 52 Miss. 418; Pylant v. Reeves, 53 Ala. 132; 25 Am. Rep. 605; Carver v. Eads, 65 Ala. 190; Higgins v. Kendall, 73 Ind. 522; Dwenger v. Branigan, 95 Ind. 221; Mitchell v. Dawson, 23 W. Va. 86; Frail v. Ellis, 15 Beav. 350; Christopher v. Christopher, 64 Md. 583.

Part Payment.—It is held that where a subsequent purchaser has no notice of the lien, but has paid part only of the purchase-money, the original vendor may enforce his lien for the amount still due from such subsequent purchaser, but no further, upon the land

in the hands of the latter. Rawles v. Perkey, 50 Tex. 311; Higgins v. Kendall, 73 Ind. 522; Craft v. Russell, 67 Ala. 9; Hunt v. Brand, 5 B. Mon. (Ky.) 562; Mitchell v. Dawson, 23 W. Va. 86. The general rule is that, to constitute a defense, the money must actually be paid before notice is received. Campbell v. Roach, 45 Ala. 667.

Assignees in Bankruptcy.—In Exchange, etc., Bank v. Stone, 80 Ky. 109, an assignee in bankruptcy was held not to be a purchaser for a valuable consideration, and the lien was enforced against him. See also 2 Story's Eq. Jur. (13th ed.), § 1228; Bayley v. Greenleaf, 7 Wheat. (U. S.) 46; Corlies v. Howland, 26 N. J. Eq. 311; Phelps v. Curtis, 80 Ill. 109; Bowles v. Rogers, 6 Ves. 95.

3. Graves v. Coutant, 31 N. J. Eq. 763; Walton v. Hargroves, 42 Miss. 18; 97 Am. Dec. 429; Stafford v. Van Rensselaer, 9 Cow. (N. Y.) 316; Magruder v. Peter, 11 Gill & J. (Md.) 217; Bankhead v. Owen, 60 Ala. 457; Mackreth v. Symmons, 15 Ves. 329.

4. Bayley v. Greenleaf, 7 Wheat. (U. S.) 46; Dugger v. Tayloe, 60 Ala. 504; Shorter v. Frazer, 64 Ala. 74; Barcliff v. Lillie, 82 Ala. 319; Walton v. Hargroves, 42 Miss. 18; 97 Am. Dec. 429; Higgins v. Kendall, 73 Ind. 522; Traphagen v. Hand, 36 N. J. Eq. 384; Dance v. Dance, 56 Md. 433; Dean v. Scott, 67 Iowa 233; National Valley Bank v. Harman, 75 Va. 604; Moeller v. Holthaus, 12 Mo. App. 526; Arledge v. Hail, 54 Tex. 398; Mitchell v. Dawson, 23 W. Va. 86.

The release of a vendor's lien, executed by the vendor after he has assigned the lien, is good as to a subsequent incumbrancer without notice of the assignment. Moran v. Wheeler (Tex. Civ. App. 1894), 26 S. W. Rep. 297.

Mortgages.—In the following cases, parties to whom the vendee mortgaged

the land, as security for a debt contracted at the time, and who took without notice, were protected. *Short v. Battle*, 52 Ala. 456; *Growing v. Behn*, 10 B. Mon. (Ky.) 383; *Poe v. Paxton*, 26 W. Va. 607; *Richards v. McPherson*, 74 Ind. 158. And it even has been held that an equitable mortgagee is entitled to priority. *Rice v. Rice*, 2 Drew. 73.

Equitable Title.—A purchaser for value of the equitable title, whether with or without notice, takes subject to the vendor's lien. *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Stoner v. Harris*, 81 Va. 451; *Butler v. Douglass*, 1 McCrary (U. S.) 630. The reason obviously is, that the protection extended in equity to a subsequent purchaser for value without notice, belongs only to the purchaser of the legal title. If, however, the equity of the purchaser, although later in time, is superior in merit to that of the vendor, it will be preferred. *Hume v. Dixon*, 37 Ohio St. 66.

Creditors and Assignees.—A creditor, or an assignee for the benefit of creditors, who takes the property as security for, or in payment of, a preexisting debt, paying no new consideration, is not a purchaser for value, and takes subject to the lien. *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Shirley v. Congress Steam Sugar Refinery*, 2 Edw. Ch. (N. Y.) 505; *Brown v. Vanlier*, 7 Humph. (Tenn.) 239; *Bailey v. Tindall*, 59 Tex. 540. But see *Wert v. Naylor*, 93 Ind. 431; *Butterfield v. Okie*, 36 N. J. Eq. 482.

Sale of Part of Land.—Where the vendee sells part of the premises, with notice to the purchaser of the lien, the vendor will be required to exhaust the property remaining in the hands of his vendee, before resorting to the part so sold. *McLaurie v. Thomas*, 39 Ill. 291.

Several Purchasers.—Where the vendee sells the land to different purchasers, all having notice of the rights of the original vendor, the lands will be charged ratably. *Blight v. Banks*, 6 T. B. Mon. (Ky.) 192; 17 Am. Dec. 136; *McLaurie v. Thomas*, 39 Ill. 291. But where the purchaser from the first vendee, of a part of the premises, holds in such a manner that the first vendor's lien still exists as to him, and he purchased with knowledge that the residue of the premises had been sold to other parties discharged from that lien, the portion so purchased by him must bear the whole burden of the unpaid pur-

chase-money due the first vendor. *McLaurie v. Thomas*, 39 Ill. 291.

In *Alabama v. Stanton*, 5 Lea (Tenn.) 423, where the vendee sold the land in separate lots, it was held that the lien should be enforced by a sale of the lots in the inverse order of their conveyance. See also *Whitten v. Saunders*, 75 Va. 563.

What Is Notice.—The knowledge that any part of the purchase-money is unpaid, is notice. *Manly v. Slason*, 21 Vt. 271; 52 Am. Dec. 60; *Baum v. Grigsby*, 21 Cal. 176; 81 Am. Dec. 153; *Hawk v. Leverett*, 71 Ga. 675; so is knowledge of unfinished negotiations, in regard to the land, between the original vendor and vendee. *Hopkins v. Garard*, 7 B. Mon. (Ky.) 312; so, also, recitals in a vendor's deed, showing the non-payment of the purchase-money, constitute notice. *Kilpatrick v. Kilpatrick*, 23 Miss. 124; 55 Am. Dec. 79; *McAlpine v. Burnett*, 23 Tex. 649; *Woodward v. Woodward*, 7 B. Mon. (Ky.) 116; *Orrick v. Durham*, 79 Mo. 174; and the fact that the original vendor remains in possession of the land is strong evidence of notice. *Pell v. McElroy*, 36 Cal. 268; *Hamilton v. Fowlkes*, 16 Ark. 340; and, in general, where a subsequent purchaser has knowledge of facts which would put a reasonable man on his inquiry as to the existence of a lien, and such inquiry would have discovered the lien, he is charged with notice. *Cordova v. Hood*, 17 Wall (U. S.) 1; *Keith v. Wolf*, 5 Bush (Ky.) 646; *Autrey v. Whitmore*, 31 Tex. 623; *Rosette v. Wynn*, 73 Ala. 146. It is not necessary that the purchaser should have notice that the debt for the purchase-money constitutes a lien. *Brinkerhoff v. Van Sciven*, 4 N. J. Eq. 251.

As to what must be alleged in the answer by a purchaser, who relies upon want of notice as a defense, see *Pearce v. Foreman*, 29 Ark. 563; *Wells v. Morrow*, 38 Ala. 125; *Buford v. McCormick*, 57 Ala. 428.

Improvements by Purchaser.—It has been held that where a purchaser has, in good faith and without notice of the lien, made improvements increasing the value of the land, he is entitled to compensation therefor, as against the one seeking to charge the land, although a conveyance of the legal estate has not been executed. *Ware v. Curry*, 67 Ala. 274. But a purchaser, or sub-purchaser, in possession when lands are sold to enforce a lien, is not entitled,

There is a direct conflict of opinion on the question of precedence as between the lien of the vendor and subsequent judgment liens recovered against the estate of the vendee for a valuable consideration and without notice. In some jurisdictions the vendor's lien is held to be superior;¹ in others, precedence is given to subsequent judgment liens, and even to attaching creditors of the vendee without notice.²

As between the lien of the vendor and a mortgage arising at the same time, it has been held that the lien of the mortgage will prevail.³

8. Waiver of Lien—*a.* **GENERALLY.**—The tendency of the courts is to restrict, rather than to extend the operation of the implied lien,⁴ and, although the lien is always presumed to exist, unless a contrary intention is shown,⁵ any act or declaration on the part of the vendor, which shows that he does not rely upon it, or has abandoned it, operates to prevent it from attaching, or to discharge it.⁶ The party alleging a waiver, must prove it by a clear

as against a purchaser at the sale, to the crops planted and growing on the lands at the time of the sale. *Johnston v. Smith*, 70 Ala. 108.

1. Priority.—*Tucker v. Hadley*, 52 Miss. 414 (in this case the lien was held to prevail over a title acquired under execution sale); *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Parker v. Kelly*, 10 Smed. & M. (Miss.) 184; *Lamberton v. Van Voorhis*, 15 Hun (N. Y.) 336; *Lissa v. Posey*, 64 Miss. 352; *Bowman v. Faw*, 5 Lea (Tenn.) 472; *Dickerson v. Carroll*, 76 Ala. 377; *Messmore v. Stephens*, 83 Ind. 524. In *Texas*, it is held that a judgment creditor, who purchases at an execution sale, and has the amount of his bid credited on the execution, may be considered a *bona fide* purchaser. *Wallace v. Campbell*, 54 Tex. 87. But see *Bailey v. Tindall*, 59 Tex. 540; *Ayres v. Duprey*, 27 Tex. 606; 86 Am. Dec. 657, showing that it is an exception to the general rule.

2. *Johnson v. Cawthorn*, 1 Dev. & B. Eq. (N. Car.) 32; 27 Am. Dec. 250; *Harper v. Williams*, 1 Dev. & B. Eq. (N. Car.) 379; *Webb v. Robinson*, 14 Ga. 216; *Allen v. Loring*, 34 Iowa 499; *Cutter v. Ammon*, 65 Iowa 281; *Gann v. Chester*, 5 Yerg. (Tenn.) 205; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Robinson v. Williams*, 22 N. Y. 380; *Cook v. Banker*, 50 N. Y. 655; *Smith v. Wortham*, 82 Va. 937; *Poe v. Paxton*, 26 W. Va. 607.

Attaching Creditors.—It has also been held that the rights of attaching creditors of the vendee, without notice, are

superior to the lien. *Adams v. Buchanan*, 49 Mo. 64; *Porter v. Dubuque*, 20 Iowa 440; *Allen v. Loring*, 34 Iowa 499. *Contra*, *Chapman v. Chapman*, 55 Ark. 542.

For an interesting discussion of this whole subject of priority, see 3 *Pomeroy's Eq. Jur.* (2d ed.), § 1253, note; *Poe v. Paxton*, 26 W. Va. 607, and cases cited.

3. *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138. In this case, a railroad company had executed and recorded a mortgage of all the lands it owned, or should acquire, in trust to secure bondholders, and an agent of the company sold and conveyed land to the company. It was held that of the two liens, accruing at the same time, the legal lien of the recorded mortgage was superior to that of the vendor.

4. *Richards v. Leaming*, 27 Ill. 431; *Peters v. Tunell*, 43 Minn. 473; 19 Am. St. Rep. 252.

5. See *supra*, this title, *When and to What Extent the Lien Exists*.

6. *Moshier v. Meek*, 80 Ill. 79; *Stevens v. Rainwater*, 4 Mo. App. 292; *Neal v. Speigle*, 33 Ark. 63; *Hightower v. Rigsby*, 56 Ala. 126; *Anderson v. Donnell*, 66 Ind. 150; *Stuart v. Harrison*, 52 Iowa 511.

An express agreement to waive the lien has, of course, the same effect. *McLaurie v. Thomas*, 39 Ill. 291.

Where a grantor, in conversation with a director of a bank, states that he is willing to convey a half interest in certain land to the president of the bank, with the understanding that such

preponderance of testimony;¹ but in an action to enforce the lien, it is not necessary for the vendor, in the first instance, to allege that he has not waived the same.²

As a general principle, a lien which has been waived or abandoned, cannot be revived.³

b. BY TAKING SECURITY.—Unless there is an express agreement to that effect, the lien is not waived by the fact that the vendor takes the personal security of the vendee—such as his note, or bond or bill—for the purchase-money.⁴ Such security is supposed to be taken for the purpose of overcoming the acknowledgment of the payment of the purchase-money contained in the

president is to pay him by giving him credit upon notes then running against him in the bank, it does not amount to a notice to the director that the grantor intends to retain a vendor's lien, but rather imports a notice that no such lien is to be retained. *First Nat. Bank v. Tompkins* (C. C. A.), 57 Fed. Rep. 20.

A lien is not waived by a conveyance containing a covenant that the property is "free from all charges and incumbrances." *Slide, etc., Mines v. Seymour*, 14 Sup. Ct. Rep. 842.

A vendor who has reserved a lien on an entire tract of land, agreeing to release therefrom such portions as might be sold by the vendees, on their turning over to him the cash and notes secured by a sub-vendor's lien, received by them on such sales, is not bound to release any portion on the payment by the vendees of one of their own purchase-money notes, without having sold any portion of the land; nor is he bound to execute such release, though the vendees have sold a portion of the land, where they platted it into lots, and blocks, and the sub-vendor's lien reserved by them does not include the streets. *Webster v. Land Mortgage etc., Co.* (Tex. Civ. App. 1894), 24 S. W. Rep. 570.

1. *Coles v. Withers*, 33 Gratt. (Va.) 186; *Wilson v. Lyon*, 51 Ill. 166.

2. *Seymour v. McKinstry*, 106 N. Y. 230. This same case decides that, in a suit to enforce the lien against a third party, the defense of want of notice must be set up, and affirmatively proved, by the latter.

3. *Burger v. Potter*, 32 Ill. 66; *Richards v. McPherson*, 74 Ind. 158; *Mayham v. Coombs*, 14 Ohio 428.

4. **Taking Personal Security of Vendee Not a Waiver—Bond, Bill, or Note.**—*Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Moore v. Worthy*, 56 Ala.

163; *Walker v. Struve*, 70 Ala. 167; *Lavender v. Abbott*, 30 Ark. 172; *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; *Corlies v. Howland*, 26 N. J. Eq. 311; *Acton v. Waddington*, 46 N. J. Eq. 16; *Nichols v. Glover*, 41 Ind. 24; *Irvin v. Garner*, 50 Tex. 48; *Madden v. Barnes*, 45 Wis. 135; 30 Am. Rep. 703; *Davenport v. Murray*, 68 Mo. 198; *Dance v. Dance*, 56 Md. 433; *White v. Williams*, 1 Paige (N. Y.) 502; *Denny v. Steakly*, 2 Heisk. (Tenn.) 156; *Elbridge v. McClure*, 2 Yerg. (Tenn.) 84; *Clark v. Hunt*, 3 J. J. Marsh. (Ky.) 553; *Thornton v. Knox*, 6 B. Mon. (Ky.) 74, 75; *Manly v. Slason*, 21 Vt. 271; 52 Am. Dec. 60.

Checks.—The rule applies to checks or drafts, as well as to notes or bills. *Madden v. Barnes*, 45 Wis. 135; 30 Am. Rep. 703; *Honore v. Bakewell*, 6 B. Mon. (Ky.) 67; 43 Am. Dec. 147.

Certificate of Deposit.—It also applies to a certificate of deposit. *Mims v. Macon, etc., R. Co.*, 3 Ga. 333.

Renewal of Note.—It also has been held that the renewal of a note, bill, or check, given for the purchase price, or the taking of a new note, is not a waiver of the lien. *Honore v. Bakewell*, 6 B. Mon. (Ky.) 72; 43 Am. Dec. 147; *Joiner v. Perkins*, 59 Tex. 300; *Helm v. Weaver*, 69 Tex. 143; *Walker v. Struve*, 70 Ala. 167; *Reeder v. Nay*, 95 Ind. 164.

Note of the Vendee Made to a Third Person.—As between the parties, the lien is not waived or lost by the fact that the original note was executed by the direction of the vendor to a third person. *Joiner v. Perkins*, 59 Tex. 300.

Intention to Waive.—An agreement or intention to waive the lien, even when only the personal obligation of the vendee is taken, may be shown. *Winter v. Anson*, 1 Sm. & Stu. 434; *McCarty v. Williams*, 69 Ala. 174.

deed, and not as a substitute for the purchase-money debt.¹ In *England*, it is also held that the acceptance of the personal security of a third person is not a waiver of the lien; but in the *United States*, the contrary doctrine is generally followed, and the acceptance of any personal obligation of a third person, or of the vendee, indorsed or guaranteed by a third person, is held to defeat the lien.²

1. *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153.

2. **Personal Security of Third Person.**—In *England*, it apparently is held that the acceptance of the mere personal security of a third party is not a waiver. *Winter v. Anson*, 3 Russ. 488; *Mackreth v. Symmons*, 15 Ves. 329; *Hughes v. Kearney*, 1 Sch. & L. 132; *Clarke v. Royle*, 3 Sim. 499.

In the *United States*, on the other hand, the acceptance of the bond, bill, note, or other personal obligation of a third person, or of the vendee, indorsed or guaranteed by a third person, is held to destroy the lien. *Stevens v. Rainwater*, 4 Mo. App. 292; *Walker v. Struve*, 70 Ala. 167; *Vail v. Foster*, 4 N. Y. 312; *Hazeltine v. Moore*, 21 Hun (N. Y.) 355; *Haskell v. Scott*, 56 Ind. 564; *Springfield, etc., R. Co. v. Stewart*, 51 Ark. 285; *Cowl v. Varnum*, 37 Ill. 181; *McGonigal v. Plummer*, 30 Md. 422; *Foster v. The Athenaeum*, 3 Ala. 302. Thus, the lien was held to have been waived in the following classes of cases:

Vendee's Note with Third Person's Indorsement.—*Gilman v. Brown*, 1 Mason (U. S.) 191; *Carrico v. Farmers', etc., Nat. Bank*, 33 Md. 235; *Rice v. Rice*, 36 Fed. Rep. 860; *Marshall v. Christmas*, 3 Humph. (Tenn.) 616; 39 Am. Dec. 199; *Burger v. Potter*, 32 Ill. 66; *Foster v. The Athenaeum*, 3 Ala. 302; *Donegan v. Hentz*, 70 Ala. 437; *Hammett v. Stricklin* (Ala.), 13 So. Rep. 573; *Campbell v. Baldwin*, 2 Humph. (Tenn.) 248.

Vendee's Bill Accepted by Third Person.—*Boynnton v. Champlain*, 42 Ill. 57. If drawn upon, but not accepted by a third person, there is no waiver. *Knisely v. Williams*, 3 Gratt. (Va.) 253.

It has been held that an acceptor of a bill of exchange is not a surety, and so the taking of an accepted bill as security does not operate as a waiver. *Marshall v. Christmas*, 3 Humph. (Tenn.) 616; 39 Am. Dec. 199; *Hughes v. Kearney*, 1 Sch. & L. 132.

Note of Third Person Indorsed by Vendee.—*Cresap v. Manor*, 63 Tex. 485.

And the result is the same, even if the note proves to be worthless. *Kendrick v. Eggleston*, 56 Iowa 128; 41 Am. Rep. 90.

Vendee's Note with Surety.—*Fonda v. Jones*, 42 Miss. 792; 2 Am. Rep. 669; *Follett v. Reese*, 20 Ohio 546; 55 Am. Dec. 472.

Vendee's Bond with Surety.—*McGonigal v. Plummer*, 30 Md. 422; *Wilson v. Graham*, 5 Munf. (Va.) 297.

There are, however, several qualifications of the general rule:—

Husband and Wife.—Where the land is purchased by the husband, but the conveyance is made to the wife, it is held that the acceptance of his note is not a waiver. *Moore v. Worthy*, 56 Ala. 163; *Davis v. Smith*, 88 Ala. 596; *Davenport v. Murray*, 68 Mo. 198; *Williams v. Crow*, 84 Mo. 298; *Davis v. Pearson*, 44 Miss. 508; *Bakes v. Gilbert*, 93 Ind. 70. See, *contra*, *Andrus v. Coleman*, 82 Ill. 26; 25 Am. Rep. 289.

It is held that no waiver is to be inferred from the fact that the husband of the vendee signs her note for the purchase-money. *Parker v. McBee*, 61 Miss. 134.

Presumption of Waiver Not Conclusive.—It has also been held that the acceptance of the notes of a third party is not conclusive evidence of a waiver, and that the presumption of waiver may be rebutted by proof that the parties agreed to retain the lien. *Lord v. Wilcox*, 99 Ind. 491.

General Rule Not Uniform.—In some jurisdictions, it has been held, contrary to the general rule in the *United States*, that taking the personal security of a third party is not a waiver. *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 224; *Burrus v. Roulhac*, 2 Bush (Ky.) 39; *Jobe v. Chedister*, 5 Lea (Tenn.) 346; *Loomis v. Davenport, etc.*, R. Co., 17 Fed. Rep. 301; *Stroud v. Pace*, 35 Ark. 100. And see *Slide, etc., Mines v. Seymour*, 14 Sup. Ct. Rep. 842, where it was held that the lien was not waived by a deposit of stock, there being nothing to show that the vendors relied

Where the obligation of the vendee, and *a fortiori* that of a third person, is given, not as security for the purchase-money, but as a substitute for, and in payment of, the original debt for the purchase price, the lien is thereby waived;¹ and this is also the case where distinct and independent security, other than the mere personal undertaking of the vendee, has been accepted by the vendor, unless the parties agree that such acceptance shall not operate as a waiver.² The basis of the foregoing rules is that,

alone for their security on the deposit of stock.

1. Novation and Extinguishment.—Keith *v.* Wolf, 5 Bush. (Ky.) 646; Acton *v.* Waddington, 46 N. J. Eq. 16; Thames *v.* Caldwell, 60 Ala. 644; Williams *v.* McCarty, 74 Ala. 295; Moshier *v.* Meek, 80 Ill. 79; Parrot *v.* Sweetland, 3 Myl. & K. 655; Dixon *v.* Gayfere, 17 Beav. 421; 21 Beav. 118.

Whether or not, in a given case, the security was given in discharge of, and as a substitute for, the original debt for the purchase price, so that there is a novation, and the original debt no longer exists, will depend upon all the circumstances showing the intention of the parties, including the terms of the deed of conveyance or of other writings. Clarke *v.* Royle, 3 Sim. 499; Dixon *v.* Gayfere, 17 Beav. 421; Jersey *v.* Briton Ferry Floating Dock Co., L. R., 7 Eq. 409; Coles *v.* Withers, 33 Gratt. (Va.) 186.

In Thames *v.* Caldwell, 60 Ala. 644, the vendee of the land died without paying the purchase-money, and the land was sold by his administrator, under a decree of court. The vendor afterward accepted from the purchaser at the sale, a draft on a third person, surrendered the note given for the purchase-money, and collected a part of the money on a draft. It was held that these facts proved a waiver.

Note of Sub-vendee.—It has been held that the substitution of the note of the sub-vendee of the land, in place of that of his vendor, is not necessarily a waiver by novation. Pouns *v.* Gartman, 29 Miss. 133; Cummings *v.* Moore, 61 Miss. 184; Boyd *v.* Jackson, 82 Ind. 525. But that it may be a novation, and so a waiver, see Wasson *v.* Davis, 34 Tex. 159.

2. Independent Security—General Rule.—The general doctrine that the acceptance of distinct and independent security is, in the absence of an agreement to the contrary, a waiver of the lien, may be illustrated by the follow-

ing, among a large number of cases. Follett *v.* Reese, 20 Ohio 546; 55 Am. Dec. 472; McGonigal *v.* Plummer, 30 Md. 422; Lewis *v.* Covilland, 21 Cal. 178; Denny *v.* Steakly, 2 Heisk. (Tenn.) 156; Adams *v.* Buchanan, 49 Mo. 64; Dudley *v.* Dickson, 14 N. J. Eq. 252; Crans *v.* Hamilton County, 87 Ind. 162; McDonough *v.* Cross, 40 Tex. 251; Wilson *v.* Sawyer, 74 Ill. 473; Ilett *v.* Collins, 103 Ill. 74; Stuart *v.* Harrison, 52 Iowa 511; Johnson *v.* Godden, 33 Ark. 600; Ducker *v.* Gray, 3 J. J. Marsh. (Ky.) 163; Walker *v.* Struve, 70 Ala. 167; Vail *v.* Foster, 4 N. Y. 312; Brown *v.* Gilman, 4 Wheat. (U. S.) 490.

Some of the cases hold, contrary to the general doctrine, that the acceptance of independent security merely raises a presumption of a waiver, which may be rebutted by other evidence. Mackreth *v.* Symmons, 15 Ves. 347; Stroud *v.* Pace, 35 Ark. 100; Sanders *v.* McAfee, 41 Ga. 684; De Forest *v.* Holum, 38 Wis. 516; Irvine *v.* Muse, 10 Heisk. (Tenn.) 477; Jarman *v.* Farley, 7 Lea (Tenn.) 141; Fonda *v.* Jones, 42 Miss. 792; 2 Am. Rep. 669; Gnash *v.* George, 58 Iowa 492; Hunt *v.* Marsh, 80 Mo. 396; Woodall *v.* Kelly, 85 Ala. 368; 7 Am. St. Rep. 57; Jackson *v.* Stanley, 87 Ala. 270; Slaughter *v.* Owens, 60 Tex. 668; Faver *v.* Robinson, 46 Tex. 204; Manly *v.* Slason, 21 Vt. 271; 52 Am. Dec. 60.

Express Agreement.—The parties, however, may agree that the taking of security shall not operate as a waiver. Daughaday *v.* Paine, 6 Minn. 443; Briscoe *v.* Callahan, 77 Mo. 134; Cresap *v.* Manor, 63 Tex. 485; Fonda *v.* Jones, 42 Miss. 792; Sanders *v.* McAfee, 41 Ga. 684; Frail *v.* Ellis, 16 Beav. 350; Napier *v.* Jones, 47 Ala. 90; Fish *v.* Howland, 1 Paige (N. Y.) 20.

Mortgage by Vendee.—The prevailing rule is that a mortgage by the vendee, either on the land conveyed, or on other land, is a waiver of the lien. Brown *v.* Gilman, 4 Wheat. (U. S.) 290; Gaylord *v.* Knapp, 15 Hun (N. Y.) 87; Pease

when the vendor accepts the personal security of a third party, or the substitution of a new debt for the old, or distinct and independent security, he is presumed no longer to rely upon the security of his lien, and hence is taken to have waived or abandoned it.¹

c. BY LACHES.—The vendor may, by his laches or negligence, or by his affirmative conduct, be estopped from claiming the lien, as against third persons who have acquired their title from the vendee.²

d. RECEIPT OR ACKNOWLEDGMENT OF PAYMENT.—A receipt in full for the purchase price given by the vendor, or an acknowledgment of payment in the deed, while *prima facie* evi-

v. Kelly, 3 Oregon 417; *Wells v. Harter*, 56 Cal. 342; *Little v. Brown*, 2 Leigh (Va.) 353; *Richards v. McPherson*, 74 Ind. 158; *Young v. Wood*, 11 B. Mon. (Ky.) 123; *Tinsley v. Tinsley*, 52 Iowa 14; *Chicago, etc., Land Co. v. Peck*, 112 Ill. 408; *Walker v. Struve*, 70 Ala. 167; *Masters v. Templeton*, 92 Ind. 447. *Contra*, *De Bruhl v. Maas*, 54 Tex. 464; *Wasson v. Davis*, 34 Tex. 159; *Boos v. Ewing*, 17 Ohio 521; 49 Am. Dec. 478.

And taking a mortgage, as security for a portion of the purchase-money, waives the lien for the remainder, *Fish v. Howland*, 1 Paige (N. Y.) 20; *Orrick v. Durham*, 79 Mo. 174; unless the presumption of waiver is overcome by an express statement to the contrary in the mortgage deed. *Briscoe v. Callahan*, 77 Mo. 134.

If the mortgage given as security is void, the lien is not defeated. *Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Haugh v. Blythe*, 20 Ind. 24; *Martin v. Cauble*, 72 Ind. 67; *Gilbert v. Bakes*, 106 Ind. 558; *Chapman v. Chapman*, 55 Ark. 542. See, however, *Camden v. Vail*, 23 Cal. 633, and *Jackson v. Stanley*, 87 Ala. 270, where it was held that the taking of an invalid pledge or mortgage was a waiver, and the acceptance of security, induced by fraudulent representations, is not a waiver. *Hinses v. Langley*, 85 Ind. 77; *Nysewander v. Lowman*, 124 Ind. 584; *Tobey v. McAllister*, 9 Wis. 463; *Thomas v. Bridges*, 73 Mo. 530; *Gnash v. George*, 58 Iowa 492; *Brown v. Byam*, 65 Iowa 374. But the mere fact that the mortgage turns out to be an insufficient security does not prevent a waiver. *Kendrick v. Eggleston*, 56 Iowa 128; 41 Am. Rep. 90; *Akers v. Luse*, 56 Iowa 346; *Hunt v. Waterman*, 12 Cal. 301; *Partridge v. Logan*, 3 Mo. App. 509.

Pledge.—It has also been held that a

pledge of shares of stock in a corporation is presumptively, although not necessarily, a waiver. *Jackson v. Stanley*, 87 Ala. 270.

1. See cases cited in notes, *supra*.

2. Thus, where the vendor induced a third person to purchase the land as unincumbered, by representing that the lien no longer existed, it was held that he was estopped from enforcing the lien against such purchaser. *Henson v. Westcott*, 82 Ill. 224; *Atkinson v. Lindsey*, 39 Ind. 296; *Thompson v. Dawson*, 3 Head (Tenn.) 384; *Burns v. Taylor*, 23 Ala. 255; *Reiley v. Miami Exporting Co.*, 5 Ohio 333.

Again, where the vendor, having a lien, agreed that on payment of a specified sum to himself and of another sum to the original purchaser, a sub-purchaser might take and hold the land free from the lien, and the money was paid and deeds executed in pursuance of the agreement, it was held that the vendee was estopped from asserting a lien for money due on the original sale, as against the sub-purchaser. *Burgess v. Greene*, 64 Ala. 509.

On the same principle, where the deed delivered by the vendors, had indorsed thereon a receipt of payment in full of the purchase-money, and the vendee, by depositing the deeds as security, obtained a loan from one having no notice of the lien, the lien was postponed to the equitable mortgage of the lender. *Rice v. Rice*, 2 Drew. 73.

Also, where the vendor fails to institute proceedings to enforce the lien, within a reasonable time after his right to do so attaches, he may be presumed to have waived it. *School Trustees v. Wright*, 11 Ill. 603; *Duffield v. Butler*, 34 W. Va. 624.

For a recent case in which it was held that a delay of thirteen years did

dence of payment,¹ will not operate as a waiver or discharge of the lien, if the purchase-money, in fact, has not been paid.²

2. JUDGMENT AT LAW FOR DEBT.—It also has been held that the recovery of a judgment for the purchase-money debt, will not operate as a waiver of the vendor's lien.³ But while the mere obtaining of a judgment at law is not a waiver, the selling of the land on execution to satisfy such judgment is a waiver.⁴ By electing to adopt the legal remedy and to sell the land under execution, the vendor is taken to have waived his right to go into equity and effect a sale under a decree; and, therefore, he will be estopped from enforcing a vendor's lien by a resale of the land, as against a purchaser at the execution sale.⁵

9. **How the Lien is Enforced**—a. REMEDY AT LAW.—It has been held that, if the vendor can recover the debt by an action at law, he has no remedy in equity;⁶ but the prevailing rule is that he

not, under the circumstances, estop the assignee of the debt from enforcing the lien, see *Lucy v. Hopkins* (Ky. 1890), 13 S. W. Rep. 518.

1. *Kelly v. Karsner*, 81 Ala. 500; *Tobey v. McAllister*, 9 Wis. 463; *Pique v. Arendale*, 71 Ala. 91.

2. *Ogden v. Thornton*, 30 N. J. Eq. 569; *Simpson v. McAllister*, 56 Ala. 228; *Holman v. Patterson*, 29 Ark. 357; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Thompson v. Corrie*, 57 Md. 197; *Hill v. McLean*, 10 Lea (Tenn.) 107.

In *Cuney v. Bell*, 34 Tex. 177, it was held that the burden was on the vendor of rebutting the recital in the deed acknowledging the payment of the purchase-money, but that very slight evidence to that effect was sufficient to justify a verdict.

3. *Graves v. Coutant*, 31 N. J. Eq. 763; *Ball v. Hill*, 48 Tex. 634; *Waldrom v. Zacharie*, 54 Tex. 503. The contrary rule has, however, been adopted in *California*, *Fitzell v. Leaky*, 72 Cal. 477; and apparently in *Indiana*, *Crans v. Hamilton County*, 87 Ind. 162. The obtaining of a judgment, however, may be considered always as a circumstance bearing on the question whether there was an intention to waive. *Dubois v. Hull*, 43 Barb. (N. Y.) 26.

4. *Nutter v. Fouch*, 86 Ind. 451; *McArthur v. Porter*, 1 Ohio 99; *Outton v. Mitchell*, 4 Bibb (Ky.) 239; *Grubb v. Crane*, 5 Ill. 153.

5. In *Dickason v. Eby*, 73 Mo. 133, the court, by Norton, J., said: "A vendor who has conveyed an absolute estate in land to his vendee, and has a

vendor's lien thereon for unpaid purchase-money, may resort either to a court of equity, and ask for the enforcement of his lien by a sale of the land to pay the debt, or he may procure his judgment at law for so much of the purchase-money as remains unpaid, and subject the land to sale by execution. A sale of the land is the result, whether one or the other of these remedies is adopted; and if the vendor elects to adopt the latter remedy, and the land is sold, he must stand by his election; for it necessarily implies a waiver of his right to effect a sale by means of the other remedy."

6. *Roper v. McCook*, 7 Ala. 318; *Ford v. Smith*, 1 McArthur (D. C.) 592; *Pratt v. Van Wyck*, 6 Gill & J. (Md.) 495; *Ridgeway v. Toram*, 2 Md. Ch. 303; *Eyler v. Crabbs*, 2 Md. 137; 56 Am. Dec. 711; *Bottorf v. Conner*, 1 Blackf. (Ind.) 287. But, under the modern procedure in *Indiana*, the vendor may sue for his debt, and enforce his lien in one action. *Nutter v. Fouch*, 86 Ind. 451.

The lien is not an original and absolute charge on the land, but only an equitable right to resort to it, if there are not sufficient personal assets. *Martin v. Cauble*, 72 Ind. 75 and cases cited. It is not, however, necessary to allege in the bill a want of other property. *Evans v. Feeny*, 81 Ind. 532; *Citizens' Bank v. Adams*, 91, Ind. 280.

The land is not ordered to be sold in the first instance; the judgment directs the sale of the land, after exhausting the other property of the vendee subject to execution. *Scott v. Crawford*, 12 Ind. 410; *Evans v. Feeny*, 81 Ind. 532.

may enforce his lien in equity, whether or not he has exhausted his remedy at law.¹ Under the code system of procedure, the vendor is allowed to seek his legal remedy on his debt, together with the enforcement of his lien, in one action;² and it is the general rule that if he prefers, he may first pursue his remedy upon his legal claim alone, without thereby waiving his right afterward to resort, if necessary, to the equitable enforcement of the lien.³

b. BILL IN EQUITY.—The bill may, as shown above, be brought by the vendor, and upon his decease, by his personal representatives, or even by a devisee of the debt secured by the lien.⁴ It has also been held that where a sale is made by an administrator under an order of court, and for the purpose of division among the heirs, the latter may maintain a bill to enforce the lien in their own names.⁵

The administrators, heirs, or devisees of the vendee;⁶ his widow, if she has a contingent interest in the surplus for her dower;⁷ subsequent purchasers, or incumbrancers;⁸ and in jurisdictions

In *Maryland*, the rule has been changed also, a statute providing that the lien may be enforced in equity, although the complainant may have a perfect remedy at law on the debt. *Maryland Rev. Code* 1878, art. 66, § 5, p. 654.

The objection that the vendor has an adequate legal remedy cannot be taken, when the vendee is insolvent. *Bates v. Childers*, 4 N. Mex. 347.

1. *Pratt v. Clark*, 57 Mo. 189; *Clark v. Hunt*, 3 J. J. Marsh. (Ky.) 553; *Bradley v. Bosley*, 1 Barb. Ch. (N. Y.) 125; *Dubois v. Hull*, 43 Barb. (N. Y.) 26; *Mayer v. Hendry*, 33 Ark. 240; *Vail v. Drexel*, 9 Ill. App. 439; *High v. Batte*, 10 Yerg. (Tenn.) 186; *Campbell v. Roach*, 45 Ala. 667; *Burgess v. Fairbanks*, 83 Cal. 215. And the rule is the same by statute in *Maryland*.

2. In *Indiana* and *Alabama*, the vendor is allowed to seek both remedies in one proceeding. *Nutter v. Fouch*, 86 Ind. 451; *Chapman v. Lee*, 64 Ala. 483.

3. In the following cases it was held that pursuing the legal remedy first was not a waiver of the equitable lien. *Nutter v. Fouch*, 86 Ind. 451; *Dowdy v. Blake*, 50 Ark. 205; 7 Am. St. Rep. 88; *Waldrom v. Zacharie*, 54 Tex. 503; *Graves v. Coutant*, 31 N. J. Eq. 763; *Clark v. Hunt*, 3 J. J. Marsh. (Ky.) 553. It is otherwise, however, when the land is sold on execution under a judgment. *Nutter v. Fouch*, 86 Ind. 451; *Dickason v. Eby*, 73 Mo. 133; *McArthur v. Porter*, 1 Ohio 99.

4. See *supra*, this title, *In Whose Favor the Lien Exists*.

Where the right to enforce the lien vests jointly in two legatees of the vendor, both are necessary parties plaintiff to a suit to enforce the lien. *Hanner v. Summerhill* (Tex. Civ. App. 1894), 26 S. W. Rep. 906.

5. *Knight v. Blanton*, 51 Ala. 333.

6. *Owen v. Bankhead*, 76 Ala. 143; *Moore v. Alexander*, 81 Ala. 509; *Jackson v. Hill*, 39 Tex. 493; *Crane v. Warfield* (Ark. 1891), 15 S. W. Rep. 609.

7. *Edwards v. Edwards*, 5 Heisk. (Tenn.) 123; *McKay v. Green*, 3 Johns. Ch. (N. Y.) 56. In *Sims v. National Commercial Bank*, 73 Ala. 248, where the bill was filed by an assignee of the lien, the wife of the original vendor, who did not sign the deed, whose right of dower was recognized by the bill and against whom no relief was sought, was held not to be a proper party.

8. *Bogan v. Hamilton*, 90 Ala. 454; *Kirk v. Sheets*, 90 Ala. 504; *Robinson v. Black*, 56 Tex. 215; *Foster v. Powers*, 64 Tex. 247; *Looney v. Simpson* (Tex. Civ. App. 1894), 25 S. W. Rep. 476. In *Bogan v. Hamilton*, 90 Ala. 454, it was held that a sub-purchaser of a part of the lands was a necessary party to a bill to enforce the lien in favor of the original vendor.

In *Moreland v. Metz*, 24 W. Va. 119; 49 Am. Rep. 246, on the other hand, it was held that in a suit by the vendor to enforce his lien, persons having judgment liens on the vendee's lands should not be made parties.

In *Robinson v. Kampmann* (Tex. Civ. App. 1894), 24 S. W. Rep. 529, it was held that, though a sub-vendee, his

where the lien is assignable, persons to whom the vendor has transferred notes for a part of the purchase-money,¹ are all necessary or proper parties to the bill.

But persons having no present interest in the land, whether the original vendees, or mere tenants in possession, are not proper parties.²

The bill should contain a definite description of the subject-matter of the lien,³ and should allege a debt due and unpaid for the purchase price,⁴ the terms of the contract of sale,⁵ and the conveyance of the land.⁶ A bill brought by an assignee of the purchase-money debt, need not state when the assignment was

heirs and representatives need not be made parties to a suit to foreclose a vendor's lien. His heirs may recover the land from a purchaser at the foreclosure sale, who has notice of their rights, on refunding the price paid by the said purchaser, with interest.

If there is any question whether the holder of a vendor's lien has, by his act, waived his lien as to a debt secured by a deed of trust made subsequent to the conveyance, reserving the lien, the beneficiary in the deed of trust is a necessary party to a suit to enforce the lien. The trustee in such deed is a necessary party, since he holds the legal title. *Turk v. Skiles* (W. Va. 1894), 18 S. E. Rep. 561.

1. *Young v. Hawkins*, 74 Ala. 370; *Glaze v. Watson*, 55 Tex. 563; *Looney v. Simpson* (Tex. Civ. App. 1894), 25 S. W. Rep. 476.

In a suit to enforce the lien, brought by an assignee of notes given for the purchase-money, it has been held that the assignor is not a necessary party, when it appears that he has no interest in the suit. *Kirk v. Sheets*, 90 Ala. 504. But see *Hunt v. Selleck* (Mo. 1894), 24 S. W. Rep. 213. Where an assignee of the notes seeks to enforce the lien, after the death of the vendor who retained the title of the lands, the heirs or devisees of the vendor are necessary parties. *Liles v. Ratchford*, 88 Ala. 397.

Claimant for the Land.—In an action to foreclose a vendor's lien, one who claims a right in the land, by reason of a judgment against the vendor, canceling the patent under which the latter claimed, is a proper and necessary party. *Looney v. Simpson* (Tex. 1894), 26 S. W. Rep. 1065.

2. *Milner v. Ramsey*, 48 Ala. 287; *Wilkinson v. May*, 69 Ala. 33. And it

has been held also that persons who owned an interest in the land, but did not join in the deed, and were not named in the purchase-money note, were not necessary parties to a bill to foreclose the lien. *Earle v. Marx*, 80 Tex. 39.

The general rule is, that the only necessary or proper parties are the parties to the original contract, and those who have acquired an interest under them. *Faubion v. Rogers*, 66 Tex. 472.

No adverse title can be tried in the suit to enforce the lien, and the holder of such a title is an unnecessary and improper party. *Faubion v. Rogers*, 66 Tex. 472; *Wells v. Francis*, 7 Colo. 396.

3. *Alford v. Wilson*, 62 Tex. 484; *Williams v. Roe*, 59 Ala. 629; *Stevens v. Flannagan*, 131 Ind. 122.

A bill which describes the land, and adds, "known as all that part of the Jack Smith land lying north of High Pine Creek," is a sufficient description, though it would have been defective without such a clause. *Liles v. Ratchford*, 88 Ala. 397.

Where the bill described the land incorrectly, but no objection was taken in the pleadings, or at the trial, and the error was corrected in the judgment, it was held that there was no ground for reversal of judgment. *Brown v. McKee*, 80 Tex. 594.

A decree to sell land to satisfy purchase-money notes, which merely describes the land as that "set out and described in the petition does not sufficiently describe the land." *Hillard v. Rountree* (Ky. 1894), 24 S. W. Rep. 607.

4. *Lord v. Wilcox*, 99 Ind. 491.

5. *Dunton v. Outhouse*, 64 Mich. 419.

6. *Welch v. Hicks*, 27 Ark. 292; *Linberg v. Finks* (Tex. Civ. App. 1894), 25 S. W. Rep. 789.

made;¹ nor is it necessary to allege that the vendee is insolvent.² The burden of proof is on the plaintiff.³

c. STATUTE OF LIMITATIONS.—The prevailing doctrine is that, as the vendor's lien is merely a security for the purchase-money debt, it cannot be enforced after the debt has become barred by the Statute of Limitations.⁴ It is held that the principal and the incident necessarily fall together.⁵ But in several jurisdictions it has been held that the lien, being in the nature of a trust, continues and may be enforced after the action on the debt is barred by limitation, and that the lapse of twenty years is necessary to raise the presumption that the lien has been satisfied.⁶

II. VENDOR'S LIEN BY EXPRESS RESERVATION — 1. Definition. —

The vendor's lien, by express reservation, exists where there is an express stipulation in the deed of conveyance of land, or even in other writings, reserving to the grantor a lien on the land conveyed, as security for the unpaid purchase-money. A lien arising in this manner becomes a specific lien, and constitutes an original substantive charge upon the land.⁷

1. *Kirk v. Sheets*, 90 Ala. 504.

2. *Stevens v. Flannagan*, 131 Ind. 122; *Martin v. Cauble*, 72 Ind. 67; *Citizen's Bank v. Adams*, 91 Ind. 280.

3. In an action to foreclose a vendor's lien, the burden of showing title and right to possession, is on the plaintiff. *Willis v. Lockett* (Tex. Civ. App. 1894), 26 S. W. Rep. 419.

4. *Stevens v. Shannon*, 43 Ark. 464; *Ilett v. Collins*, 103 Ill. 74; *White v. Blakemore*, 8 Lea (Tenn.) 49; *Trotter v. Erwin*, 27 Miss. 772; *Borst v. Corey*, 15 N. Y. 505; *Pitschki v. Anderson*, 49 Tex. 1; *Rindge v. Oliphint*, 62 Tex. 682.

In *Borst v. Corey*, 15 N. Y. 505, the court, by Bowen, J., said: "It would be an anomaly, if the plaintiff could recover his debt by an action to enforce the lien given to secure the debt, when no action could be sustained to recover the debt directly without reference to the lien. There is no reason why the limitation should be applicable in the one case and not in the other. . . . The equitable lien is neither created nor evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures. It must co-exist with the debt and cannot survive it. It is true that the Statute of Limitations does not extinguish the debt; it only bars the remedy. But the remedy by action at law is no less barred than that by suit in equity to enforce the lien."

5. *Stevens v. Shannon*, 43 Ark. 467; *Waddell v. Carlock*, 41 Ark. 523.

6. Such is the rule in *Alabama* and *Maryland*. *Baltimore*, etc., R. Co. v. Trimble, 51 Md. 99; *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Lingan v. Henderson*, 1 Bland (Md.) 236, 281; *Moreton v. Harrison*, 1 Bland (Md.) 491; *Driver v. Hudspeth*, 16 Ala. 348; *Bizzell v. Nix*, 60 Ala. 281; 31 Am. Rep. 38; *Ware v. Curry*, 67 Ala. 274; *Chapman v. Lee*, 64 Ala. 483.

The same rule has been laid down also in *Virginia*, in a case where the vendor retained a title as security for the purchase-money. *Hanna v. Wilson*, 3 Gratt. (Va.) 232; 46 Am. Dec. 190. See also *Coles v. Withers*, 33 Gratt. (Va.) 196.

In *Relfe v. Relfe*, 34 Ala. 500; 73 Am. Dec. 467, the reason for the rule is stated as follows: "The principle is, that the Statute of Limitations does not extinguish the debt, but merely bars the remedy by action at law; and there is no inconsistency in the prosecution of another remedy, after the action at law is barred."

7. Where the vendor retains the legal title as security for the unpaid purchase price, he holds a lien by virtue of the contract, and not simply the vendor's lien that exists in equity, where the vendor has parted with the legal title without payment. *Roby v. Bismarck Nat. Bank* (N. Dak. 1894), 59 N. W. Rep. 719.

2. Nature and Effect of Express Lien.—This lien differs widely from the implied lien raised by equity in favor of the vendor, in that it arises out of, and is created by, an express agreement of

This lien should be carefully distinguished from the implied lien treated *supra*, and from the right secured by retaining the legal title under a contract to sell, or a title bond, treated *infra*.

Such a lien has been upheld by the courts, in jurisdictions where the doctrine of the implied lien is not favored, or is repudiated. *Greeno v. Barnard*, 18 Kan. 518; *Helfrich v. Weaver*, 61 Pa. St. 390; *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449.

In *Heist v. Baker*, 49 Pa. St. 9, the court, by Woodward, C. J., said: "Such is our repugnance to implied or constructive liens, that we refused to treat a recitation of unpaid purchase-money as a lien, though standing in the channel of the title, and we desire to be understood as having refused after great consideration of the subject; but where it is expressly charged, the lien must be supported. It is the distinction between express and implied liens."

In several states, statutes abolishing the implied lien have excepted from their operation this lien arising out of an express reservation. *Vermont Rev. Laws 1880, § 1937*; *Virginia Code 1873, ch. 115, § 1*; *West Virginia Code 1870, ch. 75, § 1*; *McClain's Iowa Annot. Code 1888, § 3111*.

In some states, the practice of reserving a lien in the deed has become very common. A frequent practice is specifically to describe the purchase-money notes in the deed, and to state them to be an express lien on the land for their amounts. *Hall v. Mobile, etc., R. Co.*, 58 Ala. 10, 22; *Stratton v. Gold*, 40 Miss. 778; *Davis v. Hamilton*, 50 Miss. 213; *Carpenter v. Mitchell*, 54 Ill. 126; *Markoe v. Andras*, 67 Ill. 34; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Talieferro v. Barnett*, 37 Ark. 511; *Kirk v. Williams*, 24 Fed. Rep. 437.

It has been held that where a contract is made for the sale of land, in the ordinary form, the vendor agreeing to make a deed with covenants of warranty, and nothing being said about a reservation of a lien or any other security, the vendor has a right to insert in the deed a clause reserving a lien. *Findley v. Armstrong*, 23 W. Va. 113. It is otherwise, however, where it is shown that the vendor intended to rely upon

other security. *Warren v. Branch*, 15 W. Va. 21.

Reservation by Separate Instrument.—It also has been held that a lien may be reserved by other writings than the deed of conveyance, as in the purchase-money notes, provided the land is accurately described in such writings, and it is the intention of the parties that the land shall be subject to the lien. *Carr v. Thompson*, 67 Mo. 472; *Hobson v. Edwards*, 57 Miss. 128; *Osborne v. Royer*, 1 Lea (Tenn.) 217; *Eskridge v. McClure*, 2 Yerg. (Tenn.) 84; *Helm v. Weaver*, 69 Tex. 143.

But in *Waddell v. Carlock*, 41 Ark. 523, where there was a recital in a promissory note given for land, that it was "to be a lien on the land until paid," it was held that no lien or mortgage was created thereby. The distinction between this case and the others above cited has been stated as follows: "Where an instrument merely states, in one form or another, that liens would be or were retained, but without any expression or indication of intent to create or fix the liens, such statements will be considered as mere assertions and not undertakings, and the instrument will be ineffectual as a mortgage; but where the instrument manifests an intent to charge, subject, or pledge property as security for a debt, and the property is fully or sufficiently described, equity will enforce the lien as an equitable mortgage." 2 *Warvelle on Vendors* (1st ed.), p. 733, and note.

In *Eskridge v. McClure*, 2 Yerg. (Tenn.) 84, the vendee of land gave his bond for the purchase-money, and on the face of the bond it was stated that the land should be liable to the debt until the purchase-money was paid. It was held, in a suit by an assignee of the bond, that the land was subject to a lien. See also *Pinch v. Anthony*, 8 Allen (Mass.) 536; *Blackburn v. Tweedie*, 60 Mo. 505.

Married Women.—It is settled that the reserved lien is effective, and may be enforced against a married woman. *Jackson v. Rutledge*, 3 Lea (Tenn.) 626; 31 Am. Rep. 655; *Carpenter v. Mitchell*, 54 Ill. 126; *Morrison v. Brown*, 83 Ill. 562; *Weinberg v. Rempel*, 15 W. Va. 829.

the parties.¹ While its precise nature and effect have not been accurately determined, it bears a close resemblance to a mortgage; and it has generally been treated as a mortgage by the courts, in cases where the question of its exact nature has arisen.² In one respect, the effect of this lien is precisely that of the ordi-

1. In *Markoe v. Andras*, 67 Ill. 34, the court, by Breeze, J., distinguishing the express from the implied lien, said: "That kind of lien (the equitable lien) arises only by implication, where the vendor has taken no mortgage or other lien, and is not assignable. The lien in question was created by express contract of the parties, of which the assignee can avail in equity. What is the nature of this lien? As was said in *Carpenter v. Mitchell*, 54 Ill. 126, it arises by express contract; it became a matter of record on recording the vendor's deed, and was notice to all who might deal with the property, and was conceded in the note given for the balance due. All persons purchasing it were assured by its contents that a lien was conceded, not only to the vendor but to his assigns. It is, therefore, more than the ordinary lien of the vendor. It is a written contract that the land shall be burthened with the lien until the note is paid. If not a mortgage, it approximates one more nearly than the ordinary lien of a vendor." See, further, as to the difference between the express and the implied liens of the vendor, 3 Pomeroy's Eq. Jur. (2d ed.), § 1257. See *supra*, this title, *Vendor's Implied Lien for Purchase-Money of Land—Definition*, note; *Hines v. Perkins*, 2 Heisk. (Tenn.) 402.

May Secure Collateral Agreement.—It seems, also, that the express lien, unlike the implied lien, may secure the performance of any covenant or agreement, instead of the payment of a fixed sum in money, as an agreement to pay in specific articles, *Harvey v. Kelly*, 41 Miss. 490; 93 Am Dec. 267; or an agreement to assume an indebtedness of the vendor. *Sidwell v. Wheaton*, 114 Ill. 267.

2. *Robinson v. Woodson*, 33 Ark. 307; *Talieferro v. Barnett*, 37 Ark. 511; *Smith v. Rowland*, 13 Kan. 245; *Exchange, etc., Bank v. Bradley*, 15 Lea (Tenn.) 279; *Hines v. Perkins*, 2 Heisk. (Tenn.) 395; *Adams v. Cowherd*, 30 Mo. 458; *Peters v. Clements*, 46 Tex. 114; *Webster v. Mann*, 52 Tex. 416; *Carpenter v. Mitchell*, 54 Ill. 126; *Dingley v. Bank of*

Ventura, 57 Cal. 467; *Bozeman v. Ivey*, 49 Ala. 75; *Stratton v. Gold*, 40 Miss. 778; *Daniels v. Moses*, 12 S. Car. 130; *Eichelberger v. Gitt*, 104 Pa. St. 64; *Ober v. Gallagher*, 93 U. S. 199.

In *King v. Young Men's Assoc.*, 1 Woods (U. S.) 386, *Bradley, J.*, in stating the law of *Texas*, said: "The reservation of the vendor's lien in the deed of conveyance, is equal to a mortgage taken for the purchase-money, contemporaneously with the deed, and nothing more. The purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase-money." See, however, 3 Pomeroy's Eq. Jur. (2d ed.), § 1257, n. 1, for a criticism of the above use of the expression, "equity of redemption." But such seems to be a correct description of the interest of the vendee in *Texas*, where, under a reserved lien, the vendor is held to have the legal title. *Peters v. Clements*, 46 Tex. 123.

That the reserved lien is as valid and effectual as a mortgage or trust deed, see *Armentrout v. Gibbons*, 30 Gratt. (Va.) 632; *Carpenter v. Mitchell*, 54 Ill. 126; *Smith v. Rowland*, 13 Kan. 245.

It has been held also that the express lien, being in effect a mortgage, is subject to all the consequences resulting from the foreclosure and sale of an ordinary mortgage, *e. g.*, redemption within twelve months. *Markoe v. Andras*, 67 Ill. 34.

In *Kirk v. Williams*, 24 Fed. Rep. 437, the court, by *Hammond, J.*, said: "Of course it must be observed that, while the court assimilates all these liens to that of a mortgage, it does not mean the old common-law mortgage, in its technical sense, but the modern signification of that term, as one applied to any lien created by express contract of the parties as security for a debt."

The legal title passes to the vendee, subject to the lien, and the land is liable to attachment and execution as his property, just as an equity of redemption. *Gordon v. Rixey*, 76 Va. 694; *Chitwood v. Trimble*, 2 Baxt. (Tenn.) 78.

nary mortgage given back by the vendee on the purchase of land. Being embodied, in most cases, in the deed, it becomes a matter of record, and is thus entitled to priority as against subsequent purchasers and incumbrancers with constructive notice, in the same manner as the mortgage; and, in general, the effect of the two securities, with reference to other outstanding incumbrances, is the same.¹

It should be noticed, however, that the vendor, having a reserved lien, unlike the mortgagee in a common-law mortgage, has only an equitable interest, the legal title being in the vendee,² and it has been questioned sometimes whether the reserved lien is not of a higher nature than a mortgage, on the ground that the latter is a mere incident to the debt, whereas the former is an express

1. Subsequent Purchasers.—The reservation of the lien being stated "in the very first link of the vendee's chain of title, it affords the same notice to purchasers from him as they would receive from a duly executed mortgage or trust deed, and all persons so purchasing are thereby notified that a lien has been conceded, not only to the vendor, but to his assigns." *Stratton v. Gold*, 40 Miss. 778; *Hall v. Mobile, etc.*, R. Co., 58 Ala. 10; *Carpenter v. Mitchell*, 54 Ill. 126; *Sidwell v. Wheaton*, 114 Ill. 267; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Patton v. Hoge*, 22 Gratt. (Va.) 443; *Moore v. Lackey*, 53 Miss. 85; *Peters v. Clements*, 46 Tex. 114; *Webster v. Mann*, 52 Tex. 416; *Talieferro v. Barnett*, 37 Ark. 511; *Eichelberger v. Gitt*, 104 Pa. St. 64; 3 *Pomeroy's Eq. Jur.* (2d ed.), §§ 1257, 1258, and notes; 2 *Warvelle on Vendors*, pp. 728, 729.

In *National Valley Bank v. Harman*, 75 Va. 604, the vendor reserved a lien in the deed for the purchase-money, to be paid in five years, and a note was made by the vendee, also payable in five years; but the note was not referred to in the deed. The vendor afterward indorsed and transferred the note to a bank, in discharge of an antecedent debt, and then contracted to sell the property to a third person, who paid the purchase-money and took a conveyance from the first vendee. The second vendee was ignorant of the existence of the outstanding note, and of any claim on the part of the bank to the purchase-money. It was held that the second vendee took the property unaffected by any lien in favor of the holder of the note. The court said: "The most prudent and cautious inquirer would not

have supposed that any such instrument existed. Certainly it cannot be said that persons were bound at their peril to suspect or presume it. Indeed, a negotiable note, payable five years after date, is altogether so unusual that no one, even the most diligent, would have ever imagined that such a security formed a part of this transaction."

Subsequent Mortgage.—The reserved lien is superior to a subsequent mortgage made by the vendee, *Louisville Bldg. Assoc. v. Korb*, 79 Ky. 190; and to a subsequent mortgage made to the vendee. *Strauss' Appeal*, 49 Pa. St. 353.

Prior Judgment.—It also has precedence over a prior judgment against the vendee. *Parsons v. Hoyt*, 24 Iowa 154.

Execution Sale.—It is held that where a lien is reserved in the deed, and the property is sold at execution sale, the sale should be made as of incumbered property. *Thompson v. Heffner*, 11 Bush (Ky.) 353.

In *Pennsylvania*, however, it has been held that a reserved lien is divested by a subsequent sheriff's sale, unless it is in the nature of a testamentary provision for wife, or children, or is incapable of valuation, or is expressly created to run with the land. *Strauss' Appeal*, 49 Pa. St. 353.

2. Gordon v. Rixey, 76 Va. 694; *Chitwood v. Trimble*, 2 Baxt. (Tenn.) 78; *Moore v. Lackey*, 53 Miss. 92. In many of the states, at the present time, however, the mortgagee has merely an equitable lien. See **MORTGAGES**, vol. 15, p. 735. In such states the interest of the mortgagee seems to be precisely like that of a vendor who has a reserved lien.

charge upon the land, which is the natural, primary fund for its payment.¹

3. How Express Lien Is Created.—As a general rule, it may be stated that no particular language is necessary to create the reserved lien, provided the intention so to do is clearly and unequivocally expressed, and the amount of the purchase-money to be secured by, and charged upon, the land, is shown.²

The prevailing doctrine is, that there must be something more than a mere recital that a certain amount of the purchase-money remains unpaid, or is to be paid at some future time, or in some particular manner. In order to create a lien, there must be express words showing an intention to charge the land with the debt; and a recital of unpaid purchase-money is not sufficient evidence of such intention, and, therefore, will not affect third persons with notice of a lien.³

1. *Coles v. Withers*, 33 Gratt. (Va.) 195. See, however, *contra* *King v. Young Men's Assoc.*, 1 Woods (U. S.) 389.

2. **What Words Will Create an Express Lien.**—The words, "to have and to hold the same under and subject, nevertheless, to the payment" of a certain sum, at the death of the grantee, are sufficient to create the lien. *Heist v. Baker*, 49 Pa. St. 9. Also the words "subject to the payment of five thousand, nine hundred and fifteen dollars, the purchase-money," are apt words for imposing a lien. *Eichelberger v. Gitt*, 104 Pa. St. 64.

So, if the land is conveyed "charged with the payment" of certain specified sums, a lien is created. *Stanhope v. Dodge*, 52 Md. 483. It was, however, held in this case that the lien was, in its nature, rather a mortgage than a vendor's lien.

A deed containing a description of the purchase-money notes and a recital "to have and to hold on payment of the notes herein above stated," was also held to reserve a lien. *Blaisdell v. Smith*, 3 Ill. App. 150.

Also, a stipulation that the "land shall be bound for the notes," creates a lien. *Moore v. Lackey*, 53 Miss. 85.

So, a recital that the "said land and improvements are held bound for the payment of said two notes," creates a valid lien. *Talieferro v. Barnett*, 37 Ark. 511.

In *Moore v. Lackey*, 53 Miss. 85, the court, by Simrall, C. J., said: "Whatever words distinctly convey the idea that the vendor retains or reserves a lien on the land, creates an express

security. . . . A court of equity, which looks through the form to the substance, does not exact any peculiar formula to create a security on lands. If the vendee accepts a deed, with a stipulation that the 'land shall be bound for the notes' or 'be a security for them,' or any other words expressing the intention that the land is pledged as security, they would be quite as effectual as the usual form, 'reserving a lien, as security for the notes.'"

Assuming Incumbrance as Purchase-Money.—It has been held also that, if the vendor states in his deed that the land is subject to an indebtedness of his, naming the amount and the creditor, and that the vendee, as a part of the consideration, assumes the payment thereof, such deed will create an express lien on the land, in favor of the vendor's creditor. *Sidwell v. Wheaton*, 114 Ill. 267.

In Favor of Third Party.—On the same principle, where, by arrangement between the vendor and vendee, the latter executes his note for the purchase-money to a third person, a lien may be retained in the deed in favor of such person. *Mize v. Barnes*, 78 Ky. 506.

3. In *Hiester v. Green*, 48 Pa. St. 96; 86 Am. Dec. 569, the court, by Woodward, C. J., said: "The sum of the authorities is that, though equitable liens are not favored by our law, yet parties may, by clear and express words in deeds of conveyance, create liens upon land, either for purchase-money or for performance of collateral conditions, which will be binding between themselves and their privies. . . . Now, in view of this state of the law, our

It is of no importance in what part of the deed the reservation of a lien is made. It is effective to charge purchasers with notice, even if appearing only in the *habendum*.¹ It is also immaterial whether it is contained in the deed of conveyance, or in other writings.²

4. **Waiver.**—The express lien may be waived, if such is the intention of the vendor, either by express words, or by acts clearly showing such intent.³ But many acts, which would operate as a waiver of the implied equitable lien, are not a waiver of the reserved lien. The latter, arising, as it does, out of an express contract, is not affected by the acceptance, on the part of the vendor, of independent security for the purchase-money debt.⁴ The reasons why the implied lien is waived by such acceptance have

immediate question is, whether reciting on the face of the title that the purchase-money remains unpaid, and is to be paid annually, creates such a lien. In *Neas' Appeal*, 31 Pa. St. 293, an intention to create a lien was inferred from the fact that the purchase-money stood in the title. But according to all the antecedent cases, express words were necessary to establish the lien. It never before was treated as a subject for legal implication, and it is manifestly a hazardous inference to make; for the pecuniary consideration, essential to all bargains and sales, is generally mentioned on the face of the deed, and if it be said to be unpaid, it is notice of that fact to a subsequent purchaser, but it is no notice to him of a lien. He may reasonably infer that the vendor trusted the personal credit of his vendee for the purchase-money, or took bonds and mortgages or other security, or, at the least, that no lien was intended to be created by the deed because none was expressed. These inferences would seem quite as reasonable as that the parties meant what they did not express—a lien for the unpaid money." See 3 *Pomeroy's Eq. Jur.* (2d ed.), § 1256, and cases cited; also opinion of Gould, J., in *Baker v. Compton*, 52 Tex. 252.

1. *Blaisdell v. Smith*, 3 Ill. App. 150.

2. *Hobson v. Edwards*, 57 Miss. 128; *Osborne v. Royer*, 1 Lea (Tenn.) 217; and see *supra*, this title, *Definition*, note.

A contract lien will be created by a provision in a note that it is to retain a vendor's lien on certain land till paid, and such lien is good as to purchasers of the land with notice of it. *Bergman v. Blackwell* (Tex. Civ. App. 1894), 23 S. W. Rep. 243.

Where one note is taken in payment for several parcels sold separately, in which it is recited that the note is a "lien and mortgage" on the lands, there is merely a lien on each tract for the purchase price of such tract, and not for the amount of the note. *Cundiff v. Corley* (Tex. Civ. App. 1894), 27 S. W. Rep. 167.

3. *Coles v. Withers*, 33 Gratt. (Va.) 186; *Frazier v. Hendren*, 80 Va. 265; *Warren v. Branch*, 15 W. Va. 21; *French v. Dickey*, 3 Tenn. Ch. 302; *Byrns v. Woodward*, 10 Lea (Tenn.) 444.

In *Butler v. Williams*, 5 Heisk. (Tenn.) 241, where the vendor allowed his vendee's administrator to suggest the insolvency of the vendee's estate, and was a witness to show the title of his vendee, in the insolvency proceedings, and was a bidder at the sale of the lot under a decree, he was held to have waived his reserved lien.

In *Coles v. Withers*, 33 Gratt. (Va.) 186, the court, by Staples, J., referring to the reserved lien, said: "So long as the debt exists, the courts will never presume the chief security taken for its payment has been surrendered, without satisfaction, unless upon the clearest and most convincing testimony."

In *Hines v. Perkins*, 2 Heisk. (Tenn.) 395, the court went still further, holding that where a lien is reserved, "the security of the vendor cannot be defeated by anything short of what would be regarded as sufficient to defeat or extinguish the security of a mortgage."

4. Thus, where a lien is reserved in the deed, and a trust deed of other lands is given as security, the acceptance of such security does not waive

obviously no application to an express lien, which cannot be defeated by a mere implication.¹

The express, like the implied, lien is not waived by the recovery of judgment and issue of execution on the notes given for the purchase-money.²

5. Assignment.—It is also established that the reserved lien is assignable; that it passes by an assignment of the debt for the purchase-money, or of the evidence of such debt; and that it may be enforced by, and in favor of, the assignee.³ The express lien

the reserved lien. *Price v. Lauve*, 49 Tex. 74.

So, also, the taking of notes for the purchase-money indorsed by the husband of the vendee, has been held not to be a waiver of a reserved lien. *Carpenter v. Mitchell*, 54 Ill. 126. In this case the court, by Walker, J., said: "Being a lien created by contract, and not a lien raised by equitable presumption, his signing the notes did not affect the agreement of the parties that the lien should be created. We cannot hold that the expressed agreement of the parties can be defeated by the implication that it was intended to be waived, simply because there is a surety on the notes. Such, no doubt, would be true in the case of an ordinary vendor's lien, but we have seen that this is not of that character, and hence that rule does not apply."

Also, where the purchase-money note was renewed payable to an assignee of the debt, including interest due, and after renewal bearing ten per cent. interest and having personal security not on the original note, there was held to be no waiver of the reserved lien. *Byrns v. Woodward*, 10 Lea (Tenn.) 444.

So, where the notes of a sub-vendee are substituted in lieu of the notes of the first vendee, there is no waiver of the express lien; and if a vendee sells the land, and he and his vendee join in notes for a remainder of the purchase-money to the original vendor, the presumption is that the second vendee joins as principal, not as surety; and the acceptance of such notes by the original vendor is not a waiver of a reserved lien. *Hines v. Perkins*, 2 Heisk. (Tenn.) 395; *Mulherrin v. Hill*, 5 Heisk. (Tenn.) 58. And see *Kausler v. Ford*, 47 Miss. 289, where it was held that a reserved lien is not waived by the acceptance of the note of a sub-vendee, in place of the original note of the first vendee, unless the intention of the parties was

to extinguish the original debt for the purchase price.

See also, on this point, *Carr v. Thompson*, 67 Mo. 472; *Woodward v. Echols*, 58 Ala. 665; *Johnson v. Townsend*, 77 Tex. 639. Most of the cases, in which the acceptance of independent security has been held not to be a waiver, are cases where the vendor, instead of reserving a lien, strictly so called, has retained the legal title as security. 3 Pomeroy's Eq. Jur. (2d ed.), § 1259, note 1, cases cited.

1. *Carpenter v. Mitchell*, 54 Ill. 126.

2. *Exchange, etc., Bank v. Bradley*, 15 Lea (Tenn.) 279; *Carter v. Butler County Ct.*, 81 Ky. 597; *Dowdy v. Blake*, 50 Ark. 205; 7 Am. St. Rep. 88. See also *supra*, this title, *Waiver of Lien—Judgment at Law for Debt*.

But where a vendor, instead of asserting a vendor's lien, brings suit for the purchase-money, and attaches the land sold, persons claiming title under the attachment proceedings must depend on the validity of such proceedings, and cannot avail themselves of any right which the vendor had to a lien. *Myers v. Paxton* (Tex. Civ. App. 1894), 23 S. W. Rep. 284.

3. *Carpenter v. Mitchell*, 54 Ill. 126; *Markoe v. Andras*, 67 Ill. 34; *Wright v. Troutman*, 81 Ill. 374; *Blaisdell v. Smith*, 3 Ill. App. 150; *Hobson v. Edwards*, 57 Miss. 128; *Osborne v. Royer*, 1 Lea (Tenn.) 217; *Campbell v. Rankin*, 28 Ark. 401; *Talieferro v. Barnett*, 37 Ark. 511; *Morris v. Ham*, 47 Ark. 293; *Dowdy v. Blake*, 50 Ark. 205; 7 Am. St. Rep. 88; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Avery v. Clark*, 87 Cal. 619; 22 Am. St. Rep. 272; *Duncan v. Louisville*, 13 Bush (Ky.) 378; 26 Am. St. Rep. 201; *Summers v. Kilgus*, 14 Bush (Ky.) 449; *Bills v. Mason*, 42 Iowa 329.

A transfer of the purchase-money notes, where a lien is reserved, carries with it the lien, and the transferee has

is regarded as an incident to the debt which it secures;¹ in this respect, as in many others, differing from the implied equitable lien of the vendor.²

Where there are several purchase-money debts or notes secured by a reserved lien, an assignment of each carries with it an assignment of so much of the lien as is necessary to protect it.³ On the question of priority as between the assignor and assignee, and as between successive assignees, there is a diversity of opinion. In several jurisdictions, the assignee of one of such notes is held to have priority of satisfaction over the assignor, or over subsequent assignees, holding other notes.⁴ In other jurisdictions, the right to priority depends upon the time at which the notes mature;⁵ and in others, the notes stand upon an equality without

the right to foreclose it and have the land sold to satisfy his claim. *Elmendorf v. Beirne* (Tex. Civ. App. 1893), 23 S. W. Rep. 315.

In *Arkansas*, it is provided by statute that "the lien or equity held or possessed by the vendor of any real estate, for the sale of the same, shall inure to the benefit of any assignee of the notes or obligations given for the purchase-money of such real estate, and such lien or equity shall be assignable and payable by indorsement or otherwise, in the hands of such assignee; and any such assignee may maintain an action or suit to enforce the same, provided the said lien or equity is expressed upon or appears from the face of the deed of conveyance." *Arkansas Acts of 1873*, p. 217; *Arkansas Dig. 1884*, § 474. Formerly the law was the contrary in *Arkansas*. *Sheppard v. Thomas*, 26 Ark. 626; *Jones v. Doss*, 27 Ark. 518.

In *Robinson v. Woodson*, 33 Ark. 307, the vendor executed a deed expressly reserving a lien, and afterward executed a second deed, to the same vendee, acknowledging payment of the purchase price, when, in fact, it was not paid. It was held that the lien in the first deed was a contract lien like a mortgage, which was conveyed to the vendee by the execution of the second deed, and that under the second deed the vendor had the same implied lien as if the first had not been made.

It has been held that a reserved lien may be released by the vendor, although he has previously assigned a purchase-money note, secured by such lien, to a third person—an anomalous decision if the lien is held to be assignable, and enforceable by the assignee. *Summers v. Kilgus*, 14 Bush (Ky.) 449.

In *Moran v. Wheeler* (Tex. Civ. App. 1894), 26 S. W. Rep. 297, it was held that an assignment of a note acknowledging a vendor's lien, operates as an equitable assignment of the lien, and is, therefore, an "instrument in writing concerning land," within the meaning of the registry laws, requiring such instruments to be recorded in order to charge subsequent purchasers with constructive notice.

1. *Chitwood v. Trimble*, 2 Baxt. (Tenn.) 78.

2. By the preponderance of authority in this country, the implied lien is a purely personal right of the vendor, not assignable by him. See *supra*, this title, *Assignment of Lien*.

3. *Summers v. Kilgus*, 14 Bush (Ky.) 449; *Griggsby v. Hair*, 25 Ala. 327; *Menken v. Taylor*, 4 Lea (Tenn.) 445; *McClintic v. Wise*, 25 Gratt. (Va.) 448; 18 Am. Rep. 694.

4. This is the rule in *Alabama* and *Virginia*. *Griggsby v. Hair*, 25 Ala. 327; *Preston v. Ellington*, 74 Ala. 133; *McClintic v. Wise*, 25 Gratt. (Va.) 448; 18 Am. Rep. 694. In the last case the legal title was reserved rather than a lien; but on the question of priority as between the notes there is, of course, no difference between the two cases.

There is also a *dictum* showing that the same rule prevails in *Kentucky*. *Forwood v. Dehoney*, 5 Bush (Ky.) 174.

5. Such is the rule in *Indiana*, *Ohio*, *Vermont*, and *Wisconsin*. *State Bank v. Tweedy*, 8 Blackf. (Ind.) 447; 46 Am. Dec. 486; *Stanley v. Beatty*, 4 Ind. 134; *U. S. Bank v. Covert*, 13 Ohio 240; *Wright v. Parker*, 2 Aik. (Vt.) 212; *Wood v. Trask*, 7 Wis. 566; 76 Am. Dec. 230; *Lyman v. Smith*, 21 Wis. 674. In these cases the notes secured mortgages instead of reserved

reference to the time of their assignment or maturity, unless it was clearly the intention to create a preference.¹

6. Subrogation.—For the purposes of subrogation, there is said to be no difference between a vendor's lien by reservation in the deed and the mortgage given back by the vendee to secure the purchase-money.²

A surety on the note given for the purchase-money, who pays the note, will be subrogated to the vendor's lien, unless the rights of the vendor will thereby be impaired.³

So, where land subject to a reserved lien or mortgage is purchased by two or more persons, one of whom pays more than his proportion of the purchase price, he is entitled to stand in the place of the vendor to the extent of the excess so paid by him;⁴ and his right of subrogation may be enforced against a vendee of his co-purchaser, who, after partition, buys with notice of the incumbrance.⁵ A surety is not, however, entitled to subrogation before he has paid the whole debt.⁶

7. How Express Lien Is Enforced.—The proceedings to enforce the express lien are similar to those in the case of a mortgage.⁷ It is held that the vendor may enforce the lien before exhausting his remedy against the personal estate of the vendee;⁸ or he may sue at law on the purchase-money note and proceed in equity to enforce the lien at the same time.⁹ As in the case of a mortgage, the heirs and assigns of the vendee, and subsequent incumbrancers of his estate, should be made parties to the bill to enforce the lien.¹⁰ It has been held that the express lien for the pur-

liens, but it is believed that the principle is the same in either case.

1. Such appears to be the rule followed in *Tennessee, Texas, Mississippi, Maine, Pennsylvania, New Jersey, New Hampshire, and Michigan*. *Andrews v. Hobgood*, 1 Lea (Tenn.) 693; *Menken v. Taylor*, 4 Lea (Tenn.) 445 (here the vendor assigned one note guaranteeing that it should be paid in preference to the others, and it was held that the holder was entitled to priority); *Salmon v. Downs*, 55 Tex. 243; *Wooters v. Hollingsworth*, 58 Tex. 371; *Davidson v. Allen*, 36 Miss. 419; *Moore v. Ware*, 38 Me. 496; *Donley v. Hays*, 17 S. & R. (Pa.) 400; *Stevinson v. Black*, 1 N. J. Eq. 338; *Page v. Pierce*, 26 N. H. 317; *Cooper v. Ulman, Walk.* (Mich.) 251.

2. *Dowdy v. Blake*, 50 Ark. 205; 7 Am. St. Rep. 88.

3. *Grubbs v. Wysors*, 32 Gratt. (Va.) 127.

4. *Owen v. McGehee*, 61 Ala. 440; *Ackerman's Appeal*, 106 Pa. St. 1; *Simpson v. Gardiner*, 97 Ill. 237; *Williams v. Perry*, 20 Ind. 437. In such

case, each purchaser, where the land is shared equally and there is no express agreement, is a surety for the others to the extent of the debt to be paid by them. *Owen v. McGehee*, 61 Ala. 440; *Deitzler v. Mishler*, 37 Pa. St. 82; *Chipman v. Morrill*, 20 Cal. 130; *McGee v. Russell*, 49 Ark. 104.

5. *Dowdy v. Blake*, 50 Ark. 205; 7 Am. St. Rep. 88.

6. *McConnell v. Beattie*, 34 Ark. 113; *Menken v. Taylor*, 4 Lea (Tenn.) 445.

7. *King v. Young Men's Assoc.*, 1 Woods (U. S.) 386; *Wells v. Francis*, 7 Colo. 396.

The decree foreclosing the lien must contain an adequate description of the land. *James v. Brooks* (Tex. Civ. App. 1894), 24 S. W. Rep. 78.

8. *Smith v. Rowland*, 13 Kan. 245; *Huffman v. Cauble*, 86 Ind. 591; *Sparks v. Hess*, 15 Cal. 186; *Ware v. Crosthwaite* (Ky. 1894), 25 S. W. Rep. 832.

9. *Palmer v. Harris*, 100 Ill. 276; *Micou v. Ashurst*, 55 Ala. 607.

10. *King v. Young Men's Assoc.*, 1 Woods (U. S.) 386.

chase-money cannot be enforced after the debt, which it secures, has become barred by the Statute of Limitations.¹

Where the land is sold to satisfy the lien, land in the hands of sub-vendees should be held liable in the inverse order of the sales to them by the vendee;² and land retained by the vendee should be subjected to the lien first.³ Growing crops are passed under such a sale.⁴

III. WHERE VENDOR RETAINS TITLE UNDER CONTRACT OF SALE—

1. *Nature of the Interest.*—Besides the implied lien, and the lien by express reservation in the deed of conveyance, there is a third species of security for the payment of the purchase-money of the land, namely, the retention of the legal title by the vendor, under a contract to sell, or a bond to give title, or other agreement entered into between the vendor and vendee.⁵ The right

But it has been held that judgment creditors of the vendor, having liens on the land, are not necessary parties to the suit to enforce the vendor's lien. *Cunningham v. Hedrick*, 23 W. Va. 579; *Neeley v. Ruleys*, 26 W. Va. 686.

1. *Hale v. Baker*, 60 Tex. 217. In this case, the court, by Walker, J., said: "We perceive no reason for a discrimination between these kinds of lien (the implied and express liens), where the debt which they secure is barred by the Statute of Limitations. Where the vendor has reserved his lien in the deed, he may enforce the contract specifically, by suing upon the purchase-money note and foreclosing the lien, or he may, in effect, rescind the contract on default of payment of the note by disregarding his conveyance, and sell the land to another, or recover back its possession by suit. But when the evidence of his debt is barred by limitations, his opportunity for election is lost, and he must rely, for his remedy, upon the assertion of such rights only as his superior title to the land confers on him as its owner; he cannot recover the unpaid purchase-money."

In the case of the implied lien, the prevailing rule is that the lien cannot be enforced after the debt is barred by the statute. See *supra*, this title, *How the Lien Is Enforced—Statute of Limitations*. But where the vendor retains title as security, it is held that the right which he thereby acquires may be enforced after the debt is barred. *Bizzell v. Nix*, 60 Ala. 281; 31 Am. Rep. 38; *White v. Blakemore*, 8 Lea (Tenn.) 49; *Waddell v. Carlock*, 41 Ark. 523; *Coldcleugh v. Johnson*, 34 Ark. 312. See also *infra*, this title, *Where Vendor*

Retains Title Under Contract of Sale.

In *Tennessee*, it has been provided by statute that "liens on realty, retained in favor of vendors on the face of a deed, shall be barred and the liens discharged, unless suits to enforce the same be brought within ten years from the maturity of the debt." *Tennessee Acts of 1885*, ch. 9.

2. *Whitten v. Saunders*, 75 Va. 563; *Alabama v. Stanton*, 5 Lea (Tenn.) 423.

3. *Boyce v. Stanton*, 15 Lea (Tenn.) 346.

4. *Yates v. Smith*, 11 Ill. App. 459; *Smith v. Hague*, 25 Kan. 246; *Johnston v. Smith*, 70 Ala. 108.

5. *Stevens v. Chadwick*, 10 Kan. 406; 15 Am. Rep. 348; *Smith v. Rowland*, 13 Kan. 245; *Hill v. Grigsby*, 32 Cal. 55; *Avery v. Clark*, 87 Cal. 649; 22 Am. St. Rep. 272; *Amory v. Reilly*, 9 Ind. 490; *Whitehurst v. Yandall*, 7 Baxt. (Tenn.) 228; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Yancey v. Mauck*, 15 Gratt. (Va.) 300; *Hall v. Jones*, 21 Md. 439; *Johnson v. Nunnerly*, 30 Ark. 153; *Martin v. O'Bannon*, 35 Ark. 62; *Cotten v. McGehee*, 54 Miss. 510; *Fry v. Prewett*, 56 Miss. 783; *Prentice v. Nutter*, 25 Minn. 484; *Stephenson v. Rice*, 12 W. Va. 575; *Vail v. Drexel*, 9 Ill. App. 439; *Williams v. Simmons*, 79 Ga. 649; *In re Patent Carriage Co.*, L. R., 2 Eq. 349; *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. Div. 582; *Nives v. Nives*, 15 Ch. Div. 649; *Smith v. Evans*, 28 Beav. 59.

The vendor who has given a bond to convey, under section 3654 of the *Georgia Code*, may enforce payment out of the land, not only as against the immediate purchaser from him, but as against

obtained by the vendor in this way, has been termed a lien, and often has been confused with the express and implied liens.¹

In *England*, the relationship between the parties in such cases is held to be that of trustee and *cestui que trust*.² In the *United*

anyone holding under such purchaser. *Hawkins v. Dearing* (Ga. 1894), 19 S. E. Rep. 717.

1. 2 Jones on Liens (2d ed.), § 1107; 3 Pomeroy's Eq. Jur. (2d ed.), § 1260; *Robinson v. Appleton*, 124 Ill. 276; and see cases in preceding note.

Mr. Pomeroy, speaking of this use of the word "lien," said: "This is an unnecessary and incorrect use of terms; it confounds legal notions which are essentially different. There is a plain distinction between the lien of the grantor after a conveyance, and the interest of the vendor before conveyance. The former is not a legal estate, but is a mere equitable charge on the land; it is not even, in strictness, an equitable lien, until declared and established by judicial decree. In the latter, although possession may have been delivered to the vendee, and although, under the doctrine of conversion, the vendee may have acquired an equitable estate, yet the vendor retains the legal title, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure—namely, by paying the price according to the terms of the contract. To call this complete legal title a lien is certainly a misnomer. In case of a conveyance, the grantor has a lien but no title. In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien; his title is a more efficient security, since the vendee cannot defeat it by any act or transfer, even to or with a *bona fide* purchaser." 3 Pomeroy's Eq. Jur. (2d ed.), § 1260. See, further, as to the distinction between the lien, properly so called, and the retention of legal title, *Lowery v. Peterson*, 75 Ala. 109; *Moses v. Johnson*, 88 Ala. 517; *Baker v. Compton*, 52 Tex. 252; *Church v. Smith*, 39 Wis. 492; *Sparks v. Hess*, 15 Cal. 194; *Gessner v. Palmateer*, 89 Cal. 89; *Wells v. Smith*, 44 Miss. 296; *McCaslin v. State*, 44 Ind. 151; *Hutton v. Moore*, 26 Ark. 382; *Reese v. Burts*, 39 Ga. 565; *Hines v. Perkins*, 2 Heisk. (Tenn.) 395; *Robinson v. Appleton*, 124 Ill. 276; *Vail v. Drexel*, 9 Ill. App.

439; *Poe v. Paxton*, 26 W. Va. 607; *Hale v. Baker*, 60 Tex. 217; *Ransom v. Brown*, 63 Tex. 188; 3 Pomeroy's Eq. Jur. (2d ed.), §§ 1260, 1261, and notes.

"When the legal title remains in the vendor, the vendee has merely an equity of redemption in the land, and no act of his can possibly affect the vendor's title; while, in case of a mere lien in the vendor, the fee is in the purchaser, who may, at any time, discharge the lien by conveying the land to a *bona fide* purchaser for value." *Church v. Smith*, 39 Wis. 492; 2 Jones on Liens (2d ed.), § 1107. See also cases cited, *supra*, in this note.

2. *Lysaght v. Edwards*, 2 Ch. Div. 499; *McCreight v. Foster*, L. R., 5 Ch. App. 604; *Shaw v. Foster*, 5 H. L. Cas. 321; *Rose v. Watson*, 10 H. L. Cas. 672, 678; *Hadley v. London Bank*, 3 De G. J. & S. 70. The doctrine of these cases is that the contract gives rise to a constructive trust.

In *Lysaght v. Edwards*, 2 Ch. Div. 499, Sir G. Jessel, M. R., said: "It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is; viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mort-

States, it is generally considered to be in the nature of a mortgage.¹

The interest of the vendor is, on the doctrine of equitable conversion, personal property, and upon his decease, passes to his personal representative. The interest of the vendee is, by the same doctrine, real estate, and may be alienated or devised as such; and on the death of the vendee, will descend to his heirs.²

2. Waiver and Assignment.—The right obtained by retaining the legal title under a contract of sale or title-bond, is not waived by taking independent security for the purchase price, or by other acts which would operate as a waiver of the implied lien.³ So

gaged has a right to foreclose, that is to say, he has a right to say to the mortgagor, 'either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, 'either pay me the purchase-money, or lose the estate.'

The same doctrine exists in *Massachusetts*. In *Felch v. Hooper*, 119 Mass. 52, the court, by Colt, J., said: "The doctrine is well established in equity that, from the time a valid contract for the sale of land is made, that which ought to have been done is treated, as between the parties, as already done; and the seller and his representatives, and subsequent purchasers from him with notice, will be held to be trustees for the purchaser, for the purpose of affording the latter a remedy against the estate." See also *Lewis v. Hawkins*, 23 Wall. (U. S.) 125; 1 Story's Eq. Jur. (13th ed.), § 789.

1. *Wells v. Francis*, 7 Colo. 396; *Bankhead v. Owen*, 60 Ala. 457; *Lowery v. Peterson*, 75 Ala. 109; *Hardin v. Boyd*, 113 U. S. 756; *Sparks v. Hess*, 15 Cal. 186; *Gessner v. Palmateer*, 89 Cal. 89; *Graham v. McCampbell*, Meigs (Tenn.) 56; 33 Am. Dec. 126; *Church v. Smith*, 39 Wis. 492; *Baker v. Compton*, 52 Tex. 252.

In *Moses v. Johnson*, 88 Ala. 517, the court, by Stone, C. J., said: "When a vendor of real estate enters into an executory agreement to convey title on the payment of the purchase-money, he sustains, in substance, the same relation to the vendee, as a mortgagee does to a mortgagor. Each has a legal title, which, in the absence of stipulations for possession, will maintain an action of ejectment. Each can retain his legal

title against the other party, until the purchase-money, or mortgage debt, is paid, unless he permits the other to remain in undisturbed possession for twenty years. And yet each is, at last, but a trustee of the legal title for the mortgagee or vendee, if the purchase-money, or mortgage debt, as the case may be, is paid, or seasonably tendered. The same mutual rights and remedies, legal and equitable, and the same limitation to the right of recovery, obtain in the one relation and in the other."

So, also, in *Graham v. McCampbell*, Meigs (Tenn.) 56; 33 Am. Rep. 126, the court said: "We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure the payment of a debt; for in both cases courts of chancery consider the estate only as security for the payment of the debt, upon the discharge of which the debtor is entitled to a conveyance in the one instance and a reconveyance in the other."

2. *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Jones v. Lapham*, 15 Kan. 540; *Alderson v. Ames*, 6 Md. 52; *Button v. Schroyer*, 5 Wis. 598; *Martin v. O'Bannon*, 35 Ark. 62; *Scroggins v. Hoadley*, 56 Ga. 165; *Masterson v. Pullen*, 62 Ala. 145; *Huffman v. Hummer*, 17 N. J. Eq. 263; *Brewer v. Herbert*, 30 Md. 301; 96 Am. Dec. 582; *Seton v. Slade*, 7 Ves. 280; 2 Story's Eq. Jur. (13th ed.), § 790; 3 Pomeroy's Eq. Jur. (2d ed.), § 1261.

3. This right of the vendor is not waived by taking other and independent security from the vendee. *McCasin v. State*, 44 Ind. 151; *Huffman v. Cauble*, 86 Ind. 591; *Whitehurst v. Yandall*, 7 Baxt. (Tenn.) 228; *Sehorn v. McWhirter*, 6 Baxt. (Tenn.) 313; *Bradley v. Curtis*, 79 Ky. 327; *Bozeman v. Ivey*, 49 Ala. 75; *Strickland*

long as he retains the title, the vendor clearly manifests an intention to rely upon it as security for his debt; and equity will not compel him to part with the title until his debt has been paid.¹

This right of the vendor is assignable, and passes to a transferee of the note or bond given for the purchase-money, who may enforce it for his own benefit.² The vendor, by the assignment,

v. Summerville, 55 Mo. 164; *Hurley v. Hollyday*, 35 Md. 469; *Dunlap v. Shanklin*, 10 W. Va. 662; *Price v. Lauve*, 49 Tex. 74; *Day v. Hale*, 22 Gratt. (Va.) 146; *Robinson v. Appleton*, 124 Ill. 276; *Rogers v. Blum*, 56 Tex. 1; *Chapman v. Tanner*, 1 Vern. 267. *Contra*, *Hawkins v. Thurman*, 1 Idaho 598; *Avery v. Clark*, 87 Cal. 626; 22 Am. St. Rep. 272. And see *Hollis v. Hollis*, 4 Baxt. (Tenn.) 524. Nor is this right waived by accepting the note of a third person acting as the vendee's agent, in place of that of the vendee, *Bradford v. Harper*, 25 Ala. 337; *Bozeman v. Ivey*, 49 Ala. 75; or by the assignee of the note taking a new note for an extended time, *Woodward v. Echols*, 58 Ala. 665; *Conner v. Banks*, 18 Ala. 42; 52 Am. Dec. 209. Nor is it waived by obtaining a judgment against the vendee and selling his interest on execution. *Dickason v. Eby*, 73 Mo. 133; *Lewis v. Chapman*, 59 Mo. 371.

That the rule is otherwise in the case of the implied, equitable lien, see *supra*, this title, *Waiver of Lien*.

It has been held that even where the title is retained, if the vendor assigns the purchase-money notes to a third person, and accepts for them a bill of exchange, his lien is gone; and the vendee, on paying the assignee, is entitled to an absolute conveyance. *Bradford v. Harper*, 25 Ala. 337.

1. In *Anthony v. Smith*, 9 Humph. (Tenn.) 508, the notes given by the vendee were taken up, and the notes of a third person, with the guarantee of the vendee, were substituted. It was held that the right of the vendor to sell the property for the purchase-money was not waived, the court, by McKinney, J., saying: "There is a most important distinction between the equitable lien which the law gives a vendor, to secure the purchase-money, where the legal title has been conveyed, and that security which he provides for himself by the preservation of the legal title until the purchase-money is paid. In the former case he has parted with

both the legal and equitable estate; in the latter, he remains clothed with the legal title, which the law will intend to have been retained as an absolute security for the purchase-money. . . . The security of the vendor, in such case, cannot be defeated by anything short of what would be regarded as sufficient to defeat or extinguish the security of a mortgagee." See also *Rogers v. Blum*, 56 Tex. 6; *Robinson v. Appleton*, 124 Ill. 276; *Sehorn v. McWhirter*, 8 Baxt. (Tenn.) 201. But it has been held that where there is a sale of real and personal property for a gross sum, and the separate value of the land cannot be ascertained, there is no presumption that the retention of the legal title was to secure the vendor. *Sykes v. Betts*, 87 Ala. 537.

In *California*, a statute provides that "where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract, by the seller, waives his lien to the extent of the sum payable under the contract, but a transfer of such contract, in trust to pay debts, and return the surplus, is not a waiver of the lien." *California Civ. Code*, § 3047.

2. *Lowery v. Peterson*, 75 Ala. 109; *Ober v. Gallagher*, 93 U. S. 199; *Walkenhorst v. Lewis*, 24 Kan. 420; *McClintic v. Wise*, 25 Gratt. (Va.) 448; 18 Am. Rep. 694; *Martin v. O'Bannon*, 35 Ark. 62; *Gessner v. Palmateer*, 89 Cal. 89; *Avery v. Clark*, 87 Cal. 619; 22 Am. St. Rep. 272; *Russell v. Kirkbride*, 62 Tex. 455; *Bradley v. Curtis*, 79 Ky. 327; *Reynolds v. Morse*, 52 Iowa 155; *Adams v. Cowherd*, 30 Mo. 458; *Robinson v. Harbour*, 42 Miss. 795; 97 Am. Dec. 501; *Felton v. Smith*, 84 Ind. 485; 2 Jones on Liens (2d ed.), § 1119. The theory of the above decisions is that the right of the vendor who has retained the legal title, is a mere incident to the debt which it secures, and, therefore, passes by an assignment of the latter.

After the lien has been assigned, it cannot be enforced by the assignor

becomes a trustee for the assignee and cannot defeat the rights of the latter, either by giving a deed to the vendee,¹ or by disputing his own title,² or by any other act.³ If he wrongfully transfers the land to an innocent purchaser for value, he then holds the purchase-money in trust for the assignee of the notes or bond.⁴

3. The Remedy—*a. NATURE OF PROCEEDINGS.*—The proceedings to enforce the right of a vendor retaining the legal title, are similar to those in the case of a mortgage. The vendor may sue at law on the debt, or in equity to enforce the contract, or he may pursue both remedies concurrently.⁵

until the assignment has been avoided. *Green v. Betts*, 1 McCrary (U. S.) 72.

Priority.—On the question of priority, as between the assignor and assignee of the purchase-money notes, and as between successive assignees, the law is the same as in the case of the reserved lien. See *supra*, this title, *Vendor's Lien by Express Reservation—Assignment*, notes.

As between the right of the vendor retaining the title, and any liens created by the vendee, *e.g.*, a mortgage by the vendee, or a mechanic's or judgment lien against him, the former will prevail. The vendee cannot impair the right of the vendor who retains the title as security. *Seitz v. Union Pac. R. Co.*, 16 Kan. 133; *Cochran v. Wimberly*, 44 Miss. 503; *Thorpe v. Durbon*, 45 Iowa 192; *Beattie v. Dickinson*, 39 Ark. 205; *Harvill v. Lowe*, 47 Ga. 214; *Hadley v. Nash*, 69 N. Car. 162; *Tuck v. Calvert*, 33 Md. 209.

1. *Murphree v. Countiss*, 58 Miss. 712.

2. *Lowery v. Peterson*, 75 Ala. 109.

3. *McClintic v. Wise*, 25 Gratt. (Va.) 448; 18 Am. Rep. 694.

4. *Cummings v. Oglesby*, 50 Miss. 153; *Murphree v. Countiss*, 58 Miss. 712; *Conner v. Banks*, 18 Ala. 42; 52 Am. Dec. 209.

In *Young v. Atkins*, 4 Heisk. (Tenn.) 529, the vendor of land sold by title bond, assigned one of the purchase notes to the complainant, and agreed not to make a deed to the purchaser until the note was paid. The vendor and purchaser rescinded the contract of sale, and the vendor sold to another, who knew of the note, by title bond. It was held that the note was a lien on the land, the defendant not being an innocent purchaser of the legal title without notice.

If, however, the note is transferred after maturity, the assignee takes subject to all the equities available as de-

fenses against his assignor. *Shinn v. Fredericks*, 56 Ill. 439; 1 Daniel on Neg. Insts. (4th ed.), § 724a.

In *McMillen v. Rose*, 54 Iowa 522, the note given for a title bond was assigned, and the bond was afterward canceled by the parties thereto, and the real estate conveyed to others. It was held that, as against the latter, the transferee of the note had no lien. It is not clear from the report whether or not the defendants had notice of the outstanding note, but the legal title was actually conveyed to them.

Where the purchase-money notes are transferred by the vendor, he will hold the legal title in trust for the security of his assignee; and on failure of the purchaser to pay such notes at maturity, the assignee will be entitled, not only to a strict foreclosure of the purchaser's equity of redemption, but to a judgment against the vendor enforcing the execution of such trust. Where the vendor transfers only a part of the notes, he will hold the legal title as trustee for his assignee *pro tanto*. *Church v. Smith*, 39 Wis. 492.

5. *Wells v. Francis*, 7 Colo. 396; *Gaston v. White*, 46 Mo. 486; *McCaslin v. State*, 44 Ind. 151; *Sparks v. Hess*, 15 Cal. 186; *McConnell v. Beattie*, 34 Ark. 113; *Vail v. Drexel*, 9 Ill. App. 439; *Sehorn v. McWhirter*, 6 Baxt. (Tenn.) 313.

In *Micou v. Ashurst*, 55 Ala. 607, the court, by Brickell, C. J., said: "The vendor is a trustee of the titles for the vendee; and the vendee, of the purchase-money, for the vendor. The law annexes many of the incidents of a mortgage to this relation. The vendee is entitled to possession, free from all liability to account for rents and profits, until the vendor ejects him. The vendor may proceed by bill in equity to enforce the lien given him by law, for the payment of the purchase-money. He

b. OFFER OF PERFORMANCE.—Neither party can maintain an action at law on the contract, without proving an offer to perform in accordance with its terms.¹ On the question whether the vendor may enforce his so-called lien in equity, without a tender of a deed, there is a conflict of authority.² It is agreed, however, that

may sue in ejectment for the recovery of possession of the lands, and may sue at law for the recovery of the purchase-money. These remedies he may pursue concurrently, as a mortgagee may; and a court of equity, in the absence of some evidence of fraud or oppression, or of some fact rendering it inequitable, will not restrain him from pursuing them all at the same time."

It is well settled that the vendor need not, as it has sometimes been held that he must, in the case of an implied lien, exhaust his legal remedy first. *Vail v. Drexel*, 9 Ill. App. 439; *McCaslin v. State*, 44 Ind. 151; *Sparks v. Hess*, 15 Cal. 186. And the prevailing rule is the same in the case of the implied lien. See *supra*, this title, *How the Lien Is Enforced*, notes.

As in the case of a mortgage foreclosure, a person claiming adversely to the title should not be made a party to the proceeding to enforce the vendor's right. *Wells v. Francis*, 7 Colo. 396.

In *Illinois*, the proceeding to enforce the vendor's right is held to be in the nature of a strict foreclosure. *Vail v. Drexel*, 9 Ill. App. 439.

In *Iowa*, it is provided by statute that, where the purchase-money is not paid at the time fixed, the vendor, under a contract of sale, "may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property. The vendee shall, in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner." *Iowa Ann. Code*, 1888, §§ 4565, 4566.

In *Todd v. Davey*, 60 Iowa 532, it was held that, where the vendor elects to foreclose the contract of sale, he must submit to the rules of law applicable to foreclosures, and cannot, after the land has been sold and bid in by him for a part only of the judgment, and redeemed by the defendant, still claim a lien on the land for the remainder of the purchase-money.

In *Georgia*, there is also a statute providing for the foreclosure and sale

of the vendee's interest. *Georgia Code* 1882, § 3586.

In *Tennessee*, it has been held that, where the land has been divided into lots and sold by the vendee, in making sale to satisfy the lien, the last lot purchased should be sold first, and so on, in inverse order, until satisfaction is obtained. *Alabama v. Stanton*, 5 Lea (Tenn.) 423. See also *Boyce v. Stanton*, 15 Lea (Tenn.) 346.

Where there are two sub-vendees of land subject to the right of the vendor having title, they are obliged to contribute ratably to the purchase-money. If one of them owes a part of the purchase-money to the original vendee, that will be applied first, and he will be held to contribute *pro rata* to the remainder. *Wilkes v. Smith*, 4 Heisk. (Tenn.) 86.

The Petition.—The petition to sell land to satisfy unpaid purchase-money notes, must not only allege that the complainant had sold the land to the defendant and given him a title bond therefor, but also set out the terms of such bond, the character of the title to be made, and the complainant's ability and willingness to make it. *Hillard v. Rountree* (Ky. 1894), 24 S. W. Rep. 607.

1. *Stevenson v. Maxwell*, 2 N. Y. 409; *Bruce v. Tilson*, 25 N. Y. 194; *Freeson v. Bissell*, 63 N. Y. 168; *Paschall v. Brandon*, 79 N. Car. 504.

2. The following cases hold that before proceeding to enforce the right of the vendor in equity, a tender of a deed is necessary. *Wakefield v. Johnson*, 26 Ark. 506; *Turner v. Lassiter*, 27 Ark. 662; *Klyce v. Broyles*, 37 Miss. 524; *McCaslin v. State*, 44 Ind. 151; *Cole v. Wright*, 50 Ind. 296; *Evans v. Feeny*, 81 Ind. 532.

In the following cases the contrary rule is laid down: *McKenzie v. Baidridge*, 49 Ala. 564; *Freeson v. Bissell*, 63 N. Y. 168; *Church v. Smith*, 39 Wis. 492.

In *Thomson v. Smith*, 63 N. Y. 301, it was held that an action to foreclose a lien under a contract for sale, cannot be maintained by the representatives of a deceased vendor, where it is not alleged or shown that they have tend-

VENIRE FACIAS—VENIRE FACIAS DE NOVO.

if no tender is made, the bill shall contain an offer of performance,¹ unless the purchase-money was made payable on a day certain.²

c. STATUTE OF LIMITATIONS.—The right of a vendor holding title as security for the purchase-money may be enforced, although the debt is barred by the Statute of Limitations.³ Moreover, the possession of the vendee, like that of a mortgagor, is held not to be adverse to the right or lien of the vendor,⁴ which may be enforced at any time within twenty years after the sale, unless payment is shown.⁵

VENIRE FACIAS—(See also JURY AND JURY TRIAL, vol. 12, p. 335).—The writ of *venire facias* is a judicial writ directed to the sheriff of the county in which a cause is to be tried, commanding him to cause a jury of twelve men to come from the body of his county to try the issue between the litigating parties.⁶

VENIRE FACIAS DE NOVO—(See also JURY AND JURY TRIAL, vol. 12, p. 335).—A fresh or new *venire*, which the court grants where there has been some impropriety or irregularity in returning the jury, or where the verdict is so imperfect or ambiguous that no judgment can be given on it.⁷

ered, or are ready, willing, and able to give, a deed, unless the person taking the legal title to the land, either as heir or devisee, is made a party. The court distinguished the case from that of *Freeson v. Bissell*, 63 N. Y. 168, on the ground that, in the latter case, "It was unnecessary, for reasons applicable to equitable actions only, to show an offer to perform before suit brought. . . . This distinction between legal and equitable actions, grows out of the circumstance that, in the latter, the court can protect the rights of any party entitled to performance in the judgment."

1. *Freeson v. Bissell*, 63 N. Y. 168; *Bruce v. Tilson*, 25 N. Y. 194; *McKleroy v. Tulane*, 34 Ala. 78.

2. *Munford v. Pearce*, 70 Ala. 452; *Burkett v. Munford*, 70 Ala. 423.

3. *Hardin v. Boyd*, 113 U. S. 756; *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Butler v. Douglass*, 1 McCrary (U. S.) 630; *White v. Blakemore*, 8 Lea (Tenn.) 49; *Driver v. Hudspeth*, 16 Ala. 348; *Bizzell v. Nix*, 60 Ala. 281; 31 Am. Rep. 38; *Coldcleugh v. Johnson*, 34 Ark. 312.

That the rule is otherwise in the case of the implied equitable lien, and the lien by reservation in the deed of conveyance see *supra*, this title, *How the Lien Is Enforced*, and *How Express Lien Is Enforced*.

4. *Hardin v. Boyd*, 113 U. S. 756; *Coldcleugh v. Johnson*, 34 Ark. 312; *Gudger v. Barnes*, 4 Heisk. (Tenn.) 570; *Lewis v. McDowell*, 88 N. Car. 261; *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Burnett v. Caldwell*, 9 Wall. (U. S.) 290; *Butler v. Douglass*, 1 McCrary (U. S.) 630.

In the case of *Burnett v. Caldwell*, 9 Wall. (U. S.) 290, the court, by Swayne, J., said: "If the contract stipulates for possession by the vendee, or the vendor puts him into possession, he holds as a licensee. The relation of landlord and tenant does not exist between the parties. The characteristic feature of that relation is wanting. The vendee pays nothing for the enjoyment of the property. The case comes within the category of a license. In such cases the vendee cannot dispute the title of the vendor, any more than the lessee can question the title of his lessor."

5. *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Harris v. King*, 16 Ark. 122; *Phillips v. Adams*, 78 Ala. 225. In *Arkansas*, there is no bar to a suit to foreclose the lien, and the lien may be enforced within a reasonable time, even after the expiration of twenty years, if the laches is explained. *Butler v. Douglass*, 1 McCrary (U. S.) 632.

6. 3 Bl. Com. 352.

7. Black's L. Dict.

VENTRE INSPICIENDO—(See also PREGNANCY, vol. 19, p. 4; INFANTS, vol. 10, p. 624; UNBORN CHILDREN, vol. 27, p. 420).—A common-law writ, issued at the instance of the heir presumptive, and directed to the sheriff, commanding him that he cause examination to be made whether a woman therein named is with child or not, and if with child, then about what time it will be born, and to certify the same. It is granted in a case when a widow, whose husband had lands in fee simple, marries again soon after her husband's death, and declares herself pregnant by her first husband, and, under that pretext, withholds the lands from the next heir.¹

VENUE.—(See ABATEMENT, vol. 1, p. 6; ACTIONS, vol. 1, p. 178; CHANGE OF VENUE, vol. 3, p. 90; CRIMINAL PROCEDURE, vol. 4, p. 729; DOMICILE, vol. 5, p. 857; JURISDICTION, vol. 12, p. 244; PLEADING, vol. 18, p. 467.)

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I. DEFINITION—1. *Primarily*.—Venue (Norman French, *visne*, Latin, *vicinetum*, vicinity, neighborhood) means the county or district in which the facts are alleged to have occurred, and from which the jury are to come to try the issue. Thus, to “lay a venue” is to allege a place.²

In indictments, the venue is the marginal notation of the county; *e. g.*, “Suffolk, *scilicet*.” In this manner, also, in pleadings at com-

1. 1 Bl. Com. 456.
2. Abbott's, Black's, Brown's, Bouvier's, Burrill's, Rapalje & L's, Law Dicts.

In 1 Stat. Westminster, ch. 1, the word venue signifies a resort. A writ to cause jurors to come is called a *venire*. The *New York Code* treats venue as

mon law, the declaration designates the county in which the cause is to be tried.¹

2. Transitory or Local.—When the cause of action might have happened anywhere—*e. g.*, trespass for assaulting the plaintiff—the venue was, at common law, designated as “transitory,” and the plaintiff might adopt any county he pleased. But when the cause of action could have happened in one county only—*e. g.*, trespass for breaking the plaintiff’s close—the venue was said to be local, and must be laid in the county where the close was situated; but could be changed, if an impartial trial could not there be had.²

II. IN THE ENGLISH PRACTICE—1. In General.—By the Judicature Act, “there shall be no local venue for the trial of any action; but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall, in his statement or claim, name the county or place in which he proposes that the action shall be tried, and the action shall, unless the judge otherwise orders, be tried in the county or place so named.” The order may be varied by a divisional court of the high court.³

synonymous with place of trial. *Hinchman v. Butler*, 7 How. Pr. (N. Y. Supreme Ct.) 462.

1. This exclusion from the body of the pleading was prescribed by Reg. Gen. Hil. T. 4 Wm. IV. 1 Tidd Pr. 287.

2. 3 Bl. Com. 294.

As to the *forum domicilii*, and the *forum rei sitæ*, see 2 Kent’s Com. (13th ed.) 463; Story on Conflict of Laws (8th ed.), § 550 *et seq.*

For a history of the English practice as to the venue, see Jacob’s Law Dict. (Tomlins’ ed.), pp. 334, 340.

As to the meaning of domicile, in relation to venue, see *Mitchell v. U. S.*, 21 Wall. (U. S.) 350; *Desmare v. U. S.*, 93 U. S. 605.

In transitory actions, the venue is a legal fiction devised for the furtherance of justice, and cannot be traversed. *McKenna v. Fisk*, 1 How. (U. S.) 241.

In trespass *quare clausum fregit*, the venue is local. Thus, it was held that this did not lie in *England* for one’s having entered a dwelling in *Canada*, although there was also a count *de bonis asportatis*. *Doulson v. Matthews*, 4 T. R. 503; followed in *Livingston v. Jefferson*, 1 Brock. (U. S.) 203, and other American cases.

In *Rafael v. Verelst*, 2 W. Bl. 1058, an action of trespass *vi et armis*, against a president of the East India Company, for overawing a Nabob into imprisoning the plaintiff, the court, by

De Grey, J., said: “The jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequuntur forum rei*. . . . *Sujah Dowla* was a mere instrument. . . . Whatsoever makes an accessory in felony will make a principal in trespass. Since, therefore, the jury has found the procurement of the defendant, he is liable as a principal for this trespass.” *Compare Rex v. Johnson*, 6 East 583.

In *Ohio*, in 1840, the distinction of local and transitory did not exist in personal actions. So held, in an action for rent against the assignee of a term. *Genin v. Grier*, 10 Ohio 209. *Compare Thayer v. Brooks*, 17 Ohio 489; 49 Am. Dec. 474. So, also, in the present procedure, in construing *Ohio Rev. Stat.* 1890, § 5027, allowing railway and stage companies to be sued in any county through which the road passes, it relates solely to the jurisdiction of the person. The petition need not state that the road passes into the county; and the defendant appearing waives error of venue. *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207.

In *Texas*, also, is the distinction abolished by statute making venue depend on domicile. *Armendiaz v. Stillman*, 54 Tex. 623.

3. Supreme Court of Judicature Act 1873 (36 and 37 Vict., ch. 66, p. 355), Sched. Rules of Proc. 28.

At common law, where there were several facts material to the plaintiff's action, arising in different counties, he might lay the venue in either.¹

2. Extraterritorial Crime.—If any felony or misdemeanor be begun in one county and completed in another, it may be dealt with in either county, as if wholly committed therein.²

For obsolescent matter, formerly important, concerning the laying of the venue at common law, see Bacon Abr. "Venue;" and Comyns Dig., Pleader C. "The reasons which once made the venue important have long disappeared." *Mannville Co. v. Worcester*, 138 Mass. 91; 52 Am. Rep. 261; *Hunt v. Pownal*, 9 Vt. 417.

In *Mostyn v. Fabrigas*, 1 Cowp. 178, it was held that trespass and false imprisonment lay in England by a native Minorquin, against a governor of Minorca, for such injury committed in Minorca; the court, by Mansfield, C. J., remarking that the laying of the venue in Minorca, with a *videlicet*, was a fiction invented by the law in furtherance of justice, also criticising the report that the court had said that "as men they have one way of thinking, and as judges they have another;" and reviewing the laying the venue in *Roberts v. Harnage*, 1 Ld. Raym. 1042, which was an action on a bond made at Fort St. David's in the East Indies, "*videlicet*, at Islington, in the county of Middlesex," and *Parker v. Crook*, 10 Mod. 255, covenant on deed indented.

The venue in an action to recover for a nuisance—*e. g.*, damage from a defective eaves spout—must be where it occurred. *Warren v. Webb*, 1 Taunt. 377.

1. *Bulwer's Case*, 7 Coke 1; *London v. Cole*, 7 T. R. 583.

A, by deed executed in London, for securing repayment of money lent to B, was appointed receiver of B's rents in Middlesex, with a pretended salary which enabled A to retain usurious interest. A received the rents in Middlesex, but settled the accounts in London, and there paid the balance upon which the usurious interest was allowed. In a *qui tam* action for the penalty, it was held the offense was completed in London, and that the venue was properly laid there; the court, by Ashurst, J., saying: "Even supposing the foundation of this action to have arisen in two counties, I think that where there are two facts which are necessary to consti-

tute one offense, the plaintiff may, *ex necessitate*, lay the venue in either." *Scott v. Brest*, 2 T. R. 238. So, also, the venue may lie in either, for the damaging of meadows in one, caused by the diversion of water in another. *Leveridge v. Hoskins*, 11 Mod. 257.

As to the venue in an action on the case for a collision on the high seas, see *General Steam Nav. Co. v. Guillon*, 11 M. & W. 877. As to that in an action for diversion of a stream, see *Mersey, etc., Navigation v. Douglas*, 2 East 497.

2. Stat. 7 Geo. IV., ch. 64, § 12. In an action for driving a distress out of the hundred into another county, the venue might be laid in either county. *Pope v. Davis*, 2 Taunt. 252.

Delivery at a post office in Leicester, of a sealed letter inclosing a libel alleging brutality of soldiers of George III., was held to be a publication of the libel in Leicester, although the intent was to publish it where it was afterward published, namely, in Middlesex. *Rex v. Burdett*, 4 B. & Ald. 95.

Putting a letter containing a forged check in the Manchester post office, was held to be an uttering in Lancaster county. *Rex v. Perkin*, 2 Lewin C. C. 150.

Where a registrar's letter containing a false return of his fees, and his affidavit thereto, were made in Northampton, but the treasury minute on which the paymaster-general made payment was drawn up at Westminster, it was held that the venue, in an indictment for obtaining, etc., by false pretenses, was properly laid in Northamptonshire. *Reg. v. Cooke*, 1 F. & F. 64. So, also, where a false-pretense letter was posted at Nottingham to the prosecutor in Caudry, France, the venue was held to be properly laid in Nottingham. *Reg. v. Holmes*, 12 Q. B. Div. 23. To the same effect see *Reg. v. Leech*, *Dears C. C.* 642; 7 Cox C. C. 100; *Reg. v. Jones*, 1 Den. C. C. 551.

Where one obtained, from a New York banking house, a circular letter on a London bank for 210*l*, prefixed a "5," making it 5,210*l*, and obtained

In case of a murder committed on land out of the *United Kingdom* by a British subject, whether within the king's dominions or not, a justice of the peace of the county where the murderer is found may take cognizance of the offense;¹

from a firm in St. Petersburg, by exhibiting the same, drafts for £1,200 and £2,500, it was held, upon his being found and arrested in *England*, that he was not indictable in *England* for attempting to obtain money from the London bank by false pretenses; for had the St. Petersburg firm obtained payment, it would not have been an obtaining for his use, therefore not by him. *Reg. v. Garrett*, 22 Eng. L. & Eq. 606.

In case of a conspiracy entered into upon the high seas, between the captain and the purser of a man-of-war, to cheat the Crown by false vouchers, the venue was held to be properly laid in Middlesex. *Reg. v. Brisac*, 4 East 164.

An action for a false return is local, but the venue may be laid in the county where it was made, or in that in which it appears of record. *Lord v. Francis*, 12 Mod. 408; *Griffith v. Walker*, 1 Wils. 336.

See, further, as to venue of indictment for obtaining by false pretenses, etc., CRIMINAL PROCEDURE, vol. 4, p. 736, note 3.

The sending of a letter threatening murder is punishable in the county where the prosecutor received it. *Rex v. Girdwood*, 1 Leach C. C. 169.

The statutory offense of selling coals of a different description from those contracted for, is complete in the county where the coals are delivered, and not where contracted for. Otherwise, as to the offense of not justly measuring them. *Butterfield v. Windle*, 4 East 385. Compare *Grosvenor v. St. Augustine*, 12 East 244.

Under Stat. 3 Hen. VII., ch. 2, upon an indictment for forcibly abducting and marrying an heiress, it was held that "if she was taken with force in Middlesex, and carried in a coach to Strandbridge, and brought by the defendants into Surry, it was a continuing force, and a forcible caption in Surry." *Fulwood's Case*, Cro. Car. I. 488.

An indictment for stealing a brass furnace in Hereford county, is not sustainable by proof of stealing it in Radnor county, breaking it, and bringing the pieces into Hereford County. So, also, as to a charge of stealing "two turkeys;" this means live turkeys, and it

is not sustainable by proof of stealing and bringing them when dead into the county. *Rex v. Halloway*, 1 C. & P. 127; 11 E. C. L. 341.

An indictment for stealing "silver" in Londonderry county, is not sustainable by proof of receiving, with guilty knowledge, and trying to sell therein, "silver spoons" stolen in Antrim county. *Rex v. McAleece*, 1 Crawf. & D. C. C. 154. Compare the case of two horses alleged to be stolen in Somersetshire, not at the same time, not sustainable by proof of a joint taking into Wilts. *Rex v. Smith, Ry. & M.* 295.

According to Coke, "Before the making of the statute of Edw. VI., if a man had been feloniously stricken or poisoned in one county, and afterwards had died in another county, no sufficient indictment could thereof have been taken in either of said counties; because, by the law of the realm, the jurors of one county could not inquire of that which was done in any other county. 3 Coke's Inst. 48.

In 1831, where the mortal stroke was inflicted in one county, and the death occurred in another, the felony was held to be in the former. *Rex v. Hargrave*, 5 C. & P. 170; 24 E. C. L. 260.

1. Stat. 9 Geo. IV., ch. 31, § 7. For its full text, see 4 Bl. Com. (Sharswood's ed. 1860) 305, note.

In 1843, the fifteen judges held that, under this statute, the murder of an alien at Smyrna, by a British subject, was cognizable in the central court in London. *Reg. v. Azzopardi*, 1 C. & K. 203; 47 E. C. L. 203. Similarly was it held, in 1830, as to Capt. Helsham's killing of Lieut. Crowther, in a duel at Boulogne. *Rex v. Helsham*, 4 C. & P. 394; 119 E. C. L. 438. Similarly, in 1815, as to a killing at Lisbon, *Portugal*. *Rex v. Sawyer*, 2 C. & K. 101; 61 E. C. L. 101.

In 1836, a Spaniard, articulated to serve as interpreter on a British vessel, killed a sailor, off Zanzibar, but was acquitted, as not being a "subject of his Majesty," within the statute. *Rex v. Mattos*, 7 C. & P. 458; 32 E. C. L. 584. One charged with killing another on board a Brazilian slaver that had been seized by a British cruiser, was acquitted

and an accessory before the fact may be treated as a principal felon.¹

III. IN THE FEDERAL COURTS—1. In General.—In absence of contrary statutory provision, the rules of the common law of *England* govern the laying of the venue in local and transitory actions.² Accordingly, trespass *quare clausum fregit* is a local

for want of proof of lawful possession. *Reg. v. Serva*, 2 C. & K. 53; 61 E. C. L. 53.

1. Stat. 11 & 12 Vict., ch. 46.

At Paris, in 1858, Felix Orsini threw hand grenades at Louis Napoleon's carriage, killing ten persons; and in *England*, Simon Bernard was indicted for previously inciting, etc., to the deed. Campbell, C. J., instructed the jury that, if it be found that Bernard counselled the deed, the test of guilt was, "Was the event a probable consequence of the act which he counselled?" Bernard was found not guilty. *Reg. v. Bernard*, 1 F. & F. 240.

In the time of Henry VIII., an appeal of robbery against accessories abetting in one county a felony committed in another, must be laid in the county where the abetting occurred. *Gawen v. Hussee*, 1 Dyer 38 a.

2. Trespass *de bonis asportatis*, being a transitory action, it is necessary to lay only the place of trial under a *videlicet*. And where a writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action. *McKenna v. Fisk*, 1 How. (U. S.) 241.

In *Mitchell v. Harmony*, 13 How. (U. S.) 115, 137, an action against an army officer for trespass *de bonis asportatis* committed in *Mexico*, in 1847, brought in the *United States* circuit court for the southern district of *New York*, the court, by Taney, C. J., said: "An action might be maintained for it in the circuit court for any district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the *United States*."

A suit in a circuit court of the *United States*, against a corporation chartered by the State of *Connecticut*, may be brought by a resident of *Texas* in a *Texas* county where an agent conducts business thereof, by service on him. *Angerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 305. But compare *National Ty-*

pographing Co. v. *New York Typographing Co.*, 44 Fed. Rep. 711.

A trial on seizure, under act of 1793 (*United States* Rev. Stat. 1878, § 4337), for proceeding on a foreign voyage without registration, must be in the judicial district where the seizure was made, without regard to where the forfeiture accrued. *Keene v. U. S.*, 5 Cranch (U. S.) 304.

Libels *in rem* may be prosecuted in any district where the property is found. *Propeller Commerce*, 1 Black (U. S.) 581; *The Slavers (Reindeer)*, 2 Wall. (U. S.) 403.

As to venue, the *American* admiralty system is not so "contracted" as that of *England*. *Nelson v. Leland*, 22 How. (U. S.) 55.

Under U. S. Act 1887, ch. 373, amended in 1888, ch. 866, a suit by a citizen or subject of a foreign state against a citizen of the *United States*, can be brought in a federal court only in the district in which the latter resides. *Campbell v. Duluth, etc.*, R. Co., 50 Fed. Rep. 241. Sections 740-42 of *United States* Rev. Stats., as to venue of suits of a "local nature," were not repealed by the jurisdictional acts of 1875 and 1887-88.

Within *United States* Rev. Stat., § 739, a railroad company is an "inhabitant" of any district in which it operates its road through authorized agents. *East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co.*, 49 Fed. Rep. 608. So, also, as to inhabitancy by a telegraph company. *U. S. v. Southern Pac. R. Co.*, 49 Fed. Rep. 297.

The restriction in U. S. Act 1881, § 5, against repeal of any right under that of 1875, § 8, allows a bill to be maintained to enforce liens on part of a railroad in the district, against a general mortgage about to be foreclosed in an ancillary suit, although some of the defendants are non-residents thereof. *McBee v. Marietta, etc., R. Co.*, 48 Fed. Rep. 243.

In a suit in a federal court in *New Jersey*, brought by a resident of *Missouri*, the directors of the defendant

mining company were enjoined from disposing of ores contrary to their contract with the plaintiff. It was held that a supplemental bill would not lie charging a director, an inhabitant of *Pennsylvania*, with disobeying the injunction in bringing suit in *Mexico* to enforce a debt, cause the mines to be sold, etc. *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. Rep. 351.

The provision of *United States Rev. Stat.*, § 2103, that a suit to recover money paid by Indians on unlawful contracts, may be brought "in any court of the *United States*," must be construed with U. S. Act 1887, to mean a court of the district whereof the defendant is an inhabitant. U. S. v. Crawford, 47 Fed. Rep. 561.

A defendant does not, by accepting service, preclude his motion to dismiss the suit for its not being brought in the district of his residence. U. S. v. Loughrey, 43 Fed. Rep. 449.

A corporation created in one state, and having agents and a business office in another, is an "inhabitant" of the latter, within U. S. Acts 1887, ch. 373, and 1888, ch. 866. *Riddle v. New York*, etc., R. Co., 39 Fed. Rep. 290.

Under U. S. Act 1887, and *Texas Rev. Stat.*, art. 1198, § 21, art. 1223 and 4120, a suit by a citizen of *Mexico*, against a railway company, lies in the western district of *Texas*, into which its road extends, and where it has business agents, although its principal office is in the eastern district. *Zambrino v. Galveston*, etc., R. Co., 38 Fed. Rep. 449.

A steamship company incorporated and having its principal office in *Germany*, whereof all its directors are residents, and having a financial agent in *New York*, but having the office of its industrial operations in *America* at its piers in *New Jersey*, is not an "inhabitant" of *New York* within U. S. Act 1887. *Hohorst v. Hamburg American Packet Co.*, 38 Fed. Rep. 273.

A defendant's objection to being served out of his residence, may be raised by demurrer, as well as by motion to dismiss. *Miller Magee Co. v. Carpenter*, 34 Fed. Rep. 433.

A foreign corporation organized expressly to buy, own, and operate a mine in *Oregon*, and having officers there working it, is an "inhabitant" of that district, within the U. S. Judiciary Act of 1888, § 1. *Miller v. Eastern Oregon Gold Min. Co.*, 45 Fed. Rep. 345.

In a suit under *United States Rev. Stat.*, § 4915, against the commissioner of

patents, his acceptance of service in a district other than that wherein the suit is brought, "to have the same effect as if duly served on me by the proper officer," was held not to be equivalent to a voluntary appearance, or a being found, within section 739. *Butterworth v. Hill*, 114 U. S. 128.

A railroad corporation, controlling no line in *Iowa*, cannot be sued in *Iowa*, on a cause of action not arising there. *Elgin Canning Co. v. Atchison*, etc., R. Co., 24 Fed. Rep. 866.

For jurisdictional purposes, a corporation is a citizen of the state by which it was created, irrespective of its places of business. *Pacific R. Co. v. Missouri Pac. R. Co.*, 23 Fed. Rep. 565. But compare *Harding v. Chicago*, etc., R. Co., 80 Mo. 659.

In *United States Rev. Stat.*, § 542, making the southern federal district of *New York*, after designating the territory of the northern and the eastern districts, include "the residue of said state," the *United States* reservation at West Point is embraced. *Beekman v. Hudson River*, etc., R. Co., 35 Fed. Rep. 3.

A pier of *New York City* is part of the land, and not of "the waters," etc., within said section 542. *Euberweg v. La Compagnie Generale Transatlantique*, 35 Fed. Rep. 428.

Under U. S. Act 1887, a suit by A and B against C, on a contract entered into by A as partner of B, does not lie in a district whereof B and C are non-residents. *Smith v. Lyon*, 38 Fed. Rep. 53.

The privilege under U. S. Act 1887, § 1, is waived by the defendant's filing a general appearance and answering to the merits. *Morrison v. Atlas Steam Ship Co.*, 37 Fed. Rep. 279.

Under U. S. Act 1887, a suit by a resident of *Ohio* against residents of *New York*, *Vermont*, and *Maine*, to enforce a claim to property in *Vermont*, is properly brought in the *Vermont* district. *Carpenter v. Talbot*, 33 Fed. Rep. 537.

Under U. S. Act 1887, when the jurisdiction depends on citizenship, the suit may be in the district of either party; when on other grounds, in the district of the defendant's domicile. *St. Louis*, etc., R. Co. v. *Terre Haute*, etc., R. Co., 33 Fed. Rep. 385; *Bank of Winona v. Avery*, 34 Fed. Rep. 81.

Under U. S. Acts 1887 and 1888, a *New York* corporation having its principal office in *New York*, cannot be sued

action; therein the *situs*, not the residence of the parties, governs the venue.¹

in an *Illinois* federal court. *Preston v. Fire Extinguisher Mfg. Co.*, 36 Fed. Rep. 721.

Under U. S. Act 1883, giving the federal district court of *Kansas* jurisdiction of offenses committed in a part of the *Indian Territory*, "not set apart and occupied by" certain tribes, these words mean subject to the control of; actual occupancy is not necessary. *U. S. v. Rogers*, 23 Fed. Rep. 658.

One to whom the administrator of a patentee has assigned a right of action for an infringement, may, in his own name, sue thereon in any state whose law allows a suit, by the assignee of a chose in action in his own name. *May v. Logan County*, 30 Fed. Rep. 250.

A bill in the federal circuit court, to restrain infringement of a patent, does not lie in *Missouri* against a citizen of *Indiana*. Thereupon objection may be raised by demurrer, as well as by motion to dismiss. *Reinstadler v. Reeves*, 33 Fed. Rep. 308. Nor in *New York* against a corporation in *Connecticut*. *Halstead v. Manning*, 34 Fed. Rep. 565.

An action by a resident of *Missouri*, for violating the interstate commerce law, does not lie in a federal circuit court in *Missouri*, against a corporation created by, and having its principal office in, *Mississippi*, although it has an office and agent in *Missouri*, and the petition shows a cause of action at common law. *Connor v. Vicksburg*, etc., R. Co., 36 Fed. Rep. 273.

A civil suit, by an *Illinois* corporation, does not lie in a federal circuit court in *Illinois*, against a *Connecticut* corporation having its principal office in *Massachusetts*, although doing business in *Illinois*. *Gormully*, etc., Mfg. Co. v. Pope Mfg. Co., 34 Fed. Rep. 818.

An action, by a citizen of *Mexico*, does not lie in a federal circuit court in *California*, against a *Connecticut* corporation, although it has an office and managing agent in *California*. *Denton v. International Co.*, 36 Fed. Rep. 1.

A cause of action for expelling a passenger from a railway train, lies in the state where the contract of carriage was broken. *Maxwell v. Atchison*, etc., R. Co., 34 Fed. Rep. 286.

U. S. Act 1888, ch. 866, applies to suits begun in a federal circuit court. It is no bar to the jurisdiction of a case removed from a state court that the de-

fendant was a non-resident, and that the state court had acquired jurisdiction by foreign attachment without personal service. *Crocker Nat. Bank v. Pagensteher*, 44 Fed. Rep. 705.

A federal circuit court will decline jurisdiction of a suit against a corporation created in another state. *National Typographing Co. v. New York Typographing Co.*, 44 Fed. Rep. 711.

A defendant may waive the exemption from suit out of the district of inhabitancy. *Jewett v. Bradford Sav. Bank*, etc., Co., 45 Fed. Rep. 801.

Under U. S. Act 1888, ch. 866, requiring the venue to be in the district of the defendant's inhabitancy, the federal circuit court of *New Jersey* has no jurisdiction over the commissioner of patents, his official residence being in the *District of Columbia*. *Illingworth v. Atha*, 42 Fed. Rep. 141.

Under U. S. Act 1875, ch. 137, § 8 (unrepealed by U. S. Act 1888, ch. 866), the federal circuit court has jurisdiction of a suit to foreclose a mortgage on land in its district, though some of the defendants reside in another district. *Ames v. Holderbaum*, 42 Fed. Rep. 341.

A corporation created by an act of Congress, may be sued in the federal courts in any district where it is doing business and has an agent on whom service can be made, although its principal office is in another state. *Van Dresser v. Oregon R.*, etc., Co., 48 Fed. Rep. 202.

1. In *Livingston v. Jefferson*, 1 Brock. (U. S.) 203, 211, which was an action to recover for the act of the defendant while president, for removing the plaintiff from the batture in New Orleans, the court, by Marshall, C. J., after an historical review of the English common law thereon, said: "As defined in the judicial act, and in the constitution which that act carries into execution, it is worthy of observation that the jurisdiction of the court depends on the character of the parties. . . . In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight. But according to the course of the common law, the process of the court must be

Crimes committed against the laws of the *United States* may be tried at such place as Congress by law shall designate.¹

2. Extraterritorial Injuries.—In case of a misuse of water power, causing extraterritorial injury, the district in which the water is diverted has jurisdiction of the offense.²

A bill in equity to abate a nuisance, is a local suit which can be brought only in the district where the nuisance is situated.³

"The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought."⁴

executed, in order to give it the right to try the cause, and, consequently, the defect of justice might occur. Other judges have felt the weight of this argument, and have struggled ineffectually against the distinction which produces the inconvenience of a clear right without a remedy. I must submit to it."

As to local jurisdiction of a prosecution for depositing a letter mailed in *Pennsylvania*, and delivered in *New Jersey*, offering to bribe a revenue commissioner, see *U. S. v. Worrall*, 2 Dall. (U. S.) 384.

See *infra*, this title, *Judicial Cognizance of Boundaries*.

1. *E. g.*, Act of 1844, allowing the *United States* circuit court for *Arkansas* to try offenses committed in the *Indian Territory*. *U. S. v. Dawson*, 15 How. (U. S.) 467. But such crime is local if committed within a state. *Evans v. Bollen*, 4 Dall. (U. S.) 342.

Where a gun was fired from an American ship in the harbor of one of the *Society Isles*, killing a native on board a schooner, the act was held to be, in contemplation of law, on board the foreign schooner, and a *United States* court to have no jurisdiction to indict for manslaughter. *U. S. v. Davis*, 2 Sumn. (U. S.) 482.

The federal circuit court has jurisdiction of a homicide committed by one soldier upon another within a *United States* military reservation. *U. S. v. Clark*, 31 Fed. Rep. 710.

Revocation of an executive order creating an Indian reservation, does not affect the federal court's jurisdiction of an indictment found after such revocation, for a murder committed before. *U. S. v. Brave Bear*, 3 Dakota 34.

2. For analogous decisions of state courts, see *infra*, this title, *Extraterritorial Offenses*.

Where A, owning land on the *Rhode*

Island side of the Pawtucket river and a water power interest therein, constructed in *Rhode Island* a canal around the dam of B, who owned land on the *Connecticut* side, and a water power interest in the same river, it was held that B could maintain in the *United States* circuit court for *Rhode Island*, a bill in equity for an injunction, etc. *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 538. Compare the case of the Bird's Island dam in the Delaware river. *Rundle v. Delaware, etc., Canal Co.*, 14 How. (U. S.) 80 (*dissenting* opinion of Daniel, J., 95-102).

Where A, in *Connecticut*, diverted a stream flowing thence into *Massachusetts*, so that it ceased to flow to B's mill in *Massachusetts*, it was held that the *United States* circuit court for *Connecticut* had jurisdiction of B's action for consequent damage. *Foot v. Edwards*, 3 Blatchf. (U. S.) 310. Compare the case of a mill owner on the *Massachusetts* side of the Pawtucket against one on the *Rhode Island* side. *Slack v. Walcott*, 3 Mason (U. S.) 508.

3. Where the nuisance complained of was the Rock Island bridge, 1570 feet long, with three piers in *Iowa* and three in *Illinois*, it was held that the *United States* district court for *Iowa* had no power to abate the *Illinois* portion. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485. Compare *Howard v. Ingersoll*, 13 How. (U. S.) 381, a case of flowage damage to land from a dam in another state, which was retried, 23 Ala. 673.

4. *United States* Rev. Stat. 1878, § 730. "First brought" refers to custody, and not to mere arrival. *U. S. v. Bird*, 1 Sprague (U. S.) 299; *U. S. v. Armo*, 19 Wall. (U. S.) 486.

Where the mate of a vessel gave the master a mortal stroke in the haven of

"When any offense against the *United States* is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either . . . and may be dealt with as if wholly committed therein."¹

The statute declaring the death penalty of murder "within any fort, arsenal, dockyard, magazine, or other place, or district of country under the exclusive jurisdiction of the *United States*,"² may apply to the *District of Columbia*.³

St. François, but he did not die until removed on shore, it was held that this was not cognizable by a *United States* circuit court as murder on the high seas, within the act of 1890, § 730. *U. S. v. McGill*, 4 Dall. (U. S.) 426; 1 Wash. (U. S.) 463. Compare *U. S. v. Armstrong*, 2 Curt. (U. S.) 446.

A crime committed on an American vessel in the Detroit river is not, within *United States* Rev. Stat., § 5346, "within the admiralty jurisdiction of any particular state." *Ex p. Byers*, 32 Fed. Rep. 404.

The federal district court may, in its discretion, take jurisdiction of a malicious assault by the master of an Italian vessel upon a seaman thereon in a *United States* port. The case is not within the treaty of 1878, giving consuls exclusive cognizance. *The Salomoni*, 29 Fed. Rep. 534.

1. *United States* Rev. Stat. 1878, § 731.

As to the construction of the "Crimes Act of Congress of 1857" (embodied in *United States* Rev. Stat. 1878, §§ 5339, 5341), see the exhaustively considered case of death of Jones in *Michigan*, from a felonious shooting by Tyler, a *United States* marshal, on an American vessel on St. Clair river, beyond the *United States* boundary, namely, Jones' brig *Concord*, whereon Tyler was serving an attachment. *People v. Tyler*, 7 Mich. 291; 8 Mich. 340; 74 Am. Dec. 703, quoted from *infra*, this title, *In the State Courts—Extraterritorial Offenses*.

A prosecution under U. S. Act 1890, for knowingly causing lottery matter to be delivered by mail, is properly in the state where the prohibited delivery took place. *U. S. v. Horner*, 44 Fed. Rep. 677.

As to admiralty jurisdiction of torts, etc., see ADMIRALTY, vol. 1, p. 190. Hereon, especially, see *The Genesee Chief*, 12 How. (U. S.) 443; *Allen v. Newberry*, 21 How. (U. S.) 244; *The*

Lottawana, 21 Wall. (U. S.) 558; *The Sarah Jane*, 1 Low. (U. S.) 203.

2. *United States* Rev. Stat. 1878, § 5339.

3. *U. S. v. Guiteau*, 1 Mackey (D. C.) 498; 47 Am. Rep. 247. In this case, indictment for shooting President Garfield in 1881, at Washington, causing death which occurred in *New Jersey*, the court, by James, J. (at p. 542), said: "If the act of the offender achieves murder, then that act is murder; and if that act is done in the place designated, then, in contemplation of this statute, the offender commits there the crime of murder." This was approved by Judge Bradley of the *United States* Supreme Court, who refused Guiteau's application for a *habeas corpus* (p. 560). See the opinion of Judge Cox on the jurisdictional questions in this case, pp. 563-584.

Where one was shot within Fort Popham and died at Phippsburg, it was held that the murder was not within the jurisdiction of the State of *Maine*. *State v. Kelly*, 76 Me. 331; 49 Am. Rep. 620.

An *Oregon* federal court has jurisdiction of a murder of a white man by an Indian in the Umatilla reservation, this being "Indian country;" consequently, of the offense of resisting execution of the commissioner's order as to examination of the accused. *U. S. v. Martin*, 8 Sawy. (U. S.) 473; 14 Fed. Rep. 817. Compare the case of the killing of a Nez Perce Indian. *Pickett v. U. S.*, 1 Idaho 523.

Virginia never having ceded the Arlington National Cemetery grounds to the *United States*, a federal court has no jurisdiction of an indictment for larceny committed thereon. *U. S. v. Penn*, 4 Hughes (U. S.) 491.

The federal courts have not, within *United States* Rev. Stat., § 5339, jurisdiction over a homicide committed within the Presidio reservation in San Francisco, this never having been ceded. *U. S. v. Bateman*, 34 Fed. Rep. 86.

As to chancery suits in the federal courts, at common law, ordinarily, the maxim, *aquitas agit in personam*, applies as to venue.¹

IV. IN THE STATE COURTS—1. At Law—*a. IN CIVIL ACTIONS*—(1) *Statutory Restrictions.*—The state statutes not only prescribe the jurisdiction of the various courts, but also provide for the laying of the venue of different causes of action. Many have the English provision, which is that "an action may be brought in any county where the cause of action or any part thereof arose, although none of the defendants reside therein."² Sometimes the domicile of the parties is made to control, and sometimes the *situs* of the subject-matter.³

1. As to the venue of a bill in equity to abate a nuisance, see *infra*, this title, *Extraterritorial Injuries*.

A question of title, on a bill by one having a prior equity, against the one holding the oldest patent, must be tried in the district where the land lies. *Massie v. Watts*, 6 Cranch (U. S.) 148.

A case of fraud, of trust, or of contract, lies wherever the person may be found, although a question of title may constitute an essential point. See a case under an *Alabama* special act of 1823, authorizing a *Massachusetts* administratrix to sell land in *Alabama*, whereof her intestate died seised. *Watkins v. Holman*, 16 Pet. (U. S.) 25.

2. See *West Virginia* Rev. Stat. 1879, p. 872, § 2. It seems that the words "or any part thereof," were inserted to avoid the rule that the contract arose in the county of the drawee, when the bill was once accepted, and not in the county of the drawer. See *Story on Conflict of Laws* (8th ed.), §§ 317, 344; *Don v. Lippman*, 5 Cl. & Fl. 1, wherein Lord Brougham comments on the Scotch law hereon; *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Savoye v. Marsh*, 10 Met. (Mass.) 594; 43 Am. Dec. 451.

3. See *Alabama* Code 1886, §§ 2640, 3099. As to a plea to the jurisdiction, see *ABATEMENT*, vol. 1, p. 11.

The requirement of the *Alabama* Code, § 3303, that a suit before a justice be brought in the precinct of the defendant's permanent residence, does not apply to an attachment suit, this being *in rem*. *Atkinson v. Wiggins*, 69 Ala. 190.

In a transitory action, personal service of process within the county gives jurisdiction, if the defendant was not fraudulently induced to come therein. *Smith v. Gibson*, 83 Ala. 284; *Peabody v. Hamilton*, 106 Mass. 217. In

New Jersey, it was also held, in an action against the mayor of New York City, for blowing up a building to prevent the spread of a conflagration. *Hale v. Lawrence*, 21 N. J. L. 714; 47 Am. Dec. 190.

The mere fact that an unmarried man rents and occupies a room to sleep in, does not render him a "householder," within the venue provision of *Alabama* Code, § 2928. *Katzenberg v. Lehman*, 80 Ala. 512.

In *Arkansas*, as to the venue of actions *in rem*, see *McLaughlin v. McCrory*, 55 Ark. 442.

California.—In this state a proceeding by heirs to remove a trustee holding land for their benefit, is not, in the constitutional sense, an action "for the recovery of real estate," to be brought in the county where the land lies. *More v. San Francisco Super. Ct.*, 64 Cal. 345.

Under the Act of 1858, authorizing suit in any county, if the defendant's residence is unknown, the plaintiff must show diligence to ascertain the residence. *Loehr v. Latham*, 15 Cal. 418.

Under the Code Civ. Proc., § 392, allowing the foreclosure of a mortgage of land lying in two counties to be in either, on foreclosure sale by the sheriff of S. county, of land lying partly in K. county, it will be presumed that a part lay in S. county. *Goldtree v. McAlister*, 86, Cal. 93. But compare *Campbell v. West*, 86 Cal. 197.

Where the court has jurisdiction of the subject-matter, the burden is on the defendant to show that the cause was not within the jurisdiction. *Chase v. South Pac. Coast R. Co.*, 83 Cal. 468.

Colorado.—Under the *Colorado* Code, § 28, an action on a note lies in the county of the plaintiff's residence, though it be payable in another, wherein the defendant resides. *Thomas v. Colo. Nat. Bank*, 11 Colo. 511.

Under the provision in the Code for the bringing of an action of tort in the county where the plaintiff resides, an action may therein be brought for willfully driving away the plaintiff's bull from its usual range, although in another county. In *Colorado* Code, § 28, in the clause "may be tried in the county where the tort was committed," "may" is permissive and not mandatory. *Newell v. Giggey*, 13 Colo. 16.

Section 2 of the Code, as to venue of civil actions, applies both to the district and county courts. *Fletcher v. Stowell*, 17 Colo. 94.

Connecticut.—In this state a suit for account for rents and profits lies where the plaintiff dwells, although the land is in another county. *Lewis v. Martin*, 1 Day (Conn.) 263.

The provision of the Acts of 1881, ch. 121, § 3, for the court of the Waterbury (New Haven county) district to take jurisdiction of cases in which either party resides in Woodbury (Litchfield county) or Southbury, applies to an action for trespass to land in these towns. *Curtiss v. Atwood*, 51 Conn. 169.

Dakota.—A question as to the trial court's jurisdiction may be first raised in the appellate court. *Murry v. Burris*, 6 Dak. 170. It may be raised by motion after judgment, for without jurisdiction the judgment is void. *Wayne v. Caldwell*, 1 S. Dak. 483.

Delaware.—In this state "action upon a bail bond must be brought in the same court as the original action." *Delaware* Laws 1874, p. 636, § 5.

Florida.—The statute requiring a party to be sued in the county of his residence, or in that where the cause of action accrued, has reference to the cause of action, and not to the right to sue. *McDougal v. Lea*, 2 Fla. 532.

Georgia.—In *Georgia*, an administrator who has submitted to the court, outside his own county, cannot, while his discharge is not set aside, be sued for an accounting in any other county than that of his residence. *Cook v. Weaver*, 77 Ga. 9.

A claim of property levied on must be tried in the county where the execution is returnable. *Akin v. Peck*, 64 Ga. 643.

A possessory warrant may be had in any county where the chattel is found. *Jordan v. Owens*, 67 Ga. 616.

In *Georgia*, a proceeding in a justice's court to foreclose a landlord's lien must be brought in the district where the defendant resides or has property. *Jones v. Wylie*, 82 Ga. 745.

Illinois.—Under the Rev. Stat. 1891, p. 1090, § 2, a civil action for assault is transitory. *Hurley v. Marsh*, 2 Ill. 329. Replevin is transitory. *Whisler v. Roberts*, 19 Ill. 274. The action of debt is transitory. *Peoria Ins. Co. v. Warner*, 28 Ill. 429. An action for flooding land is local. *Eachus v. Ill. & Mich. Canal*, 17 Ill. 534. Forcible detainer is local. *Billings v. Chapin*, 2 Ill. App. 555. An action for an injury causing death is local. *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177.

An appeal surety compelled to pay a judgment obtained in one county, cannot cause an execution to be levied on land in another county, without bringing an action therein. *McDonald v. Asay*, 37 Ill. App. 469.

Indiana.—The statutory requirement that an action, by the assignee of a claim, be in the county where the party liable to the judgment resides, does not apply to an action *in rem* against a non-resident. *Singleton v. O'Brien*, 125 Ind. 151.

A *quo warranto* information to settle the title to a public office, must be filed in the county of the defendant's last and usual abode. *Robertson v. State*, 109 Ind. 79.

An action to reach by garnishment the proceeds of land fraudulently conveyed to baffle a plaintiff's judgment for alimony, need not be brought where the land lies. *Becknell v. Becknell*, 110 Ind. 42.

An action to revive a judgment must be brought in the court in which it was recovered. *Johnson v. Ahrens*, 117 Ind. 600.

An action to collect drainage assessments is local, though the owner of the land resides in another county. *Dowden v. State*, 106 Ind. 157.

Under the Stat. 1881, § 312, an action in a joint cause against two, may be brought in the county where the non-resident defendant has been found and served; a summons being issued to another county wherein the defendant resides. *Lindley v. Kregelo*, 121 Ind. 176.

Iowa.—Section 2178 of the Code of this state, providing that mortgages may be foreclosed where the property is situated, is permissive only. *Equitable L. Ins. Co. v. Gleason*, 56 Iowa 47.

An action by an heir to recover a share of an estate that has been settled by proceedings in one county, the land whereof is situated partly in that county and partly in another, may be

brought in either. *Seaton's Estate*, 58 Iowa 523.

An action against a party, as having become liable to perform the conditions of another's contract, must be brought where the defendant resides, although the contract calls for performance in another county. *Wright, etc., Oil, etc., Mfg. Co. v. Kleigel*, 70 Iowa 578.

One renting and keeping a house with his family is an "actual resident," within section 3507 of the Code, although intending to return to his domicile in another county, upon the completion of a certain job. *Fitzgerald v. Arel*, 63 Iowa 104; 50 Am. Rep. 733.

An action for services as agent is one "growing out of" and "connected with" the agency, within section 2585 of the Code, allowing it to be brought where the agency is located. *Ockerson v. Burnham*, 63 Iowa 570.

Under Iowa Code, § 2581, an action for breach of a contract to make and give, at Algona, a note for a wagon ordered by the defendant, to be made by the plaintiff, was held to be properly brought in the county in which Algona was situated. *Bradley v. Palen*, 78 Iowa 126. But where a contract to deliver trees named no place of the buyer's performance, his domicile was held to govern the venue of an action for the price. *Hunt v. Bratt*, 23 Iowa 171.

Kansas.—In this state an action for trespass upon land is local. *Brown v. Irwin*, 47 Kan. 50. An action under the *Kansas* Gen. Stat. 1889, to recover back double the illegal fees paid by a county, is not an action for a penalty within *Kansas* Code, § 48, and a summons served in another county gives no jurisdiction. *Kearney County v. Rush*, 44 Kan. 231.

An action for injury to growing crops, may be brought in the county where the defendant resides or may be summoned. *Duncan v. Yordy*, 27 Kan. 348.

An action on a recognizance must be brought in the county where the forfeiture occurred. *Smith v. Collins*, 42 Kan. 259.

An owner of land in *Missouri* may maintain an action in *Kansas*, for sand removed from the former state to the latter. *McGonigle v. Atchison*, 33 Kan. 726.

A local and a transitory cause of action cannot be blended by amendment. The petition, in an action to rescind a

contract for the exchange of land, cannot be amended to seek damages for breach of a covenant of warranty. *Neal v. Reynolds*, 38 Kan. 432.

Kentucky.—An action to subject the interest, acquired by an heir in her father's estate, to pay his debts, under the *Kentucky* Code, § 70, lies in the county where she resides. *Parsons v. Spencer*, 83 Ky. 305.

An action for allotment of dower, in lands of a decedent owned jointly by the heirs, must be brought where some of the subject-matter is situated, though not necessarily the greater part thereof. *Danforth v. Moss*, 90 Ky. 246.

A ward's action against the administrator and heirs of his guardian, to subject lands to pay the ward's estate, is within the *Kentucky* Code, § 66, and must be brought where the heirs reside and the property is located. *Willis v. Roberts*, 90 Ky. 122.

An action for cutting and removing timber must be brought in the county where the land lies. *Meehan v. Edwards*, 92 Ky. 574.

Under an affidavit and warrant in Anderson county, an arrest, etc., was made in Marion county. It was held that an action for false imprisonment was properly brought in Marion county; this being the one "in which the injury is done," within the *Kentucky* Civ. Code, § 74. *Mitchell v. Ripy*, 82 Ky. 516.

Under the *Kentucky* Code, § 62, requiring an action affecting real estate to be brought in the county wherein some part thereof is situated, the circuit court of a county has jurisdiction of a suit to subject to the claims of creditors' land in that and another county fraudulently conveyed, the legal title to which is in part in the same person. *Treadway v. Turner* (Ky. 1889), 10 S. W. Rep. 816.

An action against a vendor of land, for a deficit in its area, is transitory, and, under the *Kentucky* Code, § 78, lies in any county in which he is served with process. The immediate vendor cannot, by assignment, confer on his vendee the right to sue the remote vendor in another county. *Stamper v. Central Ky. Lumber, etc., Co.* (Ky. 1887), 4 S. W. Rep. 330.

A guardian's action for the sale of land of the wards, distribution of proceeds, and reinvestment, lies in the county where their ancestor died and they live, although only a portion of the lands is therein situated. *Phalan v.*

Louisville Safety Vault, etc., Co., 88 Ky. 24.

Louisiana.—In this state a husband may maintain a suit for divorce in his own parish, and the citation be served on the wife in another. *Glaude v. Peat*, 43 La. Ann. 161.

A suit to dissolve a sale of immovable property is local, and the non-resident defendant may be cited by a curator *ad hoc* without attachment. *McKenzie v. Bacon*, 38 La. Ann. 764.

An action to have the office of district attorney declared vacant for his having removed from the state, must be brought in the parish wherein he last resided. *State v. Steele*, 33 La. Ann. 910.

A suit for interdiction—*e. g.*, to control an imbecile's property—must be brought at his *domicilium habitationis*, not at his merely legal or constructive domicile. It was so held, where jurisdiction was assumed in *Louisiana*, by personal citation in Paris, *France*. *In re Dumas*, 32 La. Ann. 679.

Maine.—Here one non-resident may sue another in any county in which the defendant is personally served with process. *Rice v. Brown*, 81 Me. 56.

Maryland.—An action for obstructing a way is local. But unless a wrong venue therein be taken advantage of by demurrer, the Statute of Jeofails will cure the defect. *Crook v. Pitcher*, 61 Md. 510. An attachment lies in a county where any one of the defendant firm resides. *Collier v. Hanna*, 71 Md. 253.

A turnpike company may be sued in the county where its road lies. *Maryland Code*, art. 75, § 87, providing that no "person shall be sued out of the county in which he resides," does not apply thereto. *Baltimore, etc., Turnpike Co. v. Crowther*, 63 Md. 558.

Massachusetts.—Under Pub. Stat., ch. 161, §§ 1, 3, an action to enforce a personal contract, though relating to land, may be brought where a party lives; and this, though the land lies without the state. *Davis v. Parker*, 14 Allen (Mass.) 94.

The provision of the Pub. Stat., ch. 146, § 6, which states that when the libellant has left the county, and the libellee remains therein, the libel for divorce shall be heard "in the court held for that county," refers to the one in which the parties last lived together. *Banister v. Banister*, 150 Mass. 280.

The requirement of the Pub. Stat., ch. 183, § 3, that a trustee process be re-

turnable in the county of the trustee's residence, does not import jurisdiction of an action for trespass to land in another state, though the action be personal, and may be begun by trustee process. *Allin v. Conn. River Lumber Co.*, 150 Mass. 560.

An action by the assignee of the covenantee against the covenantor is local, and can be brought only in the county where the land lies, although the land is without, and both parties within, the state. *Clark v. Scudder*, 6 Gray (Mass.) 122.

Michigan.—A plea to the merits is not a waiver of an overruled plea in abatement to the jurisdiction. *Clark v. Mikesell*, 81 Mich. 45. Actions on contracts against non-residents, are transitory. *Atkins v. Borstler*, 46 Mich. 552.

The legislature, in creating a new county from territory belonging to an existing county, may properly provide that an ejectment suit with respect to land in the new county, pending in the court of the old county, may, after a certain date, be therein prosecuted to final judgment. *Spalding v. Kelly*, 66 Mich. 693.

Under Annot. Stat., § 7549, a suit against a public officer for an official act—*e. g.*, against a sheriff for a wrongful seizure—must be brought in the county where the act was done. *Graham v. Smith*, 62 Mich. 147.

A suit for replevin of timber is not rendered local, merely because involving the title of the land wherefrom it was cut. *Busch v. Nester*, 62 Mich. 381.

Minnesota.—As to the venue of an action to determine a right or interest in real property in this state, see *Kipp v. Cook*, 46 Minn. 535.

An action to recover personal property wrongfully seized by a sheriff, under process against a third person, may be brought in the plaintiff's county. *Hinds v. Backus*, 45 Minn. 170.

The venue of an action of tort is not changed by the death of the resident defendant before answer, if the non-resident defendant has taken no statutory step to change it. *Collins v. Bowen*, 45 Minn. 186.

Mississippi.—In this state the common-law rule does not prevail that no recovery can be had on a covenant running with the land, by an assignee of the covenantee, except in the state where the land lies, even though the covenantor resides elsewhere. *Oliver v. Love*, 59 Miss. 320.

Under Code 1880, § 2459 (1892, § 142), an attachment for a debt not due, can be sued out only in the county where the debtor last resided, or where his property is found. *Yale v. McDaniel*, 69 Miss. 337.

Under section 1847 of the Code, an administrator's action for the purchase price of a chattel of the estate, funds for payment whereof were deposited with a bank also made defendant, must be brought in the county where one of the defendants resides or is found. *Pate v. Taylor*, 66 Miss. 97.

Missouri.—Here where both parties are non-residents, a suit on a transitory cause of action may be brought by summons in any county in which the defendant is found. *Bryant v. McClure*, 44 Mo. App. 553.

Replevin lies where the property is found. *Allen v. St. Louis L. & S. R. Co.*, 38 Mo. App. 294.

Montana.—Under *Montana* Code, § 59, an action of tort must come in the county of the defendant's residence, unless the complaint states that the tort was committed in another county. *Yore v. Murphy*, 10 Mont. 304. *Compare* *Oels v. Helena Smelting, etc.*, Co., 10 Mont. 524.

Nebraska.—Under section 60 of the Civil Code of this state, an action against the maker and the indorser of a promissory note, lies in any county where one of the defendants resides, or may be summoned. *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211. But such an action cannot be instituted in a county in which the defendant does not reside before he enters the county. *Coffman v. Brandhoeffer*, 33 Neb. 279.

A *quo warranto*, or other writ issued by the supreme court, may be served in any county; title 4, section 60, *Nebraska* Code, applies only to the district courts. *State v. Frazier*, 28 Neb. 438.

Where a surety had been discharged by an extension of the note, it was held that service on him where the suit was brought, would not give jurisdiction over his co-defendant resident in another county. *Dunn v. Haines*, 17 Neb. 560. And the dismissal of an action as to a defendant served in the county where the action was pending, was held to leave no jurisdiction over one served in another county. *Cobbey v. Wright*, 23 Neb. 250.

In a case of an attachment against the property of a debtor absconding or hiding himself, the action may be brought in the county of his former

residence, and where his property is found. *Gandy v. Jolly*, 54 Neb. 536.

Nevada.—The *Nevada* venue laws are like those of *California*. *Compare Nevada* Gen. Stat. 1885, §§ 3040-3042, with *California* Code Civ. Proc. 1885, §§ 392, 393.

New Hampshire.—In this state replevin is held to be a local action, both by statute and at common law. *Sleeper v. Osgood*, 50 N. H. 331.

New Jersey.—For the construction of *New Jersey* Rev. Stat. 1877, p. 883, § 230, in regard to the venue of transitory actions, see *Bell v. Morris Canal Co.*, 15 N. J. L. 63. An action under the *New Jersey* Act of 1820, "for restraining the plaintiff from navigating the waters between the ancient shores of *New York* and *New Jersey*," is not a local but a transitory action. *Gibbons v. Ogden*, 6 N. J. L. 285.

New York.—An action to recover for injuries to personal property is transitory. *Smith v. Butler*, 1 Daly (N. Y.) 508. As to the venue of an action for injuries to the person, see *McIvor v. McCabe*, 16 Abb. Pr. (N. Y. Super. Ct.) 319; 26 How. Pr. (N. Y.) 257. As to the venue, under the *New York* Code of Civil Procedure, of an action against a constable or other public officer, see *Houck v. Lasher*, 17 How. Pr. (N. Y. Supreme Ct.) 520.

Whether the action is one within section 982, Code Civ. Proc., to establish an interest in real property, must be determined by the complaint. *Knickerbocker L. Ins. Co. v. Clark*, 22 Hun (N. Y.) 506.

In the absence of good reason to the contrary, the defendant in a wife's action for alienation of her husband's affection, is entitled to a trial in the county where, if guilty, she would be tried for the crime of enticement. So held, where the defendant claimed to have gone through a marriage ceremony, believing the husband to have been divorced from the plaintiff. *Blake v. Everman*, 56 Hun (N. Y.) 453.

Under sections 983, 984, Code Civ. Proc., construed together, a defendant with whom a public officer is joined, may have the case tried in the county wherein the former resided when the suit was instituted. It was so held where the plaintiff sought both to have an execution sale restrained, and to recover damages for the levy. *Lamson Consolidated Store Service Co. v. Hart* (Supreme Ct.), 5 N. Y. Supp. 889. The restriction in section 983, of the

venue of actions for penalties, does not apply to those arising under the game laws. *Leonard v. Ehrich*, 40 Hun (N. Y.) 460.

In an action against a person as president of an association, he is the "defendant," within *New York Laws* 1882, ch. 410, requiring the venue of an action in a New York City district court, to be in a district in which either the plaintiff or the defendant resides. *Brooks v. Dinsmore*, 15 Daly (N. Y.) 428.

Under Code Civ. Proc., § 983, allowing an action for a nuisance to lie where some part of the cause arose, an action by the water commissioner of a village in Niagara county, against the street commissioner of a city in Erie county, to abate a nuisance caused by throwing foul matter into the Niagara river, should be brought in Erie county, the cause arising there. *Horne v. Buffalo* (Supreme Ct.), 1 N. Y. Supp. 801.

Within section 984, an unmarried man was held to "reside" in the county where he had leased apartments, and slept but irregularly, and received his mail matter. *Cincinnati, etc., R. Co. v. Ives* (Supreme Ct.), 3 N. Y. Supp. 895.

Section 982, declaring local any action affecting an interest in real estate, applies to trespass *quare clausum fregit*. *Freeman v. Thomson*, 50 Hun (N. Y.) 340.

An action to recover a penalty or violation of the game law, is a civil action, and the penalty may be sued for by the district attorney of the adjoining county. *People v. Rouse* (Supreme Ct.), 15 N. Y. Supp. 414.

An action against a vendor, to recover on his agreement to pay back for deficiency in the amount of the land, is not, within section 982, one to be tried in the county where the subject is situated. *Oakes v. DeLancey* (Supreme Ct.), 12 N. Y. Supp. 840.

An action against trustees to recover, on a certificate, an interest in certain hotel property, is not local, as affecting an interest in real property. *Roche v. Marvin*, 92 N. Y. 398.

A proponent conceding the jurisdiction is estopped to object thereto on appeal. *Matter of Budlong*, 54 Hun (N. Y.) 131. *Compare* *Burdick v. Freeman*, 120 N. Y. 420.

An objection on the ground of the affiant's non-residence, may be first raised on a second trial, if the fact has not previously appeared. *Brooks v. Dinsmore*, 15 Daly (N. Y.) 428.

Under Code Civ. Proc., § 2869, a

justice of the town where the plaintiff resides has jurisdiction, though the defendant is a non-resident and was in another town in the same county when the action was begun. *Bennett v. Weaver*, 50 Hun (N. Y.) 111.

In Code Civ. Proc., § 982, the words, "actions to procure a judgment," etc., refer to a judgment that by its express form and provisions will affect the title to real property, or some interest therein. They do not embrace an action for damages for breach of a contract to convey, due to inability to give title. *Hogg v. Mack*, 53 Hun (N. Y.) 463. Otherwise, as to an action to procure a judgment directing a conveyance. *Kearr v. Bartlett*, 47 Hun (N. Y.) 245.

North Carolina.—Under section 193 of the Code of this state, an action on an administration bond, lies in the county where it was given, and where the plaintiff resides, though the defendants reside in another county. *Clark v. Peebles*, 100 N. Car. 348.

An action against a sheriff for not complying with section 200 of the Code, in the return of a summons, lies in the county from which it issued, though he is the sheriff of another county. *Watson v. Mitchell*, 108 N. Car. 364.

In section 190 of the Code, pl. 4, the words "distrained for any cause," do not apply to a sheriff's seizure in claim and delivery; the place of trial is not therein regulated by the situation of the property. *Smithdeal v. Wilkerson*, 100 N. Car. 52.

In Halifax county, A qualified as administrator, but died in Northampton county. A resident thereof, B, became A's administrator. It was held that under section 193 of the Code, an action by a resident of Halifax county against B and against a surety on A's bond, residing in Northampton county, was properly brought in Halifax county. *State v. Peebles*, 100 N. Car. 348.

Ohio.—As to the general rule and the exceptions, in this state, see *Ohio Rev. Stat.* 1890, §§ 5022-5031. The provision of section 5031, for venue, where "the defendant resides or may be summoned," does not apply to a merely nominal or simulated defendant. *Thompson v. Massie*, 41 Ohio St. 317. One is exempt from summons in another county than that of his residence, while he is attending a hearing in the case in which he is a party. *Andrews v. Lembeck*, 46 Ohio St. 38.

Oklahoma.—In *Oklahoma* the venue

laws are, with slight exceptions, like those of *Kansas*. Compare *Oklahoma* Stat. 1890, §§ 4346-4352, with *Kansas* Gen. Stat. 1889, §§ 4125-4134.

Oregon.—In *Oregon* an action on a note lies in the county of the defendant's residence. *Dunham v. Shindler*, 17 *Oregon* 256.

Pennsylvania.—An action on a bond given by the York county commissioners, for the redemption of notes executed in furtherance of completing the court house, is on a demand "arising in building the new court house," within the Act of 1839, giving the Adams county court of common pleas jurisdiction thereof. *York County v. Small*, 1 *W. & S. (Pa.)* 315.

An action against the owner of a wharf, for damage to a barge, because of the unsafe condition of the wharf, is local. But it would be transitory if based on averment of license, etc., knowing the wharf to be unsafe. *Dempsey v. Delaware Iron Co.*, 12 *Phila. (Pa.)* 314. So, also, is an action for damage to barges, from the overflow of a canal, local. *Moyer v. Chesapeake*, etc., *Canal Co.*, 12 *Phila. (Pa.)* 400.

Rhode Island.—In *Rhode Island* an action by an indorsee, on a promissory note against the maker, lies as if there had been no assignment. *Rhode Island* Pub. Stat. 1882, p. 551, § 5.

South Carolina.—In this state, the fact that, incidental to the charge of false representations in a sale of personalty, the complaint alleges that a conveyance of land was fraudulently made, will not require the venue to be where the land is situated, if not seeking to set the conveyance aside, nor stating facts sufficient therefor. *New Home Sewing Mach. Co. v. Wray*, 28 *S. Car.* 86.

The requirement of section 146 of the Code, that the venue be where the defendant resides, applies to an action against an administrator residing in one county, but appointed receiver of an estate located in another county. *Ware v. Henderson*, 25 *S. Car.* 385.

An action for unlawfully detaining a bailor's personal property is transitory. *Lipscomb v. Tanner*, 31 *S. Car.* 49.

Section 146 of the Code, as to venue in the county of the defendant's residence, if the defendant administrator resides in Greenville county, where also did his intestate, the court of common pleas of Abbeville county, cannot compel an account of his administration of an estate in Abbeville, of which he has, in

Abbeville, been appointed a receiver. *Ware v. Henderson*, 25 *S. Car.* 385.

Tennessee.—In this state, an action for willfully burning fences, trees, and crops, is local. *Nashville*, etc., *R. Co. v. Weeks*, 13 *Lea (Tenn.)* 148.

Where a transitory action is begun before the defendant enters the county, the court does not obtain jurisdiction within *Tennessee* Code, § 2808. *Carlisle v. Cowan*, 85 *Tenn.* 165.

The action granted by the Code 1884, § 1331, for a wrongful killing in *Tennessee*, may be brought by a non-resident widow of the deceased, although he was also a non-resident, and entered the service of the defendant outside the state. *Chesapeake*, etc., *R. Co. v. Higgins*, 85 *Tenn.* 620.

Texas.—In this state the statute (Sayles' Rev. Civ. Stat. 1889) provides that no person who is an inhabitant of the state, shall be sued out of the county in which he has his domicile, except in certain cases, namely, married women; transient persons; where the defendant is without the state; where the defendants reside in different counties; where the contract in suit is to be performed in a particular county; where the action is against an executor, administrator, or guardian on a money demand; in case of fraud or official defalcation; or of crime, offense, or trespass; or where an attachment is wrongful; or where the suit is for the recovery of personal property; or concerning an inheritance; or for the foreclosure of a mortgage or lien; or for partition; or concerning land; or for devise; or for an injunction to stay proceedings; or to revise proceedings of the probate court; or against a county; or the head of a department; or for the forfeiture of a charter; or against a railroad to forfeit land; or against a private corporation or railroad; or by a mechanic against a railroad; or against a foreign corporation; or an insurance company; or where the venue is prescribed by a particular law; or where the suit is against vendors of land; for breach of warranty of title; where the vendors live in different counties.

Such of the foregoing exceptions as are not peremptory, are for the benefit of the plaintiff. *Caro v. Caro*, 60 *Tex.* 395.

As to "domicile," the old residence remains unchanged until the new one is complete. *Tucker v. Anderson*, 27 *Tex.* 276. A cause suable only in the county of the defendant's domicile,

cannot be joined with one suable in the county where the obligation on which it was based was to be performed, so as to compel the defendant to submit to the latter jurisdiction against the plea of privilege allowed by Rev. Stat., art. 1198. *Altgelt v. Harris* (Tex. 1889), 11 S. W. Rep. 857.

In construing the second exception, see *Brown v. Read*, 33 Tex. 629. In construing the third, see *Liles v. Woods*, 58 Tex. 416; *Kuteman v. Page*, 3 Tex. App. Civ. Cas., § 165. In the fourth, as applying to necessary parties, see *Holloway v. Blum*, 60 Tex. 625; as against a co-surety, for contribution, see *Rush v. Bishop*, 60 Tex. 177; as to the joinder of a fictitious defendant, see *Christie v. Gunter*, 26 Tex. 700. One who is not a proper or necessary party is not a "defendant," and the co-defendant's remedy for the wrong venue is by a plea in abatement. *Texas, etc., R. Co. v. Mangum*, 68 Tex. 342.

In construing the fifth exception, see *Cohen v. Munson*, 59 Tex. 236; *Henry v. Fay*, 2 Tex. App. Civ. Cas., § 835. In construing the sixth, see *Wilson v. Kyle*, 35 Tex. 559; *Bondies v. Buford*, 58 Tex. 266. This exception does not apply to an action by a distributee to recover his share of the estate. *Stewart v. Morrison*, 81 Tex. 396.

In construing the seventh exception, see *Freeman v. Kuechler*, 45 Tex. 592; *Crawford v. Carothers*, 66 Tex. 199; *Lehmberg v. Biberstein*, 51 Tex. 457. The venue being where the fraud was committed, the vendor of the land may sue in the county where the sale took place, though he resides in another. *Boothe v. Feist* (Tex. 1892), 19 S. W. Rep. 398. To bring a case within this exception, the petition must allege not merely confederation, but some fact whence actionable fraud can be inferred. *Baines v. Mensing*, 75 Tex. 200.

In construing the eighth exception, see *Armendiaz v. Stillman*, 54 Tex. 623; *Belo v. Wren*, 63 Tex. 686; *Cook v. Hortsman*, 2 Tex. App. Civ. Cas., § 770. As to what "trespass" means, see *Connor v. Saunders*, 81 Tex. 633; *Austin v. Cameron*, 83 Tex. 351. "Offense or trespass" was held not to apply to a case of personal injury from the defendant's negligence in fastening the guy rope of a pile driver. *Ricker v. Shoemaker*, 81 Tex. 22. But "trespass" was held to embrace an in-

jury that is the indirect result of wrongful force; *e. g.*, injury to a pregnant woman from a boisterous and bloody assault committed in her presence. *Hill v. Kimball*, 76 Tex. 210. This exception applies to a suit on an attachment bond. *Cahn v. Bonnett*, 62 Tex. 674. An action against a sheriff's indemnitors for his wrongful levy, will not lie in a county other than that of his domicile, unless his misconduct be established. *Hilliard v. Wilson*, 76 Tex. 180. An action for wrongful attachment lies in the county where the seizure was made, though no defendant resides therein. *Perry v. Stephens*, 77 Tex. 246.

The venue of a suit for conversion by an illegal attachment, is in the county where the writ issued. *Focke v. Blum*, 82 Tex. 436.

In construing the eleventh exception, see *Higgins v. Frederick*, 32 Tex. 282; *Hays v. Stone*, 36 Tex. 181; *Joiner v. Perkins*, 59 Tex. 300. In construing the twelfth, see *Stark v. Burr*, 56 Tex. 130; *Osborn v. Osborn*, 62 Tex. 495.

In construing the thirteenth, as to its yielding to the fifth, see *Neill v. Owen*, 3 Tex. 145; as to its yielding to the sixth, see *Finch v. Edmonson*, 9 Tex. 511; as to specific performance or rescission of a land contract, see *Miller v. Rusk*, 17 Tex. 170; *Herrington v. Williams*, 31 Tex. 458; *Mixan v. Grove*, 59 Tex. 573; as to compelling survey, see *Texas, Mexican R. Co. v. Locke*, 63 Tex. 623; as to non-residents, excess of land sections, etc., see *State v. Snyder*, 66 Tex. 687. An action to recover land fraudulently purchased must be brought in the county where the land lies. *State v. Stone, etc., Co.*, 66 Tex. 363. One who has located a land certificate under an agreement to receive a share of the land, must sue thereon in the county where the land lies. *Murrell v. Wright*, 78 Tex. 519. A suit for destruction of buildings is local, if they are found to be of the realty. *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382. A suit to set aside a sale of state public land must be brought in the district court of the county where the land lies. *State v. Wichita Land, etc., Co.*, 73 Tex. 450.

In the absence of special exception, an action by tenants in common in two tracts of land, located under one certificate, but in different counties, lies in either, against the grantee's heirs. *Tevis v. Armstrong*, 71 Tex. 59.

In the absence of waiver by the

defendant, an action to recover three tracts of land located in three different counties, cannot be brought in one alone, merely because the plaintiff relies on the same state of facts to recover each. *Martin v. Robinson*, 67 Tex. 382.

A suit to compel a public surveyor to survey lands located, is local; his non-residence is immaterial. *Thomson v. Locke*, 66 Tex. 383.

Trespass to try title should be brought where part of the land lies, although some of the defendants reside in a county remote therefrom. *Thomson v. Locke*, 66 Tex. 383.

The *Texas* statutory requirement, that a suit to recover land be brought where the land lies, confers a mere personal privilege, and may be waived. *De La Vega v. League*, 64 Tex. 205.

An action by a non-resident plaintiff against a non-resident defendant, on an instrument that may collaterally affect land owned by both in the state, may be brought in any county where the defendant can be found, or will appear. *Pegram v. Owens*, 64 Tex. 475.

In construing the fourteenth exception, see *Jones v. Jones*, 60 Tex. 451. In construing the fifteenth, see *Winnie v. Grayson*, 3 Tex. 429; *George v. Dyer*, 1 Tex. App. Civ. Cas., § 780; as to *scire facias* to revive, see *Masterson v. Cundiff*, 58 Tex. 472; as to debt on a judgment, see *Johnson v. Skipworth*, 59 Tex. 473. This exception and article 2880, requiring suits going to the validity of the judgment to be in the court of the recovery of the judgment, do not apply to prevent sale of property on which the judgment, however valid, is no lien. *Van Ratcliff v. Call*, 72 Tex. 491.

In construing the sixteenth, see *Franks v. Chapman*, 60 Tex. 46; 61 Tex. 576. In construing the twenty-first, see *Southern Cotton Press, etc., Co. v. Bradley*, 52 Tex. 587; *Houston, etc., R. Co. v. Hill*, 63 Tex. 381; 51 Am. Rep. 642. In construing the twenty-second, see *Atlantic Ins. Co. v. Sinker*, 1 Tex. App. Civ. Cas., § 954.

A petition to enforce a vendor's lien is local, if stating facts showing its existence. *Joiner v. Perkins*, 59 Tex. 300.

A suit for malicious arrest and prosecution, lies where the affidavit was made, although the arrest was in another county. *Hubbard v. Lord*, 59 Tex. 384.

An action on a bond to secure performance of a contract, payable at no

specified place, does not lie in the county in which the contract was to be performed, if the principal and sureties do not reside therein. *Lindheim v. Muschamp*, 72 Tex. 33.

An oil company in Harris county wrote to S. in Goliad county, offering to buy, "at \$9 per ton, good crop seed, f. o. b." It was held that S.'s action for the price accrued, when he loaded the cotton seed free on board cars in Goliad county; and under *Texas* Rev. Stat., art. 1556, § 10, allowing suit where any part of the cause of action arose, the venue properly lay in that county. *Merchants', etc., Oil Co. v. Seelingson*, 4 Tex. App. Civ. Cas., § 206.

Under *Texas* Rev. Stat., art. 1199a, allowing an action for breach of warranty of title to land to be brought in any county where one of the vendors resides, a co-defendant will not be heard to plead the personal privilege of being sued in his own county. *Carothers v. Johnson*, 4 Tex. App. Civ. Cas., § 263.

A civil action for a newspaper libel, may be brought in the county where it was circulated, although not that of its original publication. *Belo v. Wren*, 63 Tex. 686.

Utah.—Under the practice act, an action, before a justice, on a due-bill not payable in any particular place, must be begun before the justice of the peace of the precinct where the debtor resides. *Kloppenstien v. Woolf*, 3 Utah 426.

Vermont.—Under Rev. L., § 899, of this state, an action for breach of covenant of warranty is transitory, and lies in *Vermont*, when the grantor resides there, though the land lies in another state. *Tillotson v. Pritchard*, 60 Vt. 94; 6 Am. Dec. 95.

Trespass to the freehold before a justice, must be in the town in which one of the parties resides. *June v. Conant*, 17 Vt. 656.

Virginia.—In *Virginia*, as to the venue of various actions, see *Virginia* Code 1887, §§ 3214-3218. A suit on a firm debt may be abated as to a non-resident partner. *Brown v. Belches*, 1 Wash. (Va.) 9.

Washington.—Under the *Washington* Civil Practice Act, § 48, allowing foreclosure in the county where the subject is situated, in a case of disconnected tracts in several counties, the suit may be brought in any one of them. *Stevens v. Ferry*, 48 Fed. Rep. 7. A suit for specific performance of a contract for sale of land, is not within the

(2) *Practice; Remedies Without Change*.—Special code legislation has provided for liberal practice, in some cases of inadvertence, in laying the venue in civil actions, somewhat conformably with the old chancery practice.¹

Washington Code, § 47, requiring an action for recovery, possession, or partition, or for determination of a question affecting the title, to be in the county or district in which part of the land lies. *Morgan v. Bell*, 3 Wash. 554.

An action for conversion of trees may be brought where the cause arose, not in the county where the land lay, notwithstanding a count or paragraph for treble damages under *Washington Code*, § 602; this being rejected as surplusage. *McLeod v. Ellis*, 2 Wash. 117.

West Virginia.—In *West Virginia* where one of the two defendants, in an action for malicious prosecution, is a non-resident, the suit lies in any county where they can both be found and served. *Vinal v. Core*, 18 W. Va. 1.

Wisconsin.—In this state as to actions, local or transitory, see *Wisconsin Annot. Stat.* 1889, §§ 2619, 2620.

Under *Wisconsin Laws* 1885, ch. 301, an action for labor on logs is transitory, and lies where the defendant is personally served. *Shafer v. Hogue*, 70 Wis. 392.

Wyoming.—In *Wyoming* the venue laws are like those of *Kansas*. *Compare Wyoming Comp. L.* 1876, p. 39, §§ 41-49, with *Kansas Gen. Stat.* 1889, §§ 4125-4134.

1. In *California*, "If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county." *California Code Civ. Proc.* 1885, § 396.

"An action by a county may be brought in any county not a party thereto." *California Code Civ. Proc.* 1885, § 394.

In *Arkansas*, a defendant's appearance may be a waiver of an erroneous venue. *Arkansas Dig. Stat.* 1884, § 5010. There, consent of parties will confer jurisdiction of an action for injury to real property elsewhere than in the county where it is situated. *Jacks v. Moore*, 33 Ark. 31.

In *Colorado*, under the Town-site Act of 1881, in case there is an adverse

claimant to any town-site land, either party may bring a suit against him in the county in which the land lies; but if the judge be interested in any land in the town, he must order the papers with a transcript to be transmitted to another judicial district, as in cases of a change of venue. *Colorado Annot. Stat.* 1891, § 4348.

In *Florida*, an objection to the venue, not raised in a plea in abatement, is not available on demurrer, or after trial on a plea to the merits. *Bucki v. Cone*, 25 Fla. 1.

In *Georgia*, a plea to the merits is a waiver of objection to the jurisdiction. *Perseverance Min. Co. v. Bisaner*, 87 Ga. 193.

In *Indiana*, attaching the property of a non-resident defendant does not confer jurisdiction over a defendant residing in another county. *Brown v. Underhill*, 4 Ind. App. 77.

Under *Iowa Code*, § 3511, the attachment of property within the township gives a justice of the peace jurisdiction, though the defendant is a non-resident. Sections 3507, 3509, 3517, making venue depend on domicile, apply only to cases of personal service, or in the district courts. *Anderson v. Union Pac. R. Co.*, 77 Iowa 445.

In *Kansas*, as to when an objection to jurisdiction coming too late is first raised on appeal, see *Kansas City R. Co. v. Rodebaugh*, 38 Kan. 45; 5 Am. St. Rep. 715.

In *Kentucky*, service on one improperly joined will not confer jurisdiction over a non-resident defendant. *Basye v. Brown*, 78 Ky. 553. *Compare Achy v. Holland*, 8 Lea (Tenn.) 510.

In *Massachusetts*, although an action to recover double gaming money is brought in the wrong county, the defendant's motion to dismiss may be refused, if he has pleaded to the merits. *Morris v. Farrington*, 133 Mass. 466.

In *Michigan*, a transitory action cannot be begun in a county where neither party resides, to be thereafter removed to the proper county. *Haywood v. Johnson*, 41 Mich. 598.

In *Minnesota*, the district court designated in the complaint may try an interest in land situated in another county,

As in *England*, so, also, in *Massachusetts*, *Maine*, and some other states not usually designated as "code states," the statutory simplification of rules of pleading has rendered superfluous any allegation of the venue in transitory actions.¹ It is the policy of the law, in determining the proper venue, to look to the convenience of litigants, and to substantial justice, irrespective of technicalities.²

unless a change of venue be seasonably demanded and actually made; and this, though the summons was served by publication only. *Kipp v. Cook*, 46 Minn. 535.

In *Missouri*, omission of the marginal venue prescribed in *Missouri Rev. Stat.*, § 2883, is no ground for arrest of judgment, if the venue appears in the body. *Dollman v. Munson*, 90 Mo. 85.

In *Nebraska*, one using the name of a firm is estopped to object to being sued in the county where he does business, instead of that of his residence. *Rosenbaum v. Hayden*, 22 Neb. 744.

In *New York*, it is not a ground of demurrer, that a transitory action, *e. g.*, for slander of title to land, is joined with an action for trespass on land in another state. *Dodge v. Colby*, 108 N. Y. 445.

An objection that the complaint does not allege that the defendant is a resident of the county, comes too late, if first raised after he has gone to trial. *Ross v. Konor* (Supreme Ct.), 2 N. Y. Supp. 169.

In *Rhode Island*, an action with wrong venue "shall be abated." *Rhode Island Pub. Stat.* 1882, p. 552, § 6.

In *Tennessee*, the presence of a defendant where the suit was brought gives jurisdiction, under *Tennessee Code*, § 2808, that in all transitory actions the right of action follows the person of the defendant, unless otherwise expressly provided. *Carlisle v. Cowan*, 85 Tenn. 165. There, consent to a continuance is not a waiver of a plea in abatement to a justice's jurisdiction. Otherwise, as to a plea to the merits. *Simpson v. East Tennessee, etc.*, R. Co., 89 Tenn. 304.

Where one not a real defendant is joined for the purpose of bringing the suit, in a county other than that in which the material defendants reside, the suit should abate. *Achy v. Holland*, 8 Lea (Tenn.) 510. Compare *Basye v. Brown*, 78 Ky. 553.

In *Texas*, an objection to the venue of a suit to recover possession of land,

if not raised by plea in abatement, is to be deemed waived. *Walker v. Stroud* (Tex. 1887), 6 S. W. Rep. 202. As to when an objection to the jurisdiction, first raised on appeal, comes too late, see *Eggenberger v. Brandenberger*, 74 Tex. 274.

1. *Blackstone Nat. Bank v. Lane*, 80 Me. 165; 24 Pick. (Mass.) 398.

In *Delaware*, "all allegations heretofore usually inserted in declarations and other pleadings, which are not material or traversable, and which the party could not be required to prove, may be omitted; unless when they are required for the right understanding of allegations that are material. *Delaware Laws* 1874, p. 648, § 14.

2. In *Maine*, a foreign defendant's temporary bodily presence is, upon service of a summons, equivalent to domicile. *Alley v. Caspari*, 80 Me. 234; 6 Am. St. Rep. 178. This is upon the axiom of Huberins, that foreigners within our limits are subject to our laws. Story on Conflict of Laws (8th ed.), § 581; Wharton on Conflict of Laws (2d ed.), §§ 17, 705, 743.

Similarly, in *Massachusetts*. *Barrell v. Benjamin*, 15 Mass. 354. In *Roberts v. Knights*, 7 Allen (Mass.) 449, both parties were British subjects. In *Peabody v. Hamilton*, 106 Mass. 217, which was an action on an account annexed for £100,000, the writ described the plaintiffs as "of London in England," and the defendant as "of the State of *New York* and commorant of Boston, in this commonwealth."

In *New Jersey*, the statutory privilege, restricting suit to the district where the defendant resides, may be waived by submitting to the jurisdiction of another court. *Fraley v. Feather*, 46 N. J. L. 429.

In construing the *New Jersey Rev. Stat.*, p. 870, § 139, see *Reed v. Wilson*, 41 N. J. L. 29.

Where the venue of an action, for damages to both real and personal property, was erroneously laid in a county, other than that where the land

But there is danger of undue expansion of the common-law rule, especially in the venue of suits for divorce.¹

In general, a *habeas corpus* proceeding should be instituted in the county where the alleged unlawful restraint is being exercised.²

In applying the principle of comity laid down in the federal constitution,³ to actional privileges in one state, of citizens of another, some anomalous cases have arisen under the statutes affecting the remedy only.⁴

(3) *Corporation Suits*.—In general, as to venue, corporations

lay, and there was no objection, or motion for nonsuit, it was held that the judge properly refused to withdraw from the jury the consideration of the land damages. *Blackford v. Lehigh Valley R. Co.*, 53 N. J. L. 56.

In *South Carolina*, it is held that an action for unlawfully detaining a bailor's personal property, may lie in another state than that where the detention occurred. *Lipscomb v. Tanner*, 31 S. Car. 49.

In *Illinois*, a defendant is not "found" in a county whither, for the purpose of service of the summons, he has been taken upon arrest under a fictitious complaint. *McNab v. Bennett*, 66 Ill. 160. An objection to the venue for non-residence comes too late if first raised on appeal. *Allen v. Watt*, 69 Ill. 655. A plea in abatement for non-residence, is not demurrable for merely concluding with praying for judgment. *Drake v. Drake*, 83 Ill. 526.

In *Vermont*, as to the superseding of the common law by statute concerning local actions, see *June v. Conant*, 17 Vt. 656.

In *Virginia*, a suit, the venue whereof depends on the defendant's residence, "shall abate" upon the officer's return of non-residence. *Virginia Code* 1887, § 3242. A plea in abatement for non-residence must state where the defendant does reside. *Middleton v. Pinnell*, 2 Gratt. (Va.) 202. Such plea must come before plea in bar. *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122. In assumpsit, the plea need not state where the cause of action arose. *Warren v. Saunders*, 27 Gratt. (Va.) 259.

1. "Where litigation is expensive, or the law inauspicious, the subjects of one country may succeed in throwing on the courts of another country, the burden of cases in which the thing contested, as well as the parties contesting, are foreign, and which the courts thus appealed to were not organized to undertake. Lately, while acknowledg-

ing the principle, there has been a growing tendency to narrow its application. In *England*, in *Massachusetts*, in *New York*, and in *Pennsylvania*, the courts on the subject of divorce have maintained, with more or less strictness, the necessity of domicile to confer jurisdiction." Wharton on Conflict of Laws (2d. ed.), § 707.

See observations of James, J., in *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31. Also *infra*, this title, *Extraterritorial Torts*.

2. In *re White*, 33 Neb. 812; *Ex p. Gollier*, 6 Ohio St. 55; *Com. v. Fox*, 7 Pa. St. 336.

3. *United States Const.*, art. IV., § 2.

4. In *Putnam v. Dike*, 13 Gray (Mass.) 535, the court, by Shaw, C. J., said: "This is certainly an extraordinary case. A small debt, contracted in *Vermont* in 1815, has increased by simple interest to three times the original amount, by lapse of time, being a period of over forty years. The only defense relied on is, that it is barred by the Statute of Limitations. This, of course, must mean the statute of *Massachusetts*. The Statute of Limitations affects the remedy only, and is, therefore, local in its operation; neither the Statute of Limitations of *Vermont*, where the contract was made, nor that of any other state or county, has any efficacy in *Massachusetts*. The parties both lived in *Vermont*, where the cause of action accrued; and there is no evidence to show that the defendant ever came within the limits of this state. If the defendant never came into *Massachusetts* after the cause of action accrued, the statute never began to run and no length of time could make that statute a bar to an action which the plaintiff might bring in this state. . . . If indeed, the defendant had never been an inhabitant of this state and there was no effectual attachment of the defendant's property in this suit, and he had appeared specially and

may sue and be sued as natural persons; and some statutes simply so provide.¹ Others prescribe more particularly.²

Some statutes provide that an action against a railroad or mail-stage company, may be brought in any county through which the line runs.³

Many decisions involving questions of venue of actions against railway, insurance, and other corporations, turn upon construction through comparison of different statutes of the same state.⁴

pleaded in abatement to the jurisdiction of the court, we do not perceive why it would not have been a good defense to this suit. But no such course was taken and perhaps the facts would not warrant it."

1. *Colorado* Annot. Stat. 1891, p. 639, § 503.

2. In *Alabama*, a foreign or domestic corporation may be sued in any county in which it does business by an agent. *Alabama* Code 1886, § 2642.

An action to vacate the charter of a corporation, "must be brought in the circuit court of the county in which the corporation has its principal office; or, if it has no principal office, in that of any county in which it does business." *Alabama* Code 1886, § 3169.

3. *Arkansas* Dig. Stat. 1884, § 5003; *Ohio* Rev. Stat. 1890, § 5027.

4. *Southern Ohio R. Co. v. Morey*, 47 *Ohio* St. 207. See *supra*, this title, *Transitory or Local*.

In the *Kentucky* Civil Code, §§ 58 and 71 must be construed together. In 1890, under a petition upon an insurance policy, which averred that the company's chief office was in Jefferson county, and that it issued a certificate through its agent in Allen county, a judgment by default, rendered in Allen county, was held to be valid, although service had been made on the chief officer in Jefferson county; such averment could not be controlled by recitals in the policy attached to the petition as an exhibit. *Kentucky Mut. Security Fund Co. v. Logan*, 90 *Ky.* 364.

There, moreover, the domicile of a railway corporation having no president in the state, is determined by the residence of its vice president, if he be in the state; this being, within *Kentucky* Civ. Code, § 73, "its chief officer." *Harper v. Newport News, etc., R. Co.*, 90 *Ky.* 359.

In *Arizona*, a suit against a railway company may be brought in any county into which its road extends. *Arizona* Rev. Stat. 1887, § 674, pl. 19.

The provision of the *Arkansas* Stat. 1875, that one, whose stock is killed by a railroad company, "may" sue in the county where the killing or wounding occurred, restricts the action to that county. *Little Rock, etc., R. Co. v. Chifton*, 38 *Ark.* 205.

A suit against a county cannot be brought elsewhere. *Shaver v. Lawrence County*, 44 *Ark.* 225.

The *California* constitutional requirement as to suits against corporations, does not import that a suit to declare a deed a mortgage and compel re-conveyance, shall not, under the *California* Code Civ. Proc., § 392, be brought in the county where the land lies, although the defendant's principal place of business is in another county. *Baker v. Fireman's Fund Ins. Co.*, 73 *Cal.* 182.

In the absence of a statute defining the residence of a corporation, this need not be restricted to its principal place of business; and an action against it to condemn land, should be brought where the land lies. *California Southern R. Co. v. Southern Pac. R. Co.*, 65 *Cal.* 394.

An action against a corporation for personal injuries, lies in the county where the accident occurred. *Lewis v. South. Pac. Coast R. Co.*, 66 *Cal.* 209.

The venue of an action against a railroad company, for its wrongful refusal to transport lumber, was held to be in the county of the tender and refusal, notwithstanding an allegation that this resulted from a conspiracy between the company and other dealers resident in another county. *Chase v. South. Pac. Coast R. Co.*, 83 *Cal.* 468.

The provision of the *California* Const., art. 12, § 16, allowing a corporation or "association" to be sued in the county where the cause accrued, applies to a mining company; and as to the venue, the complaint need not show any corporate powers. *Kendrick v. Diamond Creek Consolidated Gold Min. Co.*, 94 *Cal.* 137.

In *Colorado*, general and special provisions as to the venue of a suit against corporations, must be construed together. *Denver, etc., Constr. Co. v. Stout*, 8 Colo. 61.

In *Georgia*, a mining corporation may be sued in the county where its principal financial office is, although operating its works in another county. *Dade Coal Co. v. Haslett*, 83 Ga. 549.

An action for a railway company's refusal to issue a through bill of lading, to a point on another carrier's line, should be in the county of the defendant's residence, or in that of the point of shipment. *Coles v. Central R., etc., Co.*, 82 Ga. 149.

Under *Georgia Code*, § 3406, allowing suit to be brought in the county wherein the cause of action originated, an action by a shipper of live stock to recover for damage thereto, may be brought in the county of delivery to the carrier, though the tort was not completed therein. *Central R., etc., Co. v. Pickett*, 87 Ga. 734. Under this section a railway corporation "inhabits" all the counties in which its road lies, and it may be sued in any of them. *East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co.*, 49 Fed. Rep. 608.

An action for failure to deliver cotton at its destination, may come in the county where it was delivered to the carrier. *Central R. Co. v. Brunson*, 63 Ga. 504.

In *Illinois*, a *Missouri* corporation doing business in *Illinois* may be garnished for a debt due a resident of *Missouri*. *Hannibal, etc., R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581.

In *Indiana*, a suit against a railway company, for burning grass and fences, is an action for an injury to real estate within the *Indiana Rev. Stat.*, § 307, and is properly brought in the county where the real estate is situate, although joining a claim for damages to personality, and although the company has no agent in that county. *Indiana, etc., R. Co. v. Foster*, 107 Ind. 430.

As to the venue of a suit against a railway corporation for medical services to an employee, see *Evansville, etc., R. Co. v. Spellbring*, 1 Ind. App. 167.

An action against a railway company, for injury to land in *Illinois*, will not lie in the court of a county in *Indiana*, although the road extends therein. *Du Breuil v. Pennsylvania Co.*, 130 Ind. 137.

The *Iowa Code*, §§ 2582-2585, as to venue, do not apply to a foreign corporation running cars merely for ex-

hibition and advertisement, without carrying passengers or freight; and this though the suit be for infringement of a patent by such operation of a train of cars. *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed. Rep. 434.

In *Iowa*, an action will lie against a railway company, although the cause accrued before the road was operated therein. *Knott v. Dubuque, etc., R. Co.*, 84 Iowa 462.

Under the *Kansas Code* 1885, §§ 50-68a, an action against a railway company incorporated in another state, for injuries to persons or property, was held to lie in a county where it had a union depot, with arrangements for running its cars over tracks of other corporations therein. *Hannibal, etc., R. Co. v. Kanaley*, 39 Kan. 1.

In *Kentucky*, in general, an action against a corporation having an office in the state, or chief officer residing therein, must be brought in the county where such office or residence is situated, or where the contract was to be performed, or where the tort was committed. *Kentucky Code* 1889, § 72. (For exceptions, see §§ 62-71, 73-77.)

An action against a common carrier lies in the county where the defendant resides, or where the contract is made, or the property is to be delivered. *Adams Express Co. v. Crenshaw*, 78 Ky. 136.

In *Louisiana*, an action against a corporation, for damages from its negligence and nonfeasance, must be brought at its domicile. *Caldwell v. Vicksburg, etc., R. Co.*, 40 La. Ann. 753.

In a restriction in a railroad charter as to venue, an exception of actions of trespass may be deemed waived by a landowner allowing entry and occupancy for many years without objection. *Payne v. Morgan's, etc., R., etc., Co.*, 43 La. Ann. 981. Such exception includes an action of trespass on the case for the killing or wounding of live stock. *State v. Judge*, 33 La. Ann. 954.

In *Maine*, when any corporation is one party, and a county the other, the suit lies in any adjoining county. *Maine Rev. Stat.* 1883, p. 674, § 13.

In *Maryland*, a turnpike company may be sued in the county where it collects its tolls and exercises its corporate privileges, though its principal office and records are elsewhere. *Baltimore, etc., Turnpike Co. v. Crowther*, 63 Md. 558.

In *Massachusetts*, when a foreign corporation brings a transitory action

in a county wherein only one of the defendants resides, and, after a trial on the merits without objection to the venue, discontinues against him, a new trial may come in the same county. *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397.

As to what is a corporation's "usual place of business," see *Rhodes v. Salem Turnpike, etc.*, Bridge Co., 98 Mass. 95; *Barre Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

In *Michigan*, unless otherwise provided by statute, a township cannot be sued outside its own county. *Pack v. Greenbush Tp.*, 62 Mich. 122.

In *Minnesota*, a suit against a foreign corporation lies in any county designated in the complaint. *Olson v. Osborne*, 30 Minn. 444.

The fact that a foreign corporation has, contrary to U. S. Act 1885, ch. 183, instituted a suit in the federal court, does not, after discontinuance, preclude it from suing in the state court. *Northwestern Mut. L. Ins. Co. v. Brown*, 36 Minn. 108.

In *Mississippi*, the only local actions are ejectment and trespass *quare clausum fregit*. A suit against a railway company for damages, from an overflow resulting from negligent construction, may be brought in any county where any part of the road lies. *Archibald v. Mississippi, etc.*, R. Co., 66 Miss. 424.

Under the *Missouri* Rev. Stat. (1879), § 3481, pl. 4, allowing suit in any county when all the defendants are non-residents of the state, a foreign corporation having an office in the state, may be sued in any county thereof. *Estill v. New York, etc.*, R. Co., 41 Fed. Rep. 849.

In *Nebraska*, an action against a railway or stage owner, for an injury to persons or property upon the line, or upon a liability as a carrier, lies in any county into which the road or line passes. *Nebraska* Consol. Stat. (1891), § 4592. This includes a suit for overflow from wrong construction of a railway bridge. *Omaha, etc.*, R. Co. v. *Brown*, 29 Neb. 492.

In *New Hampshire*, as to when a foreign corporation may be sued in any county, see *Bishop v. Silver Lake Min. Co.*, 62 N. H. 455.

In *New Jersey*, in an action against a railway company for burning a barn and personal property in another county, objection to the venue was held to come too late, when first raised after the cause had proceeded to trial.

Blackford v. Lehigh Valley R. Co., 53 N. J. L. 56.

In *New York*, an action against an officer of a corporation to recover a debt of the corporation, on the ground that he had signed a false report, is penal and local, and must come where the report was filed, although the debt originated in another county. *Veeder v. Baker*, 83 N. Y. 156.

Under *New York* Code Civ. Proc., § 1779, a foreign corporation may enforce its contracts in *New York*. *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Dec. 464; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518.

The right, under *New York* Code Civ. Proc., § 1780, of a non-resident to sue a foreign corporation, depends on his residence, and not on his citizenship. *Adams v. Penn. Bank*, 35 Hun (N. Y.) 393.

Within *New York* Code Civ. Proc., § 984, the residence of a corporation, for venue purposes, is where its principal business is to be carried on, as designated by its charter, though in fact it may have an extensive business office in another county. *Rossie Iron Works v. Westbrook*, 59 Hun (N. Y.) 345.

In *North Carolina*, it has been held that an action for redress involving interpretation of the charter, should be brought in the state which created the corporation, though an auxiliary action lies in another state, where it has property. *Moore v. Silver Valley Min. Co.*, 104 N. Car. 534.

Ohio Rev. Stat., § 5027, relates to the jurisdiction of the person; the petition need not state that the road of the defendant corporation passes into the county. *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207.

As to exception, from section 5026, of special statutory actions, see *Muskingum County Infirmary v. Toledo*, 15 Ohio St. 409.

Under the *Ohio* Rev. Stat., § 5030, any foreign corporation which may be found in the state, may be sued in any county, in any court having jurisdiction of the subject-matter. *Handy v. Insurance Co.*, 37 Ohio St. 371.

An *Oregon* corporation must be sued where it has its principal office, or where the cause of action arose. *Oregon* Code, § 44, applies; § 55, pl. 1, relates to the manner of service. *Holgate v. Oregon Pac. R. Co.*, 16 Oregon 123.

In *Pennsylvania*, a private corporation may be sued in any county in

In general, a condition in a contract of insurance, limiting the venue of actions thereon, is invalid,¹ but otherwise, under express charter authorization therefor.²

which the proper officer can be served. *Lehigh Coal, etc., Co. v. Lehigh Boom Co.*, 12 Phila. (Pa.) 540.

An action against a municipal corporation can be brought only in its own county. *Heckscher v. Philadelphia* (Pa. 1887), 9 Atl. Rep. 281.

A *mandamus* may issue against a railway company in a county where its road is located, although its office is outside the state. *Com. v. New York, etc.*, R. Co., 138 Pa. St. 58.

In *Rhode Island*, "personal or transitory actions, brought by or against corporations, shall be brought either in the county in which the other party, or some one of the other parties, dwells, or in the county in which the defendant, or some one of the parties defendant, shall be found, or in which the corporation is located by its charter, or, if not located by its charter, in which the annual meetings of the corporation are required to be, or, if not required to be, are actually holden." *Rhode Island* Pub. Stat. 1882, p. 551, § 3.

In *Tennessee*, an action against a corporation for personal injuries lies in any county where it has an office or agency. *Toppins v. East Tennessee, etc.*, R. Co., 5 Lea (Tenn.) 600.

An action against a railway company, for the killing of an engineer, was held to be properly brought in *Tennessee* where the accident occurred, and where the road must be operated under the charter, although the plaintiff and the deceased, at the time of his death, resided in *Kentucky*, where the greater part of the road lay, and where the contract of employment took place. *Chesapeake, etc.*, R. Co. *v. Higgins*, 85 Tenn. 620.

In *Vermont*, a railway company's action may be either in the county of its principal office, or in that of the defendant's residence; an action against it, in any county through which its road runs. *Vermont* Rev. L. 1880, § 899.

In *Virginia*, suit lies in a county, "if a corporation be a defendant, wherein its principal office is situated, or wherein its mayor, rector, president, or other chief officer, resides." *Virginia* Code 1887, § 3214, pl. 2.

In *West Virginia*, there is a similar provision. See *West Virginia* Rev.

Stat. 1879, p. 872, § 1. And see *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135.

In *Wisconsin*, an action against a railway corporation, except an appeal in condemnation proceedings, lies in any county into which its road runs. *Wisconsin* Annot. Stat. 1889, § 2619, pl. 4.

In *Wyoming*, the rule as to the venue of an action against a railway or stage owner is like that of *Nebraska*. See *Wyoming* Comp. L. 1876, § 46.

Under the *Texas* Rev. Stat. 1198, a railway company may be sued in a county where it has an agent and operates its road, though the cause arose in another county. *Galveston, etc.*, R. Co. *v. Horne*, 60 Tex. 643.

In an action against a railway company for loss of baggage, a plea that the defendant had no office or agent in the county, and did not operate its road therein, is good, though the baggage was checked to a point therein. *Gulf, etc.*, R. Co. *v. Jackson*, 4 Tex. App. Civ. Cas., § 47.

Under the *Texas* Rev. Stat., art. 1198, § 21, allowing a suit against a "private corporation" to be brought in any county where any part of the cause of action arose, a consignor's action for failure to sell produce may be brought where the agreement was made. *Western Wool Commission Co. v. Hart* (Tex. 1892), 20 S. W. Rep. 131. A railway company is a "private corporation," within the said section 21, and may be sued in any county in which it has an agent, though its road does not extend thereto. *St. Louis, etc.*, R. Co. *v. Traweek*, 84 Tex. 65.

1. *Matt v. Iowa Mut. Aid Assoc.*, 81 Iowa 135; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174; *Hall v. Peoples' Mut. F. Ins. Co.*, 6 Gray (Mass.) 185; *Reichard v. Manhattan L. Ins. Co.*, 31 Mo. 518.

2. *Portage County Mut. Ins. Co. v. Stukeley*, 18 Ohio 455; *Portage County Mut. F. Ins. Co. v. West*, 6 Ohio St. 599.

In *Pennsylvania*, under the Act of 1857, allowing certain actions to be brought "where the property insured may be located," an action against a live stock insurance company, incorporated by the legislature, though its letters patent were issued by the gov-

(4) *Extraterritorial Torts*.—Ordinarily, an action to recover for damage from the defendant's diverting or obstructing the water

error, may be brought in the county where the insured stock is kept. *Beech v. Farmers', etc., Mut. Livestock Ins. Assoc.*, 137 Pa. St. 617.

Further, as to the venue of actions against insurance companies, see *Ship-ton v. Fees*, 10 Pa. Co. Ct. Rep. 583; *Knox County Mut. Ins. Co. v. Bowersox*, 6 Ohio Co. Ct. Rep. 275; *Howard v. Kentucky, etc., Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282; *Arnet v. Milwaukee Mechanics' Mut. Ins. Co.*, 22 Wis. 516; *Union Mut. Accident Assoc. v. Riel*, 38 Ill. App. 414; *Williams v. Columbian Mut. F. Ins. Co.*, 29 Me. 465; *Martin v. Penobscot Mut. F. Ins. Co.*, 53 Me. 419; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238; *Boynton v. Middlesex Mut. F. Ins. Co.*, 4 Met. (Mass.) 212.

In *Arizona*, a suit against a fire insurance company may be in any county in which the property is located; and a suit may also be brought against a life or accident insurance company, in the county in which the person resided at the time of the death or injury. *Arizona Rev. Stat.* 1887, § 674, pl. 20.

In *California*, a contract for insurance, under an application for a policy payable according to the terms of a future will, and, pending that, to stand in favor of the lawful heirs, was held not consummated until accepted by the insured, and suit thereon not to lie in the county where the policy was issued, but in the county where it was accepted. *Yore v. Bankers', etc., Mut. L. Assoc.*, 88 Cal. 609.

In *Connecticut*, the residence of a stockholder has been permitted to control the venue of an action on a fire policy. *Wood v. Hartford F. Ins. Co.*, 13 Conn. 202; 33 Am. Dec. 395.

In the *Illinois* venue laws, a mutual benefit association is distinguished from a life insurance company. *Northwestern L. Assoc. v. Stout*, 32 Ill. App. 31.

Under the *Kentucky* Code, an action on an insurance contract may be brought in the county in which the company has a local agent, if there is none in that wherein the assured resides, and the subject property is located. *Owen v. Howard Ins. Co.*, 87 Ky. 571.

In *Nebraska*, an action on an insurance contract made in the state, is transitory, and the venue is governed

by the *Nebraska* law. The provision of the *Nebraska* Code, § 55, allowing it to be brought where any part of the cause arose, is remedial; it lies in any county where service may be had, though the company has no agent therein. *Insurance Co. of N. A. v. McLimans*, 28 Neb. 653.

In *New Hampshire*, "the insured may bring his action in the county of his residence, notwithstanding anything to the contrary contained in the policy" (of fire insurance). *Pub. Stat.* 1891, p. 486, § 12.

Under the *New York* statute, as to an action for the penalty against a foreign insurance company effecting insurance within a municipality without giving bond, etc., the cause arises in the municipality, irrespective of where the contract was signed. *Ithaca Fire Dep. v. Beecher*, 99 N. Y. 429.

Under *Ohio* Rev. Stat. 1890, § 5026, that an action against an insurance company "may be brought in the county wherein the cause of action, or some part thereof, arose," an action against a life insurance company may be brought where the insured died. *Union Cent. L. Ins. Co. v. Pyers*, 36 Ohio St. 544.

In *Texas*, in an action by an indorsee against a maker and payee of a note, it appeared that the note was given for the first premium of life insurance, but that the policy, containing an unauthorized condition, was tendered back, and a return of the note demanded and refused. It was held that an action lay in the county of the maker's residence, where the agent procured the note, though the company had no office there, and the court had jurisdiction to render not only a judgment against the maker, but also one over, on his cross-bill, against the company. *First Nat. Bank v. Turner* (Tex. App. 1891), 15 S. W. Rep. 710.

In *Virginia*, a suit on a policy lies in the county "wherein the property was situated, or the person, whose life was insured, resided at the date of the policy." *Virginia Code* 1887, § 3214, pl. 3.

Under *Wisconsin* Rev. Stat., § 2619, an action on a life insurance policy lies in the county where the death occurred. *Bruil v. Northwestern Mut. Relief Assoc.*, 72 Wis. 430.

of a stream, in another county or court-district, must be brought where the nuisance was caused.¹

For analogous decisions in the federal courts, see *supra*, this title, *Extraterritorial Injuries*.

1. See *infra*, this title, *Judicial Cognizance of Boundaries*.

In *Mannville Co. v. Worcester*, 138 Mass. 89; 52 Am. Rep. 261, an action to recover for the city's diverting, in *Massachusetts*, water of Tatnuck brook, a tributary of Blackstone river, whereon was the plaintiff's mill in *Rhode Island*, the court, by Holmes, J., in deciding that a recovery for the consequent damage could be had in *Massachusetts*, said: "We cannot assent to the distinction between discharging and withdrawing water. The consequence in one case is positive, in the other negative; but in each it is the consequence of an act done outside the jurisdiction where the harm occurs, and the consequence is as direct in the latter case as in the former. The right infringed in the former case is called absolute ownership, in the latter, easement; but the laws of *Rhode Island*, which make a man owner of a tract of land there, have no more power to diminish freedom of action in *Massachusetts*, than any other of its laws. A concurrence of the laws of both states is as necessary in that case as in the one at bar, to create a liability which can be enforced in either state consistently with principle. Such a concurrence presents no technical difficulties, and, if the substantive end to be attained is a proper one, it will be recognized and acted on here, as we have no doubt that it would be in *Rhode Island*, if the position of the parties were reversed. Of course, the laws of *Rhode Island* cannot subject *Massachusetts* land to a servitude, and, apart from any constitutional considerations, if there are any, which we do not mean to intimate, *Massachusetts* might prohibit the creation of such servitudes. So it might authorize any acts to be done within its limits, however injurious to lands or persons outside them. But it does not do either. It has no more objection to a citizen of *Rhode Island* owning an easement, as incident to his ownership of land in that state, than it has to his owning it in gross, or to his purchasing lands here in fee. . . . So far as their creation is concerned, the law of *Massachusetts* governs, whether the mode of creation be by deed

or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two estates; being created, the law of *Rhode Island*, by permission of that of *Massachusetts*, lays hold of them and attaches them in such way as it sees fit to land there, *Massachusetts* being secured against anything contrary to its views of policy by the common traditions of the two states, and by the power over its own territory which it holds in reserve. It was also contended for the defendant that the action could only be brought in *Rhode Island*. This objection is purely technical. The reasons which once made the venue important have long disappeared, and we see no reason for any greater strictness than is absolutely required by the statutes and precedents. If the plaintiff's mill were in another county of this state, an action for damages would be rightly brought in Worcester, not only by *Massachusetts* Pub. Stat., ch. 161, § 8, but by the common law. As between two states, both of which recognize the right, if the rule is to vary at all, it should be on the side of greater liberality, to prevent a failure of justice such as would be likely to happen in the present case if this action were not maintained. The weight of judicial opinion is altogether in favor of allowing an action to be maintained, where the water was withdrawn. The decisions, in cases where both the act and the consequence complained of were outside the state in which the action was brought, are not opposed to our conclusion, and we are not called upon to decide between *Lord Mansfield*, in *Mostyn v. Fabrigas*, Cowp. 161, and *Lord Kenyon*, in *Doulson v. Matthews*, 4 T. R. 503. The American cases have generally followed the latter."

As to the cases cited by Judge Holmes, in *Manville Co. v. Worcester*, 138 Mass. 89; 52 Am. Rep. 261, or that of *Mostyn v. Fabrigas*, Cowp. 161 (venue rightly in *England*, for false imprisonment in *Minorca*), see *supra*, this title, *In the English Practice—In General*; for that of *Doulson v. Matthews*, 4 T. R. 503 (venue wrongly in *England*, for trespass in *Canada*), see *supra*, this title, *Transitory and Local*. He also cited *Barden v. Crocker*, 10 Pick.

(Mass.) 383, which held that an action on the case for obstructing the passage of alewives up Taunton river, by a dam in Bristol county, might lie either in Bristol or Plymouth county. The court, by Putnam, J., criticized the reasoning in *Thompson v. Crocker*, 9 Pick. (Mass.) 59.

In *Alabama*, it seems that an action for overflowing a mill must be brought where the property is located. *Howard v. Ingersoll*, 17 Ala. 780.

One struck in *Arkansas*, by a blast fired in the *Indian Territory*, has a cause of action arising therefor in the former state. *Cameron v. Vandergriff*, 53 Ark. 381.

In *California*, an action for diversion of water from a ditch situated in two counties, may be brought in either. *Lower Kings River Water Ditch Co. v. Kings River, etc.*, Canal Co., 60 Cal. 408.

In *Illinois*, in an action for injury to land in Bureau county, from a dam in Stark county, it was held that the venue might be laid in either. *Pilgrim v. Mellor*, 1 Ill. App. 448.

An action for flooding lands in *Indiana*, by a dam in *Illinois*, will not lie in *Illinois*. *Eachus v. Illinois, etc.*, Canal Trustees, 17 Ill. 534.

A drainage district situated in two counties may be sued in either, although its records are kept in only one; the defendant is "found" in either, within *Illinois* Rev. Stat. 1891, p. 1090, § 2. *Drainage Com'rs v. Griffin*, 134 Ill. 330.

In *Louisiana*, it is held that an action will lie in that state for damages done to the property of the plaintiff by a steamer in another state, though, by the laws of the latter, the action would be held to be local. Such an action, under the *Louisiana* laws, is a personal action. *Holmes v. Barclay*, 4 La. Ann. 63.

In *Maine*, one may maintain an action for damages to his land therein, from a dam built across the Salmon river to operate a mill in *New Hampshire*; this at common-law, but not under the *Maine* mill statute. *Wooster v. Great Falls Mfg. Co.*, 39 Me. 246.

In *Michigan*, where one's dam causes damages to another's crops, the fact that the county line coincides with the dividing line of their farms, will not bar an action by the injured party therefor in his own county. *Thorn v. Maurer*, 85 Mich. 569.

In *Minnesota*, replevin against a sheriff may be brought at the plaintiff's domicile, *Minnesota* Code, §§ 47, 49, be-

ing construed together. *Leonard v. Maginnis*, 34 Minn. 506.

In *Nebraska*, an action, for flowage from the negligent construction of a railway bridge, lies in any county where service may, under the *Nebraska* Code, § 56, be had on the defendant corporation. *Omaha, etc., R. Co. v. Brown*, 29 Neb. 492.

In *New Hampshire*, injury to a highway, from a dam entirely in *Maine*, may be prosecuted for in the former state. *State v. Lord*, 16 N. H. 357. A wooden tent, erected by parol license on the land of another, is a chattel, for injury to which trespass lies in the county where either party resides. *Ford v. Burleigh*, 62 N. H. 388.

In *New Jersey*, an action for injury to land from back flowage, caused by a dam, must be brought where the land lies. *Deacon v. Shreve*, 23 N. J. L. 204.

A compact between *New York* and *New Jersey*, gives to *New York* jurisdiction over the Hudson to the low-water mark on the *New Jersey* shore, and to *New Jersey* the exclusive right of property in the land under the water lying west of the middle of the river, with exclusive jurisdiction over wharves and docks made on the *New Jersey* shore. The court held that an indictment lies in *New Jersey* for placing a wreck on the west shore, between the high and low-water line, but not for placing it below the low-water line. *State v. Babcock*, 30 N. J. L. 29. Compare a case of bayou-island rights on the Ohio, to the low-water line of which *Virginia* had ceded her north-west territory. *Handley v. Anthony*, 5 Wheat. (U. S.) 374. Compare, also, a case involving construction of the *Georgia* compact of cession of land west of the *Chattahoochee*. *Howard v. Ingersoll*, 17 Ala. 780.

In *New York*, where the chief of police of Buffalo sent a telegram to Toronto, causing a wrongful arrest of a woman, it was held that, as to her cause of action, "part," within *New York* Code Civ. Proc., § 983, arose in Buffalo. *Tupper v. Morin*, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 398.

In *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31, which was an action between residents of *Canada* for an assault committed therein, the court, by James, J., in effect, said: It is now settled that the courts of this state have and will entertain jurisdiction of actions for personal injuries committed abroad, when both or either of the parties are citizens of

the *United States*. But *Molony v. Dows*, 8 Abb. Pr. (N. Y. C. Pl.) 316, an action for being driven out of *California*, in 1856, by a vigilance committee, holding otherwise, is not regarded as authority, that decision overlooking *United States* Const., art. 4, § 2. As a question of law, this court has jurisdiction of torts committed in a foreign country; but as a matter of policy, will only exercise it in its discretion, in exceptional cases. This was followed in *Burdick v. Freeman*, 46 Hun (N. Y.) 138.

This constitutional principle of comity was adopted in *Johnson v. Dalton*, 1 Cow. (N. Y.) 543; 13 Am. Dec. 564, which was an action for assault on the high seas between British subjects. As to its application in divorce cases, etc., see *supra*, this title, *Statutory Restrictions*.

In *Ruckman v. Green*, 9 Hun (N. Y.) 225, which was an action to recover for damage to suburban residence property on the Palisades in *New York*, from a bone and offal boiling establishment in *New Jersey*, the court, by Davis, P. J., said: "There is no sound principle, we think, which precludes a party, whose property is specially injured by a nuisance which casts upon it offensive and noxious vapors, from maintaining an action, because of the interposition of a state line between the nuisance and the property so injured."

An action will not lie in *New York* for injury to a mill in *New Jersey*, by the diversion of the water of a stream. *Watts v. Kinney*, 23 Wend. (N. Y.) 484; 6 Hill (N. Y.) 82.

Under the *New York* Code Civ. Proc., §§ 982, 983, allowing an action for a nuisance to lie where some part of the cause arose, an action by the water commissioner of a municipality, against the street commissioner of a municipality in another county, to abate a nuisance such as the throwing of filth into the stream above, should be brought in the latter county, the cause arising there. *Horne v. Buffalo* (Supreme Ct.), 1 N. Y. Supp. 801.

In *North Carolina*, an action against a sheriff for a false return, lies in the county from which the summons issued, although he is the sheriff of another county. *Watson v. Mitchell*, 108 N. Car. 364.

In *Ohio*, an action lies for damage to lands therein, occasioned by the diversion of a stream in *Pennsylvania*.

Thayer v. Brooks, 17 Ohio 489; 49 Am. Dec. 474.

In *Pennsylvania*, an action for flooding lands is local. But if a dam in one county injures land of a party in another, the action lies in either. *Oliphant v. Smith*, 3 P. & W. (Pa.) 180.

A furnace in Centre county, which, in its ore cleansing, corrupted water in Huntingdon county, was held, by Woodward, P. J., in the quarter sessions, indictable in Centre county. *Com. v. Lyons*, 1 Clark (Pa.) 497. *Compare Prevost v. Gorrell*, 3 W. N. C. (Pa.) 366, a case of an injury to an adjoining mine lessee from bad mining.

In *Texas*, in Cameron county, an action was maintained by a citizen thereof, for injury to his land in *Mexico*, from an obstruction placed in the Rio Grande in the said county. *Armen-diaz v. Stillman*, 54 Tex. 623.

In *Vermont*, a statutory action to recover for an injury from a town's defective highway, lies in the county of the plaintiff's domicile, though the defendant town is in another county. In so deciding, in *Hunt v. Pownal*, 9 Vt. 417, the court, by Redfield, J., said: "The action does not come within the exception of the statute as to actions of ejectment and trespass on the freehold. It may well be supposed that the legislature did not intend to make any other actions local, with reference to the county."

The rule that an action for personal injuries is transitory, was applied where the accident occurred in the Province of Quebec, through the defendant company's neglect to comply with a statute of that province, regulating crossings. *McLeod v. Connecticut etc., R. Co.*, 58 Vt. 727, quoting the following, Miller, J., in *Dennick v. Central R. Co.*, 103 U. S. 11: "If the defendant was legally liable in *New Jersey*, he could not escape that liability by going to *New York*. It would be a very dangerous doctrine to establish, that in all cases the several states have substituted the statute for the common law, where the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred."

An action for trespass to the freehold in *Massachusetts* will not lie in *Vermont*. *Niles v. Howe*, 57 Vt. 388.

Scire facias against the bail of the sheriff of Caledonia county for not returning tax extents, may be brought by the state treasurer in Windsor county, where the plaintiff resides and

b. IN CRIMINAL CASES—(1) *In General*.—Ordinarily, the statutes of each state provide expressly for the laying of the venue in criminal cases. This, of course, is very simple in case of an indivisible offense committed within a single jurisdiction.¹

has his office. *State Treasurer v. Kelsey*, 4 Vt. 371.

In *Washington*, an action for unlawfully cutting trees may be brought where the cause arose. And in order to sustain the jurisdiction of the court, a count praying treble damages under the *Washington* Code, § 48, may be rejected as surplusage. *McLeod v. Ellis*, 2 Wash. 117.

In *West Virginia*, as to the venue of an action of trespass on the case against a railway company, see *Humphreys v. Newport News, etc., V. Co.*, 33 W. Va. 135.

In *Wisconsin*, an action to recover a penalty for an offense, committed on any water over which two counties have common jurisdiction, may be brought in either. *Wisconsin* Annot. Stat. 1889, § 2619, pl. 2.

In *Re Eldred*, 46 Wis. 549, the court, by Ryan, C. J., said: "Possibly it would be competent for the legislature to provide that a dam situate in one county, but creating injurious effects in several, might be indicted in either. . . . But, in absence of such legislation, a dam more than a hundred rods from the county line (the statutory limit) can be indicted in its own county only."

1. See CRIMINAL PROCEDURE, vol. 4, p. 786.

In *Alabama*, "the local jurisdiction of all public offenses, unless it is otherwise provided by law, is in the county in which the offense was committed." *Alabama* Code 1886, § 3716.

In case of abolition of the county and its reestablishment under a new name, after a change of venue of a murder case, the defendant's continued appearance without objection is a waiver of the discontinuance. *Hall v. State*, 51 Ala. 9.

In *Arkansas*, proof of the venue is indispensable to conviction. *Frazier v. State*, 56 Ark. 242.

In a trial for murder, proof that the killing was from nine to fourteen miles from the county seat, without showing the direction, was held not to establish the venue. *Dobson v. State* (Ark. 1891), 17 S. W. Rep. 13.

In *California*, evidence that a burglary was committed on "Grant Ave-

nue," was held to be sufficient proof that it was committed in San Francisco, whereof this was a prominent street. *People v. McGregor*, 88 Cal. 140.

In *Colorado*, an offense committed in a county attached to another for judicial purposes, may be prosecuted in either. *Colorado* Annot. Stat. 1891, § 1434.

In *Connecticut*, "Every person charged with any offense shall be tried in the county wherein it shall have been committed, except when it is otherwise provided." *Connecticut* Gen. Stat. 1888, § 1618.

In *Florida*, the evidence must be such that the venue of the offense may be reasonably inferred. *Warrace v. State*, 27 Fla. 362.

In *Georgia*, in bastardy as to two children, one born in Terrell county, but begotten in Webster county, the other begotten in Terrell, but likely to be chargeable to Webster, it was held that the venue might be in Webster; but it "would have been the better course" to bring separate indictments. *Davis v. State*, 58 Ga. 170.

Upon a controversy as to whether the venue has been proved, the court may decide on recollection, or reopen the case. *Wiggins v. State*, 80 Ga. 468.

On a trial for larceny from the courthouse of H. county, the testimony of an accomplice that he spent the night of the crime in C., the shire town, was held sufficient to establish the venue in H. county. *Porter v. State*, 76 Ga. 658.

In *Illinois*, the failure of the record to show that the venue was proved—*e. g.*, on a trial for knowingly receiving stolen goods—is ground for reversal of conviction. *Jackson v. People*, 40 Ill. 405.

It has been held that forgery, by a bookkeeper in a national bank, of a draft purporting to be drawn thereon, is cognizable in a state court, notwithstanding the provision of *United States* Stat., § 5209. *Hoke v. People*, 122 Ill. 511. But compare *People v. Fonda*, 62 Mich. 401.

Proof that a robbery was committed on a street of Peoria, Ill., was held sufficient to establish the venue in Peoria county. *Sullivan v. People*, 114 Ill. 24.

In *Indiana*, as to the evidence requisite to establish the venue in a criminal case, see *Wiles v. State*, 33 Ind. 206; *Luck v. State*, 96 Ind. 16. Proof that an illegal sale was "at Noblesville," without stating the county, was held insufficient. *Deck v. State*, 47 Ind. 245.

In this state, one may be prosecuted in Harrison county for selling intoxicating liquors, without license, in a boat anchored in the Ohio river on the *Indiana* side, south of low-water mark. *Welsh v. State*, 126 Ind. 71.

In *Kansas*, as to the evidence necessary to establish the venue in a criminal case, see *State v. Benson*, 22 Kan. 471.

In *Louisiana*, the supreme court will not review the jury's determination as to proof of the venue in a criminal case. *State v. Starks*, 42 La. Ann. 315.

In *Maine*, in an indictment for selling a lottery ticket, the omission of the words "then and there," before "selling," was held not to be fatal to the venue. *State v. Willis*, 78 Me. 70.

In *Michigan*, consent cannot confer jurisdiction over a criminal case. *Hill v. People*, 16 Mich. 351.

In *Mississippi*, in a criminal case, the venue must be proved strictly as alleged. *Thompson v. State*, 51 Miss. 353. But it may be established by circumstantial evidence. See the case of stealing a runaway slave. *Coon v. State*, 13 Smed. & M. (Miss.) 246.

In *Missouri*, the venue must be proved as alleged. *State v. Young*, 99 Mo. 284. On a trial for maliciously killing a mule, proof that, when the shot wounds were first seen on him, he was in the county of his habitat, wandering home, and soon died, was held to be sufficient proof of venue therein, although the accused lived three miles distant, across the county line. *State v. Daugherty*, 106 Mo. 182. *Compare*, as to proof by circumstantial evidence, *State v. Snyder*, 44 Mo. App. 429; *State v. Sanders*, 106 Mo. 188.

In *Nebraska*, when one white man murders another on an Indian reservation therein, the state court has jurisdiction of the offense. *Marion v. State*, 20 Neb. 233. Otherwise, as between Indians thereon, so long as they maintain their tribal relations. *Ex p. Cross*, 20 Neb. 417.

The rule, that a status once proved is presumed to continue, was applied, on a murder trial, to prove that the deceased was shot in a certain county and, for convenience of the physician,

was removed across a river, where he died. *Binfield v. State*, 15 Neb. 485.

In *New York*, as to state jurisdiction in prosecution of crimes, see the five specifications. *Bird. New York Stat.*, p. 792, § 6; Penal Code, § 16.

In *Ohio*, in case of forgery, the place where the instrument was uttered determines the venue. *Lindsey v. State*, 38 Ohio St. 507.

In *Pennsylvania*, the place of the birth, and not of the begetting, governs the venue in bastardy. *Heikes v. Commonwealth*, 26 Pa. St. 513.

As to the offense of constructive larceny, the place where the goods were obtained with felonious intent, governs the venue, though they were disposed of in another jurisdiction. *Com. v. Smith*, 1 Clark (Pa.) 400.

There is no treaty which prevents a court of Philadelphia county from indicting and convicting a person, for an assault on board a Norwegian vessel lying in a Philadelphia port. *Commonwealth v. Luckness*, 14 Phila. 362.

In *Tennessee*, although it was not shown exactly where the killing took place, the venue of an indictment for murder was held to be properly laid in the county where the deceased was seen alive, and his body found, and where part of the road lay whereon the defendant was seen with the deceased. *Lancaster v. State*, 91 Tenn. 267.

A state court cannot indict one for perjury committed in a federal court. *State v. Shelley*, 11 Lea (Tenn.) 594.

In *Texas*, the venue in a criminal case must be established by evidence, and not by mere inference. *Sedberry v. State*, 14 Tex. App. 233; *Ryan v. State*, 22 Tex. App. 699. The evidence may be wholly circumstantial. *Cox v. State*, 28 Tex. App. 92; *Abrego v. State*, 29 Tex. App. 143.

The venue must be proved as alleged. *Williams v. State*, 21 Tex. App. 256; *Shelton v. State*, 27 Tex. App. 443; *Strickland v. State* (Tex. App. 1890), 13 S. W. Rep. 865. And this, although the judge and jury personally know the *locus in quo* to be within the jurisdiction. *Miles v. State*, 23 Tex. App. 410.

Under *Texas* Code Crim. Proc., art. 205, providing that an offense, committed without and punishable within the state, may be prosecuted in any county in which the offender is found, the removing of mortgaged property from the state may be prosecuted in the county whence it was taken, and to which

So, also, as to a crime begun without, and consummated within, the boundaries of a state.¹

the defendant is returned on being arrested in another county. *Williams v. State*, 27 Tex. App. 258.

Where, after the commission of a crime, the place is created into a new county, the courts thereof have jurisdiction. *Weller v. State*, 16 Tex. App. 200.

In *Virginia*, an objection to the venue will be considered, however informally raised. *Philips v. Com.*, 19 Gratt. (Va.) 485.

West Virginia has jurisdiction of an offense committed on a vessel which is afloat on the Ohio river, while confined within its banks, whether the vessel is, or is not, fastened to some object on the bank. *State v. Plants*, 25 W. Va. 119; 52 Am. Rep. 211.

The venue must be proved as alleged. *State v. Mills*, 33 W. Va. 455.

1. Under the *Alabama* statute (Code of 1876), which is a valid law, a prosecution for murder may be maintained in that state, in the county where the fatal blow was struck, although the death, ensuing within a year and a day, occurred in another state; and this is true without the statute, as the crime of murder consists in the infliction of the fatal wound, coupled with the necessary felonious intent, and the ensuing death is but the consequence of the unlawful act. *Green v. State*, 66 Ala. 40; 41 Am. Rep. 744.

The *Arkansas* constitutional provision for trial in the county where the crime is committed, has not abrogated the statute authorizing prosecution of a larceny in any county of the state where the thief may be found, with property stolen in another state. *State v. Johnson*, 38 Ark. 568.

In *California*, in case of a larceny committed in another state, the venue may be in any county into or through which the property has been brought. *California* Penal Code, § 789. Accordingly, an indictment charging that the defendant stole a watch and chain in *Arizona*, and brought them into Los Angeles county, was held to sufficiently bring the case within the jurisdiction of the court in that county. *People v. Staples*, 91 Cal. 23.

In *Illinois*, the offense is punishable, though begun without, and consummated within, the state, "through the intervention of any innocent or guilty

agency, or any means proceeding directly or indirectly from himself; and, in such case, he may be tried and punished in the county where the offense was consummated." *Illinois* Rev. Stat. 1891, p. 525, § 401.

In *Kansas*, one who, in *Missouri*, forged a time-check upon a railroad company having its treasury in *Kansas*, which check was first paid by the company's agent in *Missouri*, who was afterward allowed credit therefor by the treasurer in *Kansas*, was held not to be indictable therefor in *Kansas*. *Ex p. Carr*, 28 Kan. 1.

In *Kentucky*, an indictment for receiving stolen goods should be in the county where they were received. *Allison v. Com.*, 83 Ky. 254.

In *Massachusetts*, a resident who by previous appointment made within, fights a duel without the state, inflicting a wound causing death within the state, may be indicted and tried therefor in the county where the death happened. *Massachusetts* Pub. Stat. 1882, p. 1135, § 9.

So, also, in *Michigan*, see *Michigan* Annot. Stat. 1882, § 9078.

The *Minnesota* statute hereon, is not restricted to a resident. *Minnesota* Stat. 1891, § 6108.

In *Missouri*, an attempt to commit a crime is cognizable where it was made. So held, as to an attempt to obtain money from a benevolent fraternity that had its supreme council in *Maryland*, by false personation in *Missouri*. *State v. Terry*, 109 Mo. 601.

In *Ohio*, one who in *Missouri* forged a deed uttered by his innocent agent in *Ohio*, may be indicted for the uttering and publishing. *Lindsey v. State*, 38 Ohio St. 507.

A prosecution under *Oregon* Comp. L. 1887, § 1746, for inveigling a person with intent to cause him to be sent out of the state against his will, can only be in the county where the fraudulent inducing took place. *In re Kelly*, 46 Fed. Rep. 653.

One may be convicted in *Tennessee* for fraudulent appropriation, in selling therein a horse hired in *Alabama*. *Lovelace v. State*, 12 Lea (Tenn.) 721.

Texas Criminal Code, art. 454, making punishable in *Texas* certain offenses committed elsewhere, and not requiring personal presence therein, applies

As to offenses conceived or begun in one county and executed or carried out in another, or committed partly in one county and partly in another, or upon county boundary, or upon a moving train or vessel, the state statutes and decisions are less uniform.¹

to a forgery in another state, of titles to lands in *Texas*. *Hanks v. State*, 13 Tex. App. 289.

1. Under the *Arkansas* constitution of 1874, requiring trial by a jury of the county, the legislature can confer upon a court of one county no jurisdiction over a crime committed in another, though within one hundred yards of the boundary. *Dougan v. State*, 30 Ark. 41.

In *California*, an indictment of Stakem, for stealing cattle in Placer county, is not sustainable by proof that Robles stole them therein, and took them into Yuba county, where they were sold by Stakem with guilty knowledge. *People v. Stakem*, 40 Cal. 599.

The superintendent of a ranch, whose duty it was to make entries on the books, and report all transactions to his principal at San Francisco, shipped horses to Sacramento, and there received the proceeds without making entry or report. It was held that the embezzlement was in Sacramento county. *Ex p. Palmer*, 86 Cal. 631.

In *Florida*, in the absence of contrary statutory provision, an action for obtaining property by false pretenses must be brought where the property was obtained, and not in another county where the pretenses were made. *Connor v. State*, 29 Fla. 455.

In *Georgia*, to establish the venue, the county line may be proved by hearsay. *Wimbish v. State*, 70 Ga. 718.

The *Illinois* statute, requiring an offense committed in one county to be prosecuted in another, if within one hundred rods of the line thereof, contravenes the constitutional provision for trial by a jury of the county and is void. *Buckrice v. People*, 110 Ill. 29.

In *Indiana*, as to the low-water mark on the Ohio, in determining the venue of an offense, see *Welsh v. State*, 126 Ind. 71.

In *Iowa*, "when a public offense is committed partly in one county and partly within another, or when the acts or effects constituting or requisite to the consummation of the offense, occur in two or more counties, jurisdiction is in either county. *Miller's Iowa Rev. Code* 1888, § 4159. Thereunder abor-

tion is indictable where the medicine was administered, and not where the miscarriage took place. *State v. Hollenbeck*, 36 Iowa 112.

The district court of *Iowa* may punish an offense committed on a boat moored to the east shore of an island in the Mississippi river east of the center of the channel. *State v. Mullen*, 35 Iowa 199.

One who, by falsely asserting in Wright county that he was authorized to collect a judgment, obtained the execution and delivery of a mortgage and notes in Polk county, was held to be indictable in the latter county. *State v. House*, 55 Iowa 466.

The *Kansas* statute hereon (*Kansas Crim. Code*, § 23) is substantially like that of *Iowa*. Where, on a prosecution for receiving stolen property, it appeared that the accused, to aid a claimant of a mare alleged to have been stolen in Kearney county, went from Grant county and took possession of the mare, it was held that this was not such an overt act as, coupled with an evil intent, would be punishable in Grant county. *State v. Rider*, 46 Kan. 332.

Where one in Lane county, before it was organized, committed perjury in swearing to an affidavit used by him in his suit in Ness county, to which Lane was judicially attached, it was held that an indictment therefor, after Lane was organized, was in Lane, and not in Ness county. *State v. Bunker*, 38 Kan. 737.

In *Kentucky*, the county in which the accused was first arrested is the county in which the offense is triable under section 24, *Crim. Code* of that state, although the arrest was at the instance of the authorities of the county where the larceny was committed. *Massie v. Com.*, 90 Ky. 485.

One authorized to solemnize matrimony in *Ohio*, but not under the *Kentucky* law, may be prosecuted in *Kentucky* for solemnizing matrimony on that side the low-water mark of the Ohio river. *McFall v. Com.*, 2 Metc. (Ky.) 395.

In *Maine*, for an application of the principle of new asportation in a case of theft of books, where the caption was before, and the retention continued

after, the statute was enacted, see *State v. Somerville*, 21 Me. 14; 38 Am. Dec. 248.

In *Massachusetts*, an indictment of A for larceny in Cumberland county, was held to be sustainable by proof that the goods were stolen by him in Suffolk county, and brought into Cumberland by B and C, who escaped, and that A was concerned with them there in the possession and disposal of the goods. *Com. v. Dewitt*, 10 Mass. 154.

An offense committed in one county, within one hundred rods of another, may be laid in the latter. *Com. v. Gillon*, 2 Allen (Mass.) 502.

In *Michigan*, an offense committed within a hundred rods of the dividing line, is punishable in either county. *How. Michigan Stat.* 1882, § 418. *Bayliss v. People*, 46 Mich. 221. One receiving stolen property, knowing it to be such, is punishable in the county where he received or had it, though it had been stolen in another county, § 9520. Accordingly, one residing in Van Buren county, within a hundred rods of Allegan county, and receiving upon his farm seed stolen in Allegan county, was held to be properly convicted in Van Buren county. *People v. Hubbard*, 86 Mich. 440. *Compare People v. Williams*, 24 Mich. 156; 9 Am. Rep. 119.

The *Minnesota* statute, allowing an offense committed in one county to be prosecuted in another, if within one hundred rods of the line thereof, does not contravene the constitutional provision for trial by a jury of the county; this must be construed with the provision for the legislature to create judicial districts. *State v. Robinson*, 14 Minn. 447.

In *Mississippi*, where an offense was committed in Chickasaw county, but before the prosecution Colfax county was formed including the *situs*, the venue was held to be laid properly in Colfax county. *Murrah v. State*, 51 Miss. 675. On division of Panola county, a conviction for murder outside the district where it was committed, was set aside. *Spivey v. State*, 58 Miss. 858.

In *Missouri*, the venue for the offense of obtaining goods by false pretenses, is properly laid in the county where they were delivered to the carrier. *State v. Lichliter*, 95 Mo. 402.

The defendant bought mules in Randolph county, giving therefore a draft on a St. Louis firm, and falsely representing that the firm had money to meet it.

The mules were sent to St. Louis. Th defendant went with them, sold them and absconded with the proceeds. It was held that the obtaining by false pretenses was in Randolph county where the defendant became invested with the property. *State v. Dennis*, 8 Mo. 589.

The *Missouri* statute (*Missouri Rev Stat.* 1889, § 3993), punishing crime committed on a river vessel or railway train, similar to that of *California* and *New York*, was declared to be constitutional, in a larceny case. *Steerman v. State*, 10 Mo. 503. *Compare* civil cases against vessels, under the *Missouri Act* of 1845. *Yore v. Steamboat "C. Bealer,"* 26 Mo. 426; *Wood v. Steamboat "Fleetwood,"* 27 Mo. 159.

In *Nevada*, the statute of which, as to stolen property brought from one county into another, is like that of *California* and *New York*, a person charged with larceny of cattle is indictable in any county through which he drove them; his every act is, in law, a removal of the property and keeping it from the owner. *State v. Brown*, 8 Nev. 208.

So, also, in *New York*, in a case of burglary and grand larceny. *Haskins v. People*, 16 N. Y. 344.

In *New York*, a man in one county promised to marry a woman, and on the same day, in another county, seduced her. It was held that under the *New York Crim. Code*, § 134, placing in either county the jurisdiction of an offense, the acts or effects requisite to the consummation of which occur in both, the grand jury of the latter county could indict him for the seduction. *People v. Crotty* (Supreme Ct.), 9 N. Y. Supp. 937.

Under the statute allowing an offense to be prosecuted in either county, if committed within 500 yards of the boundary, the space may be considered in either for purposes of allegation and proof. *People v. Davis*, 45 Barb. (N. Y.) 494; 56 N. Y. 95.

In *North Carolina*, in 1853, the statutory offense of stealing and carrying away a slave, was only indictable in the county of the original felonious caption. *State v. Groves*, Busb. (N. Car.) 402.

In *Ohio*, where A produced to B an accomplice, a paper on which had been written "Richard Brown," and B wrote above the name a promissory note, both intending criminal utterance, it was held that A might be convicted of forgery in the county where

So, also, as to the venue provisions in cases of publication of libels.¹

One who commits perjury, in giving a deposition to be used in a cause pending in another state, is indictable where the oath was administered.²

The statutory misdemeanor of doing an act in attempting to commit a crime, is punishable in the county where the crime, unless prevented, would have been committed.³

the promise was written, without showing in what county the name was written. *Devere v. State*, 5 Ohio Cir. Ct. Rep. 509.

An agreement between *Pennsylvania* and *New Jersey*, made in 1783, gave jurisdiction of criminal offenses committed on the Delaware river to the state in which the offender was first arrested. *Com. v. Frazee*, 2 Phila. (Pa.) 191.

In *Tennessee*, two persons, while chained together and in charge of the sheriff of Madison county, journeying to the Shelby county jail, stole a watch in Fayette county. It was held that they were indictable in Shelby; their carrying the watch thither was voluntary. *State v. Margerum*, 9 Baxt. (Tenn.) 362.

But a *Tennessee* statute, giving to any county jurisdiction of an offense committed on any vessel navigating the waters of the state "within this state or within five miles of the line thereof," was held to be unconstitutional. *Craig v. State*, 3 Heisk. (Tenn.) 227.

In *Texas*, the offense of sending a letter threatening to accuse one of crime, is committed in the county where it was mailed. *Landa v. State*, 26 Tex. App. 580.

A prosecution for acquiring a chattel by false representations, must be in the county in which it was delivered. *Sims v. State*, 21 Tex. App. 649.

The *West Virginia* Code, ch. 152, § 12, authorizing an offense committed in one county, within one hundred yards of the boundary, to be prosecuted in another, is unconstitutional. *State v. Lowe*, 21 W. Va. 783; 45 Am. Rep. 570.

In *Wisconsin*, one entering a moving car, in one county, intending to commit larceny in such car, is indictable in another county, for a larceny committed in the former. *Powell v. State*, 52 Wis. 217.

1. Libel is not an "infamous crime," within the *New York* Code Crim.

Proc., § 68, prescribing the jurisdiction of the Albany court of special sessions. *People v. Parr*, 42 Hun (N. Y.) 313.

A libel printed in a Providence newspaper having circulation in a *Massachusetts* county adjacent to *Rhode Island*, was held to be indictable in such county. *Com. v. Blanding*, 3 Pick. (Mass.) 304; 15 Am. Dec. 214. Compare *Rex v. Burdett*, 4 B. & Ald. 95, cited *supra*, this title, *In the English Practice—Extraterritorial Crime*; *Thorn v. Blanchard*, 5 Johns. (N. Y.) 508, which was a case from Albany county, in the *New York* court of errors, in 1809, to recover from the defendant for having, with twenty-three other persons, in Washington county, petitioned the state council to depose the plaintiff from the office of district attorney; *Thomas v. Croswell*, 7 Johns. (N. Y.) 264; 5 Am. Dec. 269, where the libelous words were, "a misrepresentative in Congress," etc.; and *People v. Croswell*, 3 Johns. Cas. (N. Y.) 337, a case causing the enactment of the *New York* Libel Act of 1804.

In *California*, an indictment for a newspaper libel lies in the county where the paper is published, or where the person libeled resides. *In re Kowalsky*, 73 Cal. 120.

In *Texas*, a civil action for a newspaper libel may be brought in the county where the paper was circulated, although not that of its original publication. *Belo v. Wren*, 63 Tex. 686.

2. So held, in a subornation case in *Massachusetts*, the deposition, taken in Boston, being in a slander suit pending in *New York*. *Com. v. Smith*, 11 Allen (Mass.) 243.

3. Where Griffin, in Morgan county, took on tin, an impression of the key to the lock of a jewelry store therein, and in Chatham county forged a key which he sent to Jones in Morgan county, who had feignedly agreed to steal jewelry and then burn the store, it was held that Griffin was indictable in Morgan county. *Griffin v. State*, 26

In some states, the jurisdiction in the case of an accessory is expressly prescribed by statute.¹ In the case of an accessory before the fact, the venue may be laid at the place where the party becomes an accessory.²

Ga. 493. See also *People v. Bush*, 4 Hill (N. Y.) 133; *Rex v. Higgins*, 2 East 5.

An attempt to commit a misdemeanor is indictable where the overt act was done. *Com. v. Springs*, 2 Leg. Gaz. (Pa.) 93; *Com. v. Gillespie*, 7 S. & R. (Pa.) 469; 10 Am. Dec. 475.

The attempt must import some overt act. *Reg. v. Daniell*, 6 Mod. 99. Compare *State v. Avery*, 7 Conn. 266; 18 Am. Dec. 105. A mere intent, with no movement toward executing, is not an attempt. *Bevington v. State*, 2 Ohio St. 160; *Campbell v. State*, 35 Ohio St. 70.

An attempt to commit a crime imports a want of successful purpose. *Darrow v. Family Fund Soc.*, 42 Hun (N. Y.) 245.

1. In *California*, an accessory is indictable in the county where the accessory offense was committed, although the principal offense was committed in another county. *California Penal Code*, § 791.

Section 791 does not conflict with section 971, abrogating the distinction between accessories before the fact and principals. *People v. Hodges*, 27 Cal. 340. In this case, an indictment in El Dorado county for inciting in Santa Clara county, two hundred miles away, a murder committed in El Dorado county, the court, by Shafter, J., quoted Archibald, Cr. Pr. (8th ed.), p. 12, that, to be a principal and not an accessory, the inciter must be "at such convenient distance as to be able to come to the immediate assistance of his associates if required, or to watch to prevent surprise, or the like."

The jurisdiction against a principal not present, is in the same county as if he were present and aiding and abetting. *California Penal Code*, § 792.

Prize fighting, or a conspiracy thereto, is punishable in any county in which any act is done toward the commission of the offense, or into, out of, or through which the offender passed to commit the offense, or where the offender is arrested. *California Penal Code*, § 795.

2. In *State v. Chapin*, 17 Ark. 561; 65 Am. Dec. 452, indictment for arson, in counseling, in *Ohio*, the burning, in

Arkansas, of the steamboat "Martha Washington," the court, by English, C. J., said: "If the crime is the immediate result of his act he may be made to answer for it in our courts, though actually absent from the state at the time he does the act, because he is constructively present, or present in contemplation of law."

In *Missouri*, in 1842, R. was charged with shooting B. with intent to kill, and Joseph Smith, the Mormon prophet was charged with being an accessory. On requisition upon the governor of *Illinois*, Smith was arrested, but on *habeas corpus* to the *United States* circuit court for *Illinois*, he was discharged; the affidavit of B. merely averring belief that Smith was accessory without stating the facts whereon this was founded. *Ex p. Smith*, 3 McLean (U. S.) 121.

In *California*, "the distinction between an accessory before the fact and a principal," is abrogated. *California Penal Code* 1885, § 971; *People v. Rozelle*, 78 Cal. 84.

In *Connecticut*, the doctrine has never been recognized that a resident of one state, who procures a felony to be committed in another state, by a guilty agent, without being personally present to assist in the commission of the offense, cannot be punished in the state where the offense is committed. *State v. Grady*, 34 Conn. 118.

In *Georgia*, the common-law rule is still in force, that, in misdemeanors there are no accessories before the fact all are principals. *Kinnebrew v. State* 80 Ga. 232. As to presence, etc., see *Pinkard v. State*, 30 Ga. 757, a case of stealing slaves.

In *Indiana*, in 1862, the conviction of J. for inciting, in *Ohio*, one B. to commit a larceny in *Indiana*, was reversed on appeal. *Johns v. State*, 19 Ind. 421. 81 Am. Dec. 408.

In *Kentucky*, in 1877, an accessory after the fact of murder, was held to be indictable where the accessory act was done. *Tully v. Com.*, 11 Bush (Ky.) 154.

In *Mississippi*, as to the presence of the accessory, see *Hogsett v. State*, 41 Miss. 522; *Unger v. State*, 42 Miss. 642

And the rule is similar, in the case of conspirators.¹

(2) *Extraterritorial Offenses*.—Ordinarily, when an offense is divisible in sections—one, of preparation, in one place, and another, of execution, in another place—the tribunals of either place have jurisdiction of the entire offense.² In general, the

In *New Hampshire*, an accessory in *Maine*, to arson in *New Hampshire*, was held to be indictable in *New Hampshire*, in the county of the principal offense. *State v. Moore*, 26 N. H. 448; 59 Am. Dec. 354.

In *New York*, one may be indicted and tried in the county where he became an accessory, or in that where the principal felony was committed. *Birds. New York Stat.*, p. 793, § 11.

In *Wixson v. People*, 5 Park. Cr. Rep. (N. Y.) 119, the court, by Knox, J., after distinguishing felonies from misdemeanors, where there are no accessories, said: "To warrant one's conviction as principal, it is enough that he be constructively present. By this is meant that he must be of the party, and do some act in execution of the common design, or be near enough to the scene of operations to assist in carrying it out, or to aid those who are immediately engaged in it to escape, should necessity require." *State v. Ricker*, 29 Me. 84.

As to presence, etc., see *People v. Bassford*, 3 N. Y. Cr. Rep. 219.

In *Ohio*, as to presence, etc., see *Breese v. State*, 12 Ohio St. 146; 80 Am. Dec. 340, a case of confederates enticing away the owner, while another breaks open the store.

In *Texas*, one may be prosecuted for aiding his accomplice to fabricate, in another state, a deed purporting to convey land in *Texas*. *Rogers v. State*, 11 Tex. App. 608.

In *Texas*, in 1881, one forging in Chicago, a deed of *Texas* land, was held to be indictable in *Texas*. *Ex p. Rogers*, 10 Tex. App. 655; 38 Am. Rep. 654.

Under the *Texas Penal Code*, art. 79, and *Code Crim. Proc.*, art. 216, one cannot be held as an accomplice in the county where the stolen property was carried, unless he advised, aided, and encouraged the principal in that county. *West v. State*, 28 Tex. App. 1.

In *Washington*, it is provided "no distinction shall exist between an accessory before the fact and a principal." *Washington Annot. Stat.* 1891, § 1189.

In *Wisconsin*, an accessory before

the fact is punishable in the same manner as the principal felon. *Wisconsin Annot. Stat.* 1889, § 4613. As to presence, etc., see *Connaught v. State*, 1 Wis. 159; 60 Am. Dec. 370.

1. In *People v. Mather*, 4 Wend. (N. Y.) 259; 21 Am. Dec. 122, the "Masonry case," charging conspiracy to abduct and imprison William Morgan, the court, by Marcy, J., said: "If conspirators enter into an illegal agreement in one county, . . . go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement."

In *Pennsylvania*, in 1869, a conspiracy to obtain a billiard saloon in Philadelphia, through false pretense of having liquors in bond in *New York* to pay therefor, was held to be indictable in any county where the overt act was committed. *Com. v. Corlies*, 3 Brew. (Pa.) 575. Compare the petroleum conspiracy case, *Com. v. Tack*, 1 Brew. (Pa.) 517; also the lottery-ticket case, *Com. v. Gillespie*, 7 S. & R. (Pa.) 469.

The fact of confederating is the gist of the offense. A conspiracy in *Pennsylvania*, to pass counterfeit notes of an *Ohio* bank, is indictable in *Pennsylvania*. *Collins v. Com.*, 3 S. & R. (Pa.) 220. Compare *Com. v. McGowan*, 2 Pars. Eq. Cas. (Pa.) 341. Similarly, as to a conspiracy in *Pennsylvania* to get one court-martialed in Fort Columbus, *New York*, for desertion, and obtain a reward. *Com. v. McClean*, 2 Pars. Eq. Cas. (Pa.) 367.

In *California*, a railway company may be sued for a wrongful refusal to receive and transport lumber, in the county where the tender and refusal was made, although the complaint sets forth a conspiracy therefor in another county. *Chase v. South. Pac. Coast R. Co.*, 83 Cal. 468.

In *Michigan*, a conspiracy to cheat may be tried wherever an overt act, in pursuance thereof—e. g., getting money from a bank—has been committed. *People v. Arnold*, 46 Mich. 268.

2. See CRIMINAL PROCEDURE, vol. 4, p. 736.

author of a libel, or of a letter containing false pretenses, is indictable in the place from which it was sent, as well as in the place in which it was received.¹

As to indictment for homicide, where death results in one county from a felonious stroke or poisoning dealt in another many states have reenacted the English statute,² allowing the venue to be in the county of the blow. In others, it may be either in the county where the cause was administered or in the one where the death occurred.³

1. Where R., by mail, sent a note with forged indorsements from New York City to E., in Genesee county, for the purpose of obtaining credit upon it, it was held that the crime was not consummated until the note was received by E., and that, in indicting for uttering, etc., the venue was properly laid in Genesee county. *People v. Rathbun*, 21 Wend. (N. Y.) 509.

Where S., in Ohio, drew and signed receipts falsely acknowledging the receipt of pork, subject to the order of a commission firm in New York, and A. obtained money by exhibiting them to the firm, it was held that, in indicting A. and S. therefor, the venue was properly laid in New York. *People v. Adams*, 3 Den. (N. Y.) 190; 45 Am. Dec. 468; *Adams v. People*, 1 N. Y. 173. Compare the lottery ticket case, *Com. v. Gillespie*, 7 S. & R. (Pa.) 469; 10 Am. Dec. 475; also the case of the forged county bonds, *People v. Hall*, 57 How. Pr. (N. Y. Supreme Ct.) 342. See also Judge Thatcher's charge to the grand jury, Boston Mun. Ct. 1832, as to "incendiary" (abolitionist) publications, 8 Am. Jurist 66. See also therein, on p. 69, the republished case of Harvey, who, in 1828, had been convicted in Boston for procuring from a Boston firm \$200, through an adroit false pretense letter written and mailed at Albany, New York.

In Colorado, bigamy may be prosecuted in the county where the cohabitation with the second wife took place, although the second marriage was without the state. *Colorado Annot. Stat.* 1891, § 1317.

In North Carolina, in 1799, a person arrested for counterfeiting, in Virginia, money of North Carolina, was discharged, he being punishable in Virginia. *State v. Knight*, Tayl. (N. Car.) 65.

In Ohio, delivery to a carrier in another county, of a letter containing false pretenses, completes the offense

of obtaining, etc. *Norris v. State*, 2 Ohio St. 217; 18 Am. Dec. 291. As to false pretenses made in another state see *Wilcox v. Nolze*, 34 Ohio St. 520.

2. Stat. 2 & 3 Edw. VI., ch. 24, § 2.

3. The Massachusetts Bill of Rights requiring, in criminal prosecutions, the verification of facts in the vicinity where they happen, etc., is not contravened by Massachusetts Pub. Stat. 1882 p. 1197, §§ 19, 22. Where the mortal injury is inflicted in one county, and death ensues in another, the venue for prosecution may lie in either. So, also as to an offense committed within one hundred rods of the boundary line of two counties. Where an offense is committed at sea within one league of shore it may be prosecuted in the adjacent county. *Massachusetts Pub. Stat.* 1882 p. 1197, §§ 19, 22; *Com. v. Parker*, 1 Pick. (Mass.) 550.

In *Com. v. Costley*, 118 Mass. 25 where a pistol shot had been fired in one county, and the body of the deceased was found below a river draw bridge, in another county, with weight attached, the court, by Gray, C. J., in construing the Massachusetts statute said: "For the purposes of allegation, prosecution and punishment, each county may be deemed to extend one hundred rods into the county adjoining."

In Tennessee, within Tennessee Code 1884, § 5800, the murder is adjudged to be "committed" in the county in which the blow was struck. *Riley v. State*, 1 Humph. (Tenn.) 646.

In California, it was similarly held though the statute was changed between the blow and the death. *People v. Gill*, 6 Cal. 637.

In Minnesota, so held, where the death was in Wisconsin. *State v. Gesert*, 21 Minn. 369.

In Alabama, so held, where the death was in Georgia. *Green v. State*, 66 Ala. 40; 41 Am. Rep. 744.

In New Jersey, it is held that the infliction in New York, of a mortal

bruise whereof one dies in *New Jersey*, is no crime against *New Jersey*. *State v. Carter*, 27 N. J. L. 499.

In *Kansas*, the indictment need allege only that the mortal stab was given in the county of the prosecution; an omission to specify where the death occurred is immaterial. *State v. Bowen*, 16 Kan. 475.

In *Louisiana*, similarly held, although the death occurred outside the state, *State v. McCoy*, 8 Rob. (La.) 545; 41 Am. Dec. 301; or on Lake Borgne, *State v. Foster*, 7 La. Ann. 255; 8 La. Ann. 290; 58 Am. Dec. 678.

In *Michigan*, if a felonious, mortal wound be inflicted "on the high seas, or on any other navigable waters, or on land, either within or without the limits of this state, by means whereof death shall ensue in any county thereof, such offense may be prosecuted and punished in the county where such death may happen." *Michigan Comp. L.*, § 5944; Annot. Stat. 1882, § 9420.

In a case already stated *supra*, this title, *Extraterritorial Injuries*, *Tyler v. People*, 8 Mich. 334, the court, by Manning, J., said: "The shooting itself, and the wound which was its immediate consequence, did not constitute the offense of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery, not murder; and would have been criminally accountable to the laws of *Canada* only. But the consequences of the shooting were not confined to *Canada*. They followed Jones into *Michigan*, where they continued to operate until the crime was consummated in his death. If such a killing did not, by the common law, constitute murder in *Michigan*, we think it the clear intent of the statute to make it such, to the same extent as if the wounding and the death had both occurred in the state."

In *Massachusetts*, this decision was approved in a case under a similar statute, *Com. v. Macloon*, 101 Mass. 17; 100 Am. Dec. 89, the court, by Gray, J., said: "The able and learned dissenting opinion of Mr. Justice Campbell, proceeds upon the ground that no part of the criminal act of the defendant was done at the place of the death, a position which seems to us to be untenable."

In the said dissenting opinion (*Tyler v. People*, 8 Mich. 348), Judge Campbell says: "Tyler committed no act of violence within our borders. For aught that we know, he might have been oc-

cupied in yielding aid instead of injury. What then can render him a criminal against this state? When and how did he disturb our peace and good order? Jones was not brought here in the prosecution of any murderous design. So far as Tyler is concerned, he might have been carried to *Canada* as well. Had Jones lived for a few months, although afterwards dying of his wounds, he might have traversed half the states of the Union, and Tyler could have had no voice in controlling his motions. He might go where murder is punished by death, or he might come here, where it is merely a state prison offense; and yet Tyler would be responsible, if this prosecution can be maintained, to any state or country against which the voluntary choice of Jones might make him a constructive offender. Inasmuch as all present encouraging a prize fight are principal offenders, in case either of the combatants is slain, or subsequently dies of his injuries, and are thus made guilty of murder or manslaughter, in case either of the persons, who have recently [1860] edified the English public by such an exhibition should visit this state, and die here within a year and a day, of injuries there received, the whole distinguished company that attended that exhibition would become guilty of manslaughter against the peace and dignity of *Michigan*. And the resort of invalids to hospitals and watering places for treatment, may, by the death of anyone, subject any absent aggressor to the criminal laws of a state he has never seen, should his occasion call him thither at any subsequent period of his life. This is making the guilt of the offender spring from the acts of others, and not from his own. And it is importing into the criminal law a principle at variance with its whole reason. How can the public be wronged by the peaceable entrance of a sick or wounded man, or by his dwelling or dying here? We have no right to exclude him unless his disease endangers the public health. And if any harm arises from his coming, he, or those who bring him, are the public disturbers, and not those who have somewhere else contributed to cause his infirmity or disease, but who could not prevent him from going where he should see fit to go."

In *U. S. v. Guiteau*, 1 Mackey (D. C.) 582; 47 Am. Rep. 247, the court, by Cox, J., adverted to the foregoing

2. In Chancery.—Ordinarily, procedure in equity follows the law as to whether the domicile of the parties or the *situs* of the subject-matter shall control the venue. The statutes of each state more or less expressly prescribe the jurisdiction.¹

Massachusetts and *Michigan* decisions, said: "This does not militate against the jurisdiction of the original county or state; it simply asserts an additional jurisdiction."

1. In *Arkansas*, an action to enjoin a sale of land under a fraudulent mortgage, or for an account of the amount due on the mortgage and to cancel fraudulent conveyances and inquire into alleged partnership matters in the land, is not, within the *Arkansas* Dig. Stat., § 4532, one for the "recovery of an estate or interest in land." An amendment setting up a title and praying recovery may be stricken out. *Jones v. Fletcher*, 42 Ark. 422.

A suit to enjoin a railway company from removing earth is, within the *Arkansas* Civ. Code, § 81, "an action for injury to real property," and, therefore, is to be brought in the county within which some part of the subject is situated. *Cox v. St. Louis, etc., R. Co.*, 55 Ark. 454.

Under *California* Code Civ. Proc., § 392, an action, by the owner of the undivided interest, to have an administrator's sale of another undivided interest in the same land set aside as fraudulent, lies where any part of the land is situated. *Sloss v. DeToro*, 77 Cal. 129. Under the said section 392, an action to reform a contract for sale of land must be brought where the land lies. *Franklin v. Dutton*, 79 Cal. 605.

The *California* constitutional requirement, that an action to enforce a lien on real estate be local, does not apply to enforcement of a trust on real and personal estate. *Le Breton v. San Francisco Super. Ct.*, 66 Cal. 27.

A suit to compel reconveyance of both real and personal property and for an accounting of rents and profits, and for a personal judgment, must be brought in the county where the defendant resides. *Smith v. Smith*, 88 Cal. 572.

A suit to enjoin the erection of a dam threatening injury to the defendant's land, must be brought where the land is situated. *Drinkhouse v. Spring Valley Water Works*, 80 Cal. 308.

In *California*, as to the venue of a complaint for dissolution of a partner-

ship having an interest in a mine, see *Clark v. Brown*, 83 Cal. 181.

In *Alabama*, a bill against the defendants in different counties should be brought in the county where the "material defendant" resides, against whom a decree is sought. *Lewis v. Elrod*, 38 Ala. 17.

The right, under the *Alabama* Code § 3760, of election of jurisdiction, does not exist where the relief sought is as to both land and personal property. *Ashurst v. Gibson*, 57 Ala. 584.

A bill to foreclose a mortgage of land lying in two counties, may be filed in either. *Bolling v. Munchus*, 65 Ala. 558.

A judgment debtor, garnished to subject the proceeds of the judgment to a claim against the judgment creditor, is a "material defendant" within whose district, under the *Alabama* Code, § 3421, the bill must be brought. *Stree v. Selig*, 88 Ala. 533.

In *Georgia*, a bill to enjoin trespass by felling timber is transitory, and no local. *Powell v. Cheshire*, 70 Ga. 357 48 Am. Rep. 572.

Unless praying an injunction to stay law proceedings, a bill must be filed in the county where a defendant resides against whom relief is prayed. This applies to a collusive agreement of an administrator in fraud of heirs or creditors, although his refusal to sue for land equitably belonging to the estate would enable the heirs to bring a local action. *Edwards v. Kilpatrick*, 70 Ga. 328.

Under *Georgia* Code, § 5169, a suit to annul a fraudulent conveyance lies in the county of the debtor's residence though the alleged fraudulent grantee resides elsewhere. *De Lacy v. Hurst*, 83 Ga. 223.

The *Georgia* constitutional requirement that the defendants, in all civil cases, be sued in the county where they reside, does not apply to equity cases. *Rice v. Tarver*, 4 Ga. 571.

Although in the *Georgia* Code, § 2237, stock in a manufacturing company, "whose principal investments are in realty and machinery attached thereto," is deemed realty, yet a bill to set aside a sale of such stock may be brought in another county, where it

one of the defendants resides. *Eagle, etc., Mfg. Co. v. West*, 61 Ga. 120.

A wife, adopting as her residence the place of her abandonment in *Georgia*, may there maintain a bill for alimony, the husband, a resident of *New York*, being served with process in *Georgia*, when in the act of deserting her. *Campbell v. Campbell*, 67 Ga. 423.

A bill by executors against an administrator, relating to land in *Glascock* county, may lie in *Washington* county, where the defendant, against whom the substantial relief is sought, resides. *Fulgham v. Pate*, 77 Ga. 454.

A bill to set aside a sheriff's deed must be brought in the county where the grantee resides; he being, within the *Georgia* Const., art. 6, § 16, pl. 3, the one against whom substantial relief is prayed. *Caswell v. Bunch*, 77 Ga. 504.

In *Illinois*, the provision of the chancery code making land suits local, is only declaratory of a general principle of equitable relief. But when the relief sought does not require the court to deal directly with the estate itself, the case is not within the statute. Accordingly a creditor's suit to set aside a fraudulent conveyance of his debtor may be brought in any county where the debtor and fraudulent vendee are found. In such case the court does not act upon the land itself, but merely declares the conveyance void, and removes the same as an obstacle to the creditor's legal remedy. *Johnson v. Gibson*, 116 Ill. 294.

Resident creditors of an *Alabama* corporation, cannot maintain a suit in *Illinois* to reach unpaid stock subscriptions, until they have recovered judgment in *Alabama*, and had execution thereon returned unsatisfied. *Turner v. Alabama Min., etc., Co.*, 25 Ill. App. 144.

A partner's suit for an accounting may be brought where one defendant resides, although the partnership personal property is in another county. *Quinn v. MacMahan*, 40 Ill. App. 593.

In *Indiana*, an action to restrain a mortgagee of land in *Kosciusko* county from parting with the mortgage, is not local within the *Indiana* Rev. Stat. 1881, § 307, and may be brought in *Marshall* county. *Becknell v. Becknell*, 110 Ind. 42.

In *Iowa*, the fact that an injunction is asked as an ancillary remedy, does not render the action a local one. *Baker v. Ryan*, 67 Iowa 708.

Under the *Iowa* Code, § 3396, a suit

to enjoin collection of a judgment must be brought in the county of the rendition thereof. *Phelan v. Johnson*, 80 Iowa 727. But an equitable action to cancel an absolutely void judgment and enjoin its collection may be maintained in any court having jurisdiction of such matters, regardless of the court from which execution has issued. *State Ins. Co. v. Waterhouse*, 78 Iowa 674.

A foreclosure suit, wherein no personal judgment can be had, is not within the *Iowa* Code, § 2578, and must be brought where the land lies. *Orcutt v. Hanson*, 70 Iowa 604.

In *Kansas*, an action to enjoin a fraudulent judgment may be brought in any county in which it is sought to be put in force, though rendered in another county. So held, on a petition by a wife for divorce alleging a collusive judgment between the husband and others to defeat her right to alimony. *Busenbark v. Busenbark*, 33 Kan. 572.

In *Kentucky*, an action to rescind a contract for the sale of land is transitory. *Kendrick v. Wheatley*, 3 Dana (Ky.) 34; *Thompson v. Elmore* (Ky. 1892), 18 S. W. Rep. 235.

An action to quiet title to land, involving the validity of a certain judgment of the circuit court of one of the two counties in which the land lies, may be brought in the other county. *Howe v. Anderson* (Ky. 1890), 14 S. W. Rep. 216.

An action by a judgment creditor, to set aside a fraudulent conveyance, may be brought where the land lies, though the debtor resides in another county where the judgment was recovered. *Marcum v. Powers* (Ky. 1888), 9 S. W. Rep. 255; 10 Ky. L. Rep. 380.

In an action for specific performance of a land contract, the court may also render a personal judgment, although the defendant is not a resident of the county. *Collins v. Park* (Ky. 1892), 18 S. W. Rep. 1013.

In *Massachusetts*, one *Ohio* corporation, which in *Ohio* has obtained a judgment against another, may maintain a bill in equity against the latter's officers, residing and keeping the books in *Massachusetts*, for discovery of the stockholders' names and shares, in order, by a suit in *Ohio*, to enforce a personal liability imposed by the *Ohio* law. *Post v. Toledo, etc., R. Co.*, 144 Mass. 341; 59 Am. Rep. 86.

In *Michigan*, a partner's action for an accounting and division of assets as personalty, lies in the county where

the parties live and do the firm's business, irrespective of the location of its lands. *Godfrey v. White*, 43 Mich. 171.

Under *Michigan* Annot. Stat. 1882, § 6612, the assignee of a judgment recovered in one county, may, in another wherein he resides, maintain a creditor's bill thereon. *Rankin v. Rothschild*, 78 Mich. 10.

The special provision of *Mississippi* Code 1883, § 2553, making local a suit for partition, or to quiet title, controls the general provision, section 1847. *Nugent v. Powell*, 63 Miss. 99.

In *New Jersey*, when a case has been heard by the vice-chancellor without objection, and the chancellor has adopted his advice and signed a decree, it is too late to raise on appeal the question as to the vice-chancellor's right to hear the case. *Delaware Bay*, etc., *R. Co. v. Markley*, 45 N. J. Eq. 139.

In *New York*, an action against a national bank in another county, may be brought in the county of the plaintiff's residence. *Talmage v. Third Nat. Bank*, 91 N. Y. 531.

An action by a creditor, as *cestui que trust* under an assignment, seeking to restrain enforcement of judgments, must be brought in the county where real estate affected thereby is situated. The nature of the action cannot be changed by stipulation. *Sweetser v. Smith*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 319.

An action to set aside as fraudulent an assignment for the benefit of creditors that includes real estate, is local within *New York* Code Civ. Proc., § 982, and can be tried only where some of the land lies. *Moss v. Gilbert*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 202.

But an action by a second mortgagee, to compel the first to assign, is not local. *Yates County Nat. Bank v. Blake*, 43 Hun (N. Y.) 162.

A creditor's action to set aside an assignment of property embracing real estate, is local. *Acker v. Leland*, 96 N. Y. 383.

A receiver's action to recover real and personal estate, must be brought in the county where the land lies. *Thompson v. Heidenrich*, 66 How. Pr. (N. Y. Supreme Ct.) 391.

An action involving the question whether a conveyance is in fraud of creditors, is not necessarily local within *New York* Code Civ. Proc., § 123, and need not be where the land lies. *Rawles v. Carr*, 17 Abb. Pr. (N. Y. Supreme Ct.) 96. So, also, an action to set aside a statutory foreclosure of a

mortgage of real property, and to redeem the land from the mortgage. *Hubbell v. Sibley*, 4 Abb. Pr. N. S. (N. Y. Supreme Ct.) 403.

Under *New York* Code Civ. Proc., § 982, a suit to compel specific performance of a contract to exchange lands is triable in the county where the defendant's land is situated. *Kearr v. Bartlett*, 47 Hun (N. Y.) 245.

In *North Carolina*, it has been held that a stockholders' suit against officers of a corporation, involving construction of its charter, should be brought in the state of its incorporation, although a suit praying an injunction, etc., may be brought in another state where it has property. *Moore v. Silver Valley Min. Co.*, 104 N. Car. 534.

In *Oregon*, under the general equity powers of the court, a chattel mortgage may be foreclosed in any county where service may be had upon the defendant. *Commercial Nat. Bank v. Davidson*, 18 Oregon 57.

In *Pennsylvania*, ancillary proceedings by bill in equity, execution, or otherwise, must come in whichever court of common pleas took jurisdiction of the original proceeding. *Bryan v. Dailey*, 14 Phila. (Pa.) 90. Otherwise, as to ejectment by a purchaser at a sheriff's sale. *Letchford v. Dewees*, 14 Phila. (Pa.) 108.

An action to establish a resulting trust, and thereupon obtain partition lies in the county where the land is situated; the *Pennsylvania* Act of 1836 as to the court's control of the trustee, does not apply. *Hayes' Appeal*, 123 Pa. St. 110.

In *South Carolina*, in an action to foreclose a mortgage brought in the county where part of the property is situated, and in which one of the defendants resides, the court may render judgment for deficiency against a debtor residing and served in another county. *Wagener v. Swygert*, 30 S. Car. 296.

Under *South Carolina* Code, § 146, an action for an accounting and to set aside a judgment and a sale thereunder, lies in the county of the defendant's residence. *Bell v. Fludd*, 28 S. Car. 313.

A suit to subject devised land to pay the devisor's debts, and to vacate the devisee's deeds, being one to recover an interest in real estate, within *South Carolina* Gen. Stat. 1882, § 1983, must be brought in the county where the lands are located. *Bacot v. Lowndes*, 24 S. Car. 392.

In *Tennessee*, a county may, in its

3. In Probate.—The statutes of each state very definitely prescribe the jurisdiction of courts having cognizance of the probate of wills, the contest thereof, settlement of decedents' estates, and suits by or against their representatives.¹

own chancery court, maintain a bill to have declared void an act annexing certain of its territory to another county, in contravention of the *Tennessee* Const., art. 10, § 4. *Union County v. Knox County*, 90 Tenn. 541.

Under the *Tennessee* Code, § 4311, requiring a bill against a non-resident to be in the chancery district in which the cause of action arose, a suit by one partner against the other is properly brought where the firm's business was conducted, although its object is to impound a judgment in the latter's favor in another county. *Wells v. Collins*, 11 Lea (Tenn.) 213.

A bill to reach trust funds invested in land need not be brought in the county where the land lies. *Whittaker v. Wittaker*, 10 Lea (Tenn.) 93.

In *Texas*, a suit to remove an executor and restrain waste lies in the county where the will was probated, though other than that of his residence. *Bondies v. Buford*, 58 Tex. 266.

As to what is a suit for specific performance of a land contract within the venue statute, see *Cavin v. Hill*, 83 Tex. 73.

A suit, by an equitable owner for partition of land, lies where it is situated, although other relief is sought which, if alone, would require suit in the county of the defendant's domicile. *Coryell v. Linthecum* (Tex. 1889), 11 S. W. Rep. 1092.

Under the *Virginia* Code, requiring a suit for an injunction to be brought where the alleged condemnation of the right of way is threatened to be done, an entry on land can be enjoined only in the county wherein it lies. *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932.

In *West Virginia*, a grantor's action to have the deed declared a mortgage, may be brought where the grantee resides, though the land lies in another county. *Lawrence v. Du Bois*, 16 W. Va. 443.

Under the *West Virginia* Code 1887, ch. 123, a suit to enjoin interference with railroad ties, may be brought in the county where part of them are found, if the defendant was served therein, though he resides in another

county, and the contract on which the plaintiff bases title was made there. *Toledo Tie, etc., Co. v. Thomas*, 33 W. Va. 566.

1. In *Alabama*, a will must be proved. *First*, when the testator, at the time of his death, was an inhabitant of the county, in the probate court of such county. *Second*, when the testator, not being an inhabitant of the state, dies in the county, leaving assets therein, in the probate court of such county. *Third*, when the testator, not being an inhabitant of the state, dies out of the county, leaving assets therein, in the probate court of the county in which such assets or any part thereof are. *Fourth*, when the testator, not being an inhabitant of the state, dies, not leaving assets therein, and assets thereafter come into any county, in the probate court of any county into which such assets are brought. *Alabama* Code 1886, § 1976.

A will contest must come "in the district in which such will was probated, or in the district in which a material defendant resides." *Alabama* Code 1886, § 2000.

Executors or administrators are liable to be sued in their representative characters, in all cases, in the county in which letters were granted; and service of summons may be made on them in any county in the state. *Alabama* Code 1886, § 2262.

In *Arkansas*, "an action to establish or set aside a will must be brought in the county in which the will, if valid, ought, according to law, to be recorded." *Arkansas* Dig. Stat. 1884, § 4996.

In *South Carolina*, the court of common pleas of Abbeville county cannot render judgment against an administrator, resident in Greenville county, of an intestate also a resident there, for an account of his administration of an estate of which he had been appointed receiver in Abbeville county, where the estate was located. *Ware v. Henderson*, 25 S. Car. 385.

In *Kentucky*, a guardian's action for partition sale of land lying in two counties, may be brought in the one where the ward's ancestor died. *Phalan v. Louisville Safety Vault, etc., Co.*, 88 Ky. 24.

V. JUDICIAL COGNIZANCE OF BOUNDARIES—(See also JUDICIAL NOTICE, vol. 12, p. 169).—Whether a particular place is within the boundaries of a state or county or other political district, is not a question of law for the court, but a matter of fact for the jury to determine.¹

State legislation or agreement cannot restrict federal jurisdiction; but it may give definiteness to some questions which Congress has necessarily left undetermined.²

A court created within and for a particular territory, is bounded in the exercise of its power by the limits thereof, unless there be some special legislative authorization to the contrary.³

A federal court is the supreme judicial tribunal to determine its jurisdiction as against a state court.⁴

The Supreme Court of the *United States* has original jurisdiction, under the constitution, of controversies between states concerning their boundaries.⁵

The Indian nations are distinct, independent political communities.⁶

1. In *U. S. v. Jackalow*, 1 Black (U. S.) 484, 487 which was a case of piracy occurring on a vessel five miles east of Lyons' Point, the boundary between *New York* and *Connecticut*, the court, by Nelson, J., said: "The description of a boundary must be a matter of construction which belongs to the court; but the application of the evidence in the ascertainment of it, as thus described and interpreted, with a view to its location and settlement, belongs to the jury. Courts take notice of the territorial extent of the jurisdiction and sovereignty, exercised *de facto*, by their own government, and of the local divisions of their country, as into states, . . . so far as political government is concerned, . . . but not of their precise boundaries, further than they may be described in public statutes." 1 Greenl. Ev. (14th ed.), § 6.

2. Courts take notice of government surveys. *Gardner v. Eberhart*, 82 Ill. 316. *E. g.*, as to the Hudson river boundary between *New York* and *New Jersey*. *Hall v. Devoe Mfg. Co.*, 14 Fed. Rep. 183. Under U. S. Act 1789, making the *New Jersey* judicial district, "consist of the State of *New Jersey*," the boundaries of the district and the territorial jurisdiction of the federal courts coincide with the boundaries of the state, and vary with their change by the *New York* and *New Jersey* compact of 1833. *In re Devoe Mfg. Co.*, 108 U. S. 401. See *People v. Central R. Co.*, of N. J., 42 N. Y.

283; *Schooner L. W. Eaton*, 9 Ben. (U. S.) 289.

3. *Ex p. Graham*, 3 Wash. (U. S.) 456; *Picquet v. Swan*, 5 Mason (U. S.) 35.

In *Toland v. Sprague*, 12 Pet. (U. S.) 300, 337, where the plaintiff was domiciled in *Pennsylvania*, and the defendant in *Massachusetts*, but long resident at Gibraltar, and the attached goods were found in *Pennsylvania*, and where it was not necessary to decide the question of the jurisdiction of the *United States* courts in foreign attachments the court, by Taney, C. J., remarked that the circuit court decisions thereon had not been uniform, and that upon this point, "the construction of the act of 1789 is not free from difficulty."

Where an essential portion of the defendants resided in *Alabama*, and would not voluntarily appear, a bill in equity in *Mississippi*, praying interpleader, etc., was held to be properly dismissed. *Herndon v. Ridgway*, 17 How. (U. S.) 424. See also *Jobbins v. Montague*, 6 Nat. Bank Reg. 117, proceedings under the bankrupt act.

4. See the "*Olmstead case*," U. S. v. Peters, 5 Cranch (U. S.) 115; *Ableman v. Booth*, 21 How. (U. S.) 506; *Freeman v. Howe*, 24 How. (U. S.) 450; *Tarble's Case*, 13 Wall. (U. S.) 397.

5. *Virginia v. West Virginia*, 11 Wall. (U. S.) 39.

6. *Worcester v. Georgia*, 6 Pet. (U. S.) 515.

What is to be "deemed" Indian country, within the act of 1834, remains such

In general, the venue must be proven, even though the judge and jury personally know the *locus in quo* to be within the jurisdiction.¹

The Judiciary Acts of 1887 and 1888, giving the federal courts "original cognizance, concurrent with the state courts," of certain civil suits, require that "no civil suit shall be brought before either of the said courts, against any person, or by any original process or proceeding, in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of the different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."²

VI. CHANGE OF VENUE—1. **To What County.**—In addition to the treatment which this subject has received already in a previous article in the encyclopaedia,³ reference is made also to additional and later cases cited and set forth in the appended note.⁴

only so long as the Indians retain their title to the soil. *U. S. v. Forty-three Gallons of Whiskey*, 93 U. S. 188; *Bates v. Clark*, 95 U. S. 204.

As to what are "exterior boundaries," within the Internal Revenue Act of 1868, see the *Cherokee Tobacco Case*, 11 Wall. (U. S.) 616, and dissenting opinion therein, pp. 622, 624.

1. *Miles v. State*, 23 Tex. App. 410.

The conviction cannot stand if the transcript fails to show that the venue was proved. *Terry v. State*, 22 Tex. App. 679; *McDevro v. State*, 23 Tex. App. 429.

The court will not take judicial notice of the location of a town in order to prove the venue. *State v. First Nat. Bank* (S. Dak. 1892), 51 N. W. Rep. 780.

The court may know by the name of a plaintiff that it is an incorporation and extraterritorial. *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13; 35 Am. Dec. 171.

The court will take judicial notice of the county in which an incorporated town is situated. *State v. Reader*, 60 Iowa 527.

2. 25 *United States Stat. at L.*, p. 434, § 1. As to section 2, regulating removal of causes, see **REMOVAL OF CAUSES**, vol. 20, p. 982.

A foreign corporation, organized expressly to own and operate a mine in *Oregon*, and having there officers and an agent working the mine, is an "inhabitant," within the act of 1888. *Miller v. Eastern Oregon Gold Min. Co.*, 45 Fed. Rep. 345.

A *Texas* railway corporation, whose principal office was in the eastern dis-

trict of *Texas*, was held to be an "inhabitant" of the western district wherein its road extended, and where it had an agent and office for transaction of its ordinary business. *Zambrino v. Galveston, etc.*, R. Co., 38 Fed. Rep. 449. And, in this connection, see also the cases of *Riddle v. New York, etc.*, R. Co., 39 Fed. Rep. 290; *Holmes v. Oregon, etc.*, R. Co., 6 Sawy. (U. S.) 262, 277; *Hohorst v. Hamburg American Packet Co.*, 38 Fed. Rep. 273.

3. See **CHANGE OF VENUE**, vol. 3, p. 90.

4. In *California*, where a suit against A and B, residents of different counties, was brought in A's county, and had been dismissed as to A, it was held that B was not entitled, within the *California* Code, § 395, to a change to his own county. *Remington Sewing Mach. Co. v. Cole*, 62 Cal. 311.

The *California* constitution confers no power to transfer an appeal from a justice's court, to another county whereof the defendant is a resident. *Gross v. San Francisco Super Ct.*, 71 Cal. 382.

After a transfer of the cause, at the defendant's request, from a justice of the peace to a superior court, as involving the legality of a tax, it cannot be transferred to another county for trial. *Powell v. Sutro*, 80 Cal. 559.

Under the *California* Const., art. 12, § 16, governing the venue of suits against corporations, a railway company whose principal place of business is in San Francisco, when sued in another county outside the state, for the breach of a contract made in San Francisco, is entitled to a change to San

Francisco county. *Cohn v. Central Pac. R. Co.*, 71 Cal. 488.

A judgment cannot be impeached by the fact that the county to which the cause was transferred was not the nearest one. *Gage v. Downey*, 79 Cal. 149.

The right, under the *Colorado* Civil Code, § 25, to a change to the county where some part of the land is situate, is absolute, and the court has no jurisdiction to proceed. *Smith v. People*, 2 Colo. App. 99.

The *Illinois* Statute of 1887, giving three judges to a circuit, obviates the necessity of changing the venue to another county, on account of the alleged prejudice of one of the judges; the practice is to call in another judge of the same circuit to try the cause. *Chicago, etc., R. Co. v. Perkins*, 26 Ill. App. 67.

In *Indiana*, the cause may be sent to a county, although it is named in the affidavit as one of several in which existed a prejudice against the defendant. *Michigan Mut. L. Ins. Co. v. Naugle*, 130 Ind. 79.

In *Kansas*, a defendant who, on the ground of impossibility of getting a fair trial, has applied for a change to another county in the same judicial district, still retains his constitutional right to object to a change to a county in another district. *State v. Knapp*, 40 Kan. 148.

In *Kentucky*, a change will not be made to a county other than the one adjoining, merely because the parties cannot agree on the one adjoining. *Miller v. Cabell*, 81 Ky. 178.

Under the *Michigan* statute, the cause may, for disqualification of the judge, be removed to the county where an attorney of record resides, though he was not such at the time of disqualification. *Stimson v. Michigan Shingle Co.*, 71 Mich. 374.

As to the discretion of the court in the selection of the county, see *Bolles v. Sault Savings Bank Loan, etc., Co.*, 86 Mich. 229.

The determination of the first magistrate as to who was "the nearest magistrate," within the *Wisconsin* Rev. Stat., § 4809, as to the change in a criminal case, is conclusive. *Martin v. State*, 79 Wis. 165.

In *Missouri*, as to the discretion of the court in the selection of the county, see *State v. O'Bryan*, 102 Mo. 254.

In granting the change, a county in the same circuit may be preferred to the requested one in another circuit,

although prejudice is alleged as to the former. *State v. Higgerson*, 110 Mo. 213.

The provision of the *New York* Law of 1888, ch. 577, § 3, that "suits for violation of the game laws shall be prosecuted to determination in the county where they shall be commenced unless, for good cause appearing, a discontinuance shall be directed by the chief game and fish protector," does not prevent the supreme court from changing the place of trial from the adjoining county to the county where the alleged offense occurred, when the convenience of witnesses or the ends of justice demand it. *People v. Coughtry*, 58 Hun (N. Y.) 245; *People v. Rouse*, 15 N. Y. Supp. 414; 61 Hun (N. Y.) 618.

In *North Carolina*, a motion for removal of a suit against a sheriff and parties who executed in his favor a bond of indemnity, to a county where, under the *North Carolina* Code, § 191, the sheriff alone could be sued, is properly refused after entry of a *nolle prosequi*, as to him. *Harvey v. Rich*, 98 N. Car. 95.

In an action to dissolve a firm, and foreclose mortgages on its real estate it is error to refuse a change to the county wherein the land lies. *Falls of Neuse Mfg. Co. v. Brower*, 105 N. Car. 440.

The *Texas* Act of 1874, requiring the change to be to some adjoining county the court-house of which is "nearest" that of the county in which the suit is pending, means the one the most convenient of access, though not nearest in actual distance; and the court may determine which is nearest by the usual traveled route. *Shaw v. Cade*, 54 Tex. 307. *Compare* *Boyett v. State*, 26 Tex. App. 689.

A change of boundary of an adjoining county was held not to be the "making of a new county," within the provision of the *Texas* Rev. Stat. 1274, for change of venue. *Dodson v. Bunton*, 81 Tex. 655.

In *Wisconsin*, upon one's indictment for murder in Pepin county, and change to Dunn county, without her consent her motion for a change to La Crosse county, for prejudice of the judge, was held to be no waiver of her right to be tried in Pepin. *Wheeler v. State*, 24 Wis. 52.

In an application under the *Wisconsin* statute for a change on the ground of prejudice of the judge, an averment of prejudice of another judge is

2. When a Change May Be Made—*a.* IN GENERAL.—Here, too, the general treatment already given will suffice.¹ Later citations are referred to below.²

surplusage, and does not preclude a change to a county within the circuit of the latter. *Davies v. State*, 72 Wis. 54.

1. See CHANGE OF VENUE, vol. 3, p. 91.

2. As to what matters will be heard, upon an application under the *United States Stat.*, § 1014, for a change to another district, see *U. S. v. Fowkes*, 49 Fed. Rep. 50.

In *Arkansas*, having proceeded to trial in the first court after an order for a change, raises a presumption that the fees were not paid, and that the court retained jurisdiction. *Duncan v. Tufts*, 52 Ark. 404.

In *California*, omission to pay the costs is ground for vacating the order for removal, notwithstanding a subsequent tender thereof. *Estep v. Armstrong*, 69 Cal. 536.

A pending motion for a new trial is, within the *California Code*, § 398, an "action or proceeding" transferable for disqualification of the judge. *Finn v. Spagnoli*, 67 Cal. 330.

In an action to try title to land, but not brought in the county wherein the land lies, the defendant's remedy is a motion to dismiss. *Fritts v. Camp*, 94 Cal. 393.

An ambiguity in a complaint, as between two causes of action, must be resolved against the pleader, in determining the defendant's right to the change. *Ah Fong v. Sternes*, 79 Cal. 30.

In *Colorado*, it is not the duty of the court, of its own motion, to change the place of trial of an action brought in the wrong county. *Fletcher v. Stowell*, 17 Colo. 94.

In *Florida*, unless the record shows some statutory ground for the change, the second court acquires no jurisdiction. The fact that a kinsman of the judge, not a party to the suit, is interested in property involved therein, is no such ground. *Williams v. Robles*, 22 Fla. 95.

In *Illinois*, a proceeding to reduce the alimony allowed in a divorce suit, is a "suit or proceeding in law or equity," wherein the change may be had. *McPike v. McPike*, 10 Ill. App. 332.

In *Indiana*, a proceeding supplementary to execution is a "civil action," within the statute governing

change of venue. *Burkett v. Holman*, 104 Ind. 6; 119 Ind. 141. So, also, is a divorce proceeding. *Powell v. Powell*, 104 Ind. 18; *Evans v. Evans*, 105 Ind. 204.

A party is entitled to only one change of venue from the county. Failure to perfect the change is no waiver; the opposite party may pay the costs, and cause it to be perfected. An affidavit that the same causes are operating against the party in a certain other county, merely goes to aid the discretion of the court. *Michigan Mut. L. Ins. Co. v. Naugle*, 130 Ind. 79.

A proceeding before a justice, to obtain surety of the peace, is one wherein a change must be granted on affidavit of prejudice, or the subsequent proceedings will be void. *Smelzer v. Lockhart*, 97 Ind. 315.

In *Iowa*, even with the parties' consent, an action cannot be transferred from a justice of the peace to the district court, before final judgment. *Evans v. Phelps*, 77 Iowa 526.

A stipulation not to demand a change will not bind the plaintiff, after additional parties have been brought in; the *Iowa* statute allowing a change for undue influence of a party, or of his attorney. *Bixby v. Carskaddon*, 63 Iowa 164.

The prohibition in *Iowa Code*, § 2591, of a second change for a cause existing at the time of the first, applies whether it was granted for the prejudice of the judge, or of that of the inhabitants. *Weare v. Williams*, 69 Iowa 252.

Although a change of venue could not have been had of an appealed suit—*e. g.*, one for rent—yet if it be by consent, consolidated with one originally brought in the appellate court, admitting of a change—*e. g.*, one for injuries to the building—this may properly be granted. *Browne v. Hickie*, 68 Iowa 330.

The remedy under the *Iowa Code*, §§ 2586, 2589, of a non-resident defendant, is for removal to the county in which he was found; not for a dismissal. *Marquardt v. Thompson*, 78 Iowa 158.

In *Kansas*, when an action is commenced before a justice, and the defendant obtains a change of venue to

another justice, this will not prevent the plaintiff from obtaining still another change, if he has sufficient grounds therefor. *Herbert v. Beathard*, 26 Kan. 746.

In *Kentucky*, the defendant's appearing, etc., was held to be a waiver of his right to object to a change, or to an action to subject land to a judgment recovered in another county. *Norton v. Marksberry* (Ky. 1887), 5 S.W. Rep. 482.

The provision in *Maryland* Pub. Gen. L., art. 23, § 261, that the petition for forfeiture of a franchise shall be filed in the circuit court of the county where the corporation had its origin, or has its principal office, imports that the proceeding is not, within the *Maryland* Const., art. 4, § 8, a suit or action at law wherein a changed venue can be taken. *Bel Air Social, etc., Club v. State*, 74 Md. 297.

In *Michigan*, a special proceeding for which the statute designates the court, is not transferable to another court. *Scott v. Speed*, 58 Mich. 311.

A stipulation as to the taking of proofs, and the docketing for a hearing without further notice, was held not to be a waiver of right to move a change for disqualification of the judge. *Pack County v. Simpson*, 74 Mich. 28.

A creditor's petition, upon an assignment for the benefit of creditors, that, on the ground of defects, the assignee be required to file a new assignment, inventory, and appraisal, is a "civil proceeding," removable to another circuit court by reason of the judge's interest as a stockholder. *Kittridge v. Washtenaw*, 80 Mich. 200.

In *Missouri*, in the absence of fraud, the fact that the change was made without the statutory verification of the petition, will not avoid the judgment. *Stearns v. St. Louis & S. F. R. Co.*, 94 Mo. 317.

The change cannot lie from a probate court. *Morris v. Lane*, 44 Mo. App. 1. As to the change from one circuit court to another, see *Catron v. La Fayette County*, 106 Mo. 659.

Under *Nebraska* Crim. Code, § 445, the change can be ordered only by the court of the county where the offense was committed. *Gaudy v. State*, 27 Neb. 707.

In *Nevada*, there can be no change of venue of an action for collection of delinquent taxes on real estate. *State v. Shaw*, 21 Nev. 222.

In *New Jersey*, in transitory actions, the court will not change the venue on

the ground of inconvenience, upon any nice balancing of circumstances or mere accommodation to the parties over these the legal right of the plaintiff must prevail. *Demarest v. Hurd* 46 N. J. L. 471.

In *New York*, a defendant's stipulation that issues should stand joined as of the date of a prior order extending the time for answering, was held to preclude from a change of venue. *Nasl v. Silver Lake Ice Co.* (Supreme Ct.) 6 N. Y. Supp. 913.

The *New York* Code, § 3216, and the consolidation act, *New York* Laws 1882, ch. 410, regulating the removal of causes to the common pleas court, do not apply to summary proceedings to recover possession of land. *Drummond v. Fisher* (C. Pl.), 16 N. Y. Supp. 867.

As to the practice in filing the undertaking, see *Scherer v. Hopkins* (C. Pl.) 16 N. Y. Supp. 863.

The obtaining the order of interpleader, without making plea to the jurisdiction, was held to raise no presumption of waiver of right to change of venue of an action brought in a county where neither party resided. *Baer v. Kempner* (C. Pl.), 3 N. Y. Supp. 529.

In an action for breach of warranty of horses, a refusal of the defendant's motion for a change to the county of the sale, where a majority of the material witnesses were, was held to be error although conditioned with the execution of a stipulation for their examination before a referee. *Belding v. Ladd* (Supreme Ct.), 7 N. Y. Supp. 379.

The fact that part of the property the assignment whereof the suit seeks to set aside, is real estate in another county, is ground for a change of venue. *Moss v. Gilbert*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 202.

In an action to set aside a general assignment covering real estate, the defendant's right to a change cannot be defeated by the plaintiff's offer to stipulate not to attempt to reach the real estate. *Wyatt v. Brooks*, 42 Hun (N. Y.) 502.

In a suit for specific performance of a contract to exchange lands, the defendant whose land lay in a county other than that wherein the plaintiff's land lay, was held entitled to a change to his own county. *Kearr v. Bartlett*, 47 Hun (N. Y.) 245.

Under the *New York* Code, § 3216 requiring the application for change of venue to be made before adjournment an adjournment, after opening of default

b. DISQUALIFICATION OF THE JUDGE.—A change of venue may be founded upon the bias or prejudice of the judge, or on his pecuniary interest, or on the fact that he has been of counsel for one of the parties.¹

and payment of the plaintiff's claim on stipulation, was held to be a waiver of the defendant's right to removal. *Krahner v. Heilman* (C. Pl.), 9 N. Y. Supp. 633.

In *Pennsylvania*, *mandamus* is a "civil cause in law or equity," within the *Pennsylvania* Act of 1875, providing for the change. *Williamsport v. Com.*, 90 Pa. St. 498.

In *Texas*, the change will not be granted in a misdemeanor case without express statutory authorization. *Hallsell v. State*, 29 Tex. App. 22.

In *Utah*, if the complaint shows the suit to have been instituted in the wrong judicial district, the plaintiff must, within ten days, pay the costs of the change consequently made. *Utah Laws* 1890, p. 73.

Under the *Virginia* Statute of 1878, p. 339, the accused may, "upon his arraignment in the county court, demand to be tried in the circuit court." One upon being arraigned for burglary, made a motion for a continuance for material witnesses, which the court refused to consider until after the arraignment. He excepted, and elected to be tried in the circuit court. It was held that such compulsion of alternatives deprived him of his right of free election of forum. *Anderson v. Com.*, 84 Va. 77.

In *Wisconsin*, the statutory rule vaticating an order for a change, if the papers are not filed within twenty days, does not apply to the case of the clerk's refusal to file because of non-payment of his fees. *Mantz v. Werner*, 64 Wis. 408.

On paying the costs required by the *Wisconsin* Stat. 1887, ch. 306, § 1, and filing the affidavit of prejudice of the judge, the right to the change is absolute. *Bantley v. Stowell*, 82 Wis. 244.

1. See CHANGE OF VENUE, vol. 3, p. 93; JUDGE, vol. 12, p. 2.

In *California*, where a superior court judge, disqualified to try the cause, "called in" another judge to try it, it was held that the parties were not entitled to have it "transferred," within the *California* Code Civ. Proc., § 398. *Upton v. Upton*, 94 Cal. 26.

Bias of the judge against the defend-

ant corporation and its president is no statutory disqualification justifying the change. *Bulwer Consolidated Min. Co. v. Standard Consolidated Min. Co.*, 83 Cal. 613.

A judge may order a change for his having been under a general retainer from one of the parties; he has been an "attorney" at least within the spirit of the statute. *Kern Valley Water Co. v. McCord*, 70 Cal. 646.

In *Colorado*, the facts that the judge had formerly represented the people in a criminal prosecution of the defendant, and been the plaintiff's counsel in a suit against him, were held to be no ground for the change. *Karcher v. Pearce*, 14 Colo. 557.

In an action involving a mining lease, it was held to be no ground for disturbing the judge's refusal of the change, asked on his alleged disqualification, from his brother's part ownership of the mine the brother's interest not being covered by the lease nor in any wise affected thereby; he believing he would not be influenced by this fact, nor by the fact that his brother was an attorney for one of the parties, nor by the fact that he himself had been an unsuccessful bidder. *Patrick v. Crowe*, 15 Colo. 543.

In *Florida*, in an action to set aside a judgment, the fact that the judge's brother-in-law was a purchaser of property sold therein, was held to be no disqualification of the judge by reason of interest, consanguinity, or affinity, his kinsman not being a party to the suit. *Williams v. Robles*, 22 Fla. 95.

In *Illinois*, the fact that the county judge before appointment had, as attorney for the heirs, resisted the allowance of the widow's award, was held to necessitate transmission to the circuit court, not of the whole administration, but only the proceeding relating to such award; nor could he call in the judge of another county court. *Graham v. People*, 111 Ill. 253.

If any one of the three judges is present and not disqualified to give a fair trial, a change asked on account of the prejudice of the two others, may be refused. *Chicago v. Perkins*, 125 Ill. 127.

An application on the ground of bias

c. CONVENIENCE OF WITNESSES.—In civil cases the convenience of witnesses may be considered on the question of a change

of the judge, if conformable to the statute, cannot be defeated by counter affidavits. *Cantwell v. People*, 138 Ill. 602.

In *Indiana*, although the result of a corrupt refusal of the change be fine and imprisonment of the applicant, the magistrate is not liable to him civilly therefor. *State v. Wolever*, 127 Ind. 306.

In *Iowa*, in determining whether a cause for change was in existence within the *Iowa Code*, § 2591, the courts will take judicial notice of who are the judges, and what their terms of office. *Upton v. Paxton*, 72 Iowa 295.

The amendment *Iowa Laws* 1884, ch. 94, granting discretion to the judge in case of alleged prejudice, does not affect a vested right; it supersedes the old rule of practice. *Eikenberry v. Edwards*, 71 Iowa 82.

An affidavit stating that the plaintiff was informed and believed the judge had said that the alleged cause of action was a "damned fraud," but not setting forth any source of the information, was held not to show such ground of change that the refusal should be deemed an abuse of discretion. *Garrett v. Bicklin*, 78 Iowa 115.

In *Kansas*, a judge may order the change because he knows he is to be a material witness for the applicant. *Gray v. Crockett*, 35 Kan. 686.

If the judge has been of counsel, and the issues have not been made up, the party may, up to the time of the judgment, demand a change, have the issues made up, and get a trial thereon. *Sumner County v. Wellington Tp.*, 39 Kan. 137.

The fact that on a former trial of the cause, the presiding judge has been a material witness, is a ground for the change. *Burlington Ins. Co. v. McLeod*, 40 Kan. 54.

In *Kentucky*, an affidavit that the judge will not afford an impartial trial, must state the facts on which the belief is founded. *Vance v. Field*, 89 Ky. 178.

Michigan Annot. Stat., § 6495, allowing the change when the judge "has been consulted or employed as counsel," applies where the judge, before appointment, has given advice about compromising the case although refusing to meddle because other counsel had been employed. *Curtis v. Wilcox*, 74 Mich. 69.

In *Missouri*, the change for disqual-

ification of the judge should not be granted until the "reasonable opportunity" has been given the parties to select a special judge, as provided in the *Missouri Rev. Stat.* 1889, § 2262. *State v. Bacon*, 107 Mo. 627. *Compare* *State v. Thomas*, 32 Mo. App. 159.

In the absence of express statutory provision, a second change for prejudice of the judge will not be granted. *State v. Anderson*, 96 Mo. 241.

The general provision of the *Missouri Rev. Stat.*, § 1878, applies both to a regular, and to a special judge. *State v. Shipman*, 93 Mo. 147.

Under the *Montana Code*, § 62, pl. 4 requiring no change where another judge will appear, etc., a mandate will not issue against the alleged disqualified judge, who has announced the day and hour when another judge will attend to hear the motion. *Granite Mountain Min. Co. v. Durfee*, 11 Mont. 222.

In *North Carolina*, when the presiding judge remarked, in a private conversation, after hearing the testimony of a witness, who was thereafter indicted for perjury committed in giving that testimony, that the witness was "a grand scoundrel," this was held to be no evidence of such prejudice as would disqualify him from presiding at the trial for perjury. *State v. Johnson*, 10 N. Car. 780. *Compare* a case of the judge's criticism of the jury on a former trial, *State v. Reno*, 41 Kan. 674.

In *Ohio*, under section 550 of the *Rev. Stat.*, the interest of the judge, to be a valid ground of change of the venue must be a pecuniary one in the result. *State v. Winget*, 37 Ohio St. 153.

As to when, in a case under the above section, the facts averred in the affidavit cannot be inquired into, see *State v. Shaw*, 43 Ohio St. 324.

In *Wisconsin*, as to the immateriality of an averment that other judges are prejudiced, see *McCrary's Will*, 71 Wis. 83.

An averment in the words of the *Wisconsin Stat.*, § 4809, that "from prejudice or other cause" the justice will not decide impartially, is insufficient, in neither the prejudice nor the cause be specified. *Billings v. Noble*, 75 Wis. 325.

Upon the death of the judge, the cause may be tried by his successor in the absence of an affidavit that he is prejudiced. *Winn v. State*, 82 Wis. 571.

of venue.¹ But in criminal cases, in the absence of statute, the place of trial may not be changed merely for the convenience of the witnesses.²

d. IMPOSSIBILITY OF AN IMPARTIAL TRIAL.—Local prejudice so intense as to render an impartial trial impossible is ground for a change of venue.³

1. See CHANGE OF VENUE, vol. 3, p. 95. A few later decisions may here be noted.

In *Indiana*, as to the discretion of the court concerning the relative importance of the convenience of witnesses, see *Ringgenberg v. Hartman*, 102 Ind. 537.

In *New York*, as to the discretion of the court concerning the relative importance of the convenience of witnesses, see *Dexter v. Alfred* (Supreme Ct.), 12 N. Y. Supp. 365; *Hooker v. Sandford* (Supreme Ct.), 12 N. Y. Supp. 890; *Trope v. Saratoga Assoc.* (Supreme Ct.), 12 N. Y. Supp. 518; *Sawyer v. Clark* (Supreme Ct.), 14 N. Y. Supp. 252; *In re J. F. Pease Furnace Co.* (Supreme Ct.), 13 N. Y. Supp. 654.

In an action for personal injuries, a change for the convenience of six witnesses was held to be properly denied, where the retention was more convenient for the plaintiff, her husband, two physicians and four other witnesses. *Fowler v. Third Ave. R. Co.* (Supreme Ct.), 8 N. Y. Supp. 762. Compare the change in the suit for damages from fraud in repairing the state capitol. *People v. Snaith* (Supreme Ct.), 8 N. Y. Supp. 668.

Where neither party to a divorce suit is a resident of the county, a motion to change to that of the defendant's residence, must prevail against the plaintiff's counter motion to retain the venue for convenience of witnesses. *Stimson v. Stimson* (Supreme Ct.), 9 N. Y. Supp. 238.

In a civil suit for assault and false imprisonment, the discretion of the trial court as to what place is most favorable to the convenience of the witnesses will not be disturbed, if not clearly shown to have been imprudently exercised. *Thompson v. Narwood* (Supreme Ct.), 19 N. Y. Supp. 632.

The fact that the contract sued on was made in another county, will not prevent an adaptation of the place to the convenience of the most of the witnesses. *Perry v. Boomhower* (Supreme Ct.), 18 N. Y. Supp. 937; nor the fact that the defendants and some of their

witnesses reside in another county. *Daley v. Hellman* (Supreme Ct.), 17 N. Y. Supp. 946. Compare *Brower v. Husted* (Supreme Ct.), 17 N. Y. Supp. 707.

In an action for libel, a change for convenience of witnesses was granted where the plaintiff's claim to residence in the original county was supported only by his own conclusions, and not by facts. *Dunn v. Lewis* (Supreme Ct.), 19 N. Y. Supp. 755.

Application for a change of venue for the convenience of the defendant's witnesses will not be refused merely because the plaintiff's witnesses residing out of the state, will be inconvenienced by the change. *Bowles v. Rome, etc., R. Co.*, 38 Hun (N. Y.) 507.

Affidavits showing with reasonable certainty that the change will be for the convenience of a majority of the witnesses, are sufficient. *Lyon v. Davis* (Supreme Ct.), 7 N. Y. Supp. 564. See also *Tuthill v. Felter* (Supreme Ct.), 6 N. Y. Supp. 173; *Banks v. Bensky* (Supreme Ct.), 7 N. Y. Supp. 518; *Clanton v. Ruffner*, 78 Cal. 268.

The affidavit need not state how the affiant knows that the witnesses will testify as therein averred. *Myers v. Lansingburgh*, 54 Hun (N. Y.) 623.

2. *People v. Harris*, 4 Denio (N. Y.) 150.

3. See CHANGE OF VENUE, vol. 3, p. 96; CRIMINAL PROCEDURE, vol. 4, p. 818. A few later decisions may here be noted.

The fact that, owing to newspaper denunciation of the accused, there may be difficulty in impaneling a jury, is not *ipso facto* a sufficient ground for a change of venue. *Muscoe v. Com.*, 87 Va. 460; *Edwards v. State*, 2 Wash. 291; *Hickam v. People*, 137 Ill. 75.

In *Alabama*, the trial of a negro for killing a popular deputy sheriff came on two and one half months after the homicide. The affidavits showed that the militia had been called out to protect the prisoner from lynching; also, that some of the jurors summoned had threatened to "make short work of the murderer." It was held that the change

ought to be granted, although counter-affidavits gave opinions that he could have a fair trial. *Seams v. State*, 84 Ala. 410.

Where affidavits of the defendant and seven witnesses, that the proceedings were infected by excitement and prejudice, were rebutted by those of sixty-five witnesses, it was held not error to overrule the application for a change without examinations *ore tenus*. *Hawes v. State*, 88 Ala. 37.

Where two witnesses testified that people generally believed the defendant guilty, and he testified that a mob had been formed to hang him, but the arresting officer testified that he never heard of any such mob, the refusal of the change was approved. *Rains v. State*, 88 Ala. 91.

The provision of *Arkansas Dig. Stat.*, 1884, that a criminal cause shall be removed to another county, if it appears that from prejudice of the inhabitants an impartial trial cannot be had within the county, applies to Yell county; *Arkansas Act of 1875*, allowing a change from one district to another therein, does not control, if the prejudice is averred to extend to the inhabitants of the county. *Wells v. State*, 53 Ark. 211.

In *California*, on counter-affidavits showing that the excitement following the crime had subsided three weeks before the application, a refusal of the change was held not to be an abuse of discretion. *People v. Goldenson*, 76 Cal. 328.

In *Colorado*, on a prosecution for murder, counter-affidavits showed that, although a prejudice existed in one part of the county, an impartial jury could be obtained from another portion thereof, and that one newspaper had published a guarded account of the homicide, asking a suspension of the popular judgment until the testimony be heard. The court held that the change was not improperly refused. *Power v. People*, 17 Colo. 178.

In *Illinois*, the fact that at the county seat where a homicide had been committed, the local prejudice was so strong that the sheriff was obliged to remove the defendant to another county for safe keeping, was held not to be conclusive of impossibility of obtaining a fair trial, the counter-affidavits showing that an impartial jury could be obtained from other parts of the county. *Price v. People*, 131 Ill. 223.

In *Indiana*, in an action against a surety, the fact that the plaintiff had,

just before the trial, traduced him in public places, and called attention to the absconding of the principal, was held insufficient ground for granting the change. *Brow v. Levy*, 3 Ind. App. 464.

The requirement in the *Indiana Rev. Stat.* 1881, § 412, of a change where it is shown that the opposite party has an undue influence over the citizens of the county, is mandatory, and no counter showing is admissible. *Rout v. Ninde*, 118 Ind. 123.

In *Iowa*, an application for change of venue, after the setting aside of a conviction of murder, made on the ground that an unprejudiced trial could not be had, was supported by affidavits of the defendant and seven other persons, and by certain extracts from newspaper published at the time of the arrest. Forty-four counter-affidavits were filed. The court held that the refusal of a change was not an abuse of discretion. *State v. Kennedy*, 77 Iowa 208. But compare *State v. Billings*, 77 Iowa 417; *State v. Stewart*, 74 Iowa 336.

Where there were affidavits of the defendant and fifty residents of the county, as to excitement and prejudice against him, opposed by those of seventy-seven residents, the supreme court in the absence of proof of abuse of discretion, affirmed the refusal of a change to another county. *State v. Cadwell*, 79 Iowa 473.

In a prosecution for libel in a political canvas, affidavits of forty-one persons alleging prejudice, were contradicted by affidavits of forty-four persons. The court held that the change was properly refused. *State v. Conable*, 81 Iowa 60.

Under *Iowa Code*, § 2590, allowing a change for undue local influence of an attorney, the fact that the defendant's attorney had received an unprecedented vote for a political office in the county and had great influence, was held to sufficiently establish the plaintiff's affidavits and motion for the change. *Deer v. Bagley*, 80 Iowa 197. Compare *State v. Woodward*, 84 Iowa 172.

In *Kansas*, the fact that immediately after the homicide bitter threats had been made against the accused, and he was denounced in several newspaper articles, was held not to be ground for reversal for refusal of the change, there being affidavits of twenty-one citizens denying such general prejudice as would prevent a fair trial. *State v. Rhea*, 25 Kan. 576.

In *Kentucky*, on a trial for murder, it appeared that the militia had been called out to prevent mob violence, but the excitement had subsided at the time of the application for the change, and the majority of the witnesses believed that a fair trial could be had. The court held that the refusal was not a ground for reversal of conviction. *Dilger v. Com.*, 88 Ky. 550.

In *Louisiana*, where prejudice, as shown by an attempt to lynch the defendant, was sworn to by six witnesses, but fifteen denied its existence at the time of the trial, it was held no abuse of discretion to refuse the change. *State v. Dent*, 41 La. Ann. 1082.

To entitle the accused to a change on the ground of public excitement, it must be such as will prevent an impartial verdict. *State v. Ford*, 37 La. Ann. 443.

In *Missouri*, prejudice in the judge's mind against a party's cause or defense, is not against his person, and is no ground for a change. *Bent v. Lewis*, 15 Mo. App. 40.

The restriction in *Missouri* Rev. Stat. 1879, §§ 18, 19, as to change of venue from the St. Louis criminal court, is repealed by section 1877, allowing a change on an affidavit that the judge will not afford a fair trial. *State v. Hayes*, 81 Mo. 574.

Where the evidence as to the existence of public excitement is conflicting, but no witness averred that he thought the defendant would not get a fair trial, it was held that the motion for change was properly overruled. *State v. Brownfield*, 83 Mo. 448.

In *Nebraska*, on a trial for rape, affidavits of leading citizens that there was intense excitement and prejudice against the prisoner, and threats of lynching, were held sufficient to entitle him to a change; and a judgment of conviction was reversed because of its refusal. *Richmond v. State*, 16 Neb. 388.

An application for change on the ground of prejudice of citizens, may give the reasons of the parties for refusing to make affidavit. *Simmerman v. State*, 16 Neb. 615.

In *New Hampshire*, a change should be granted in a civil action on un rebutted presumptive evidence that, with reasonable effort, a fair trial cannot be had in the first county. *Hilliard v. Beattie*, 58 N. H. 112.

In an action for damages from a railway accident, the fact that the most of the persons injured were residents of

the county where it occurred, was held to be ground for a change therefrom, to secure an impartial trial. *Stoddard v. Delaware, etc., Canal Co.*, 16 N. Y. Supp. 621; 62 Hun (N. Y.) 619.

In *Oregon*, where, after two trials, there was a conviction of murder in the first degree, which was set aside by the supreme court, and it appeared that the leading newspapers had fully reported the trial with declarations of guilt, and that the jury had been obtained only after three hundred names had been drawn, it was held that the change ought to be granted. *State v. Olds*, 19 Oregon 397.

In *Texas*, where the accused applies for a change on the ground of prejudice in the county, the state may examine witnesses as to the means of knowledge of the compurgators. *Henning v. State*, 24 Tex. App. 315.

A combination of influential citizens to suppress crime generally, was held not to be "a dangerous combination," within *Texas* Code Crim. Proc., art. 578, which specifies the grounds upon which a change of venue may be granted. The combination contemplated is one directed against the accused in the particular case. *Cravey v. State*, 23 Tex. App. 677.

In *West Virginia*, on one's indictment for murder, the facts that the sheriff had published a prejudicial letter, and that, ten months after the homicide, a mob of the county threatened to lynch the accused, were held sufficient ground for a change. *State v. Greer*, 22 W. Va. 800.

In *Wisconsin*, in an action for damages from fraudulent representations in the sale of a peculiar kind of oats, the plaintiff's motion for the change, on the ground that one defendant was very influential in the county, and that the farmers therein were much excited over the matter, was refused, there being numerous counter-affidavits. This was held to be no abuse of discretion. *Ross v. Hanchett*, 52 Wis. 491. Compare a case of prosecution of bank officers, wherein was alleged excitement of depositors, etc. *Com. v. Balph*, 111 Pa. St. 365; *Com. v. Delamater*, 145 Pa. St. 210. See also *Perrin v. State*, 81 Wis. 135.

The *Wyoming* statute requiring the change upon a party's affidavit that he believes that, owing to the prejudice of the people, an impartial trial cannot be had, is mandatory. *Perkins v. McDowell*, 3 Wyoming 203.

e. NON-RESIDENCE OF PARTIES.—The non-residence of the defendant is sometimes ground for a change of venue.¹

3. Who May Apply.—The question of who may apply for a change of venue has undergone treatment.² In the appended note are a few additional cases.³

In *Wisconsin*, in an action against a railway company for damage from communicated fire, it appeared that a large region had been burned over, and that fourteen similar cases were pending. An attorney made affidavit that a combination existed to wrongfully charge the fires to the negligence of the defendant, irrespective of justice. It was held that the change should have been granted. *Cyra v. Stewart*, 79 Wis. 72.

Political prominence of the accused is not, within *New York* Crim. Code, § 344, "good cause" for the transfer of the case to the court of oyer and terminer; but novelty and importance of the questions involved is "good cause" therefore, especially if the prosecuting officer declares them to have been already decided in the instructions to the grand jury in the court of general sessions. So held, upon an indictment of railway officials for violation of the car-heating act. *New York* Laws, 1890, ch. 421; *People v. Clark* (Supreme Ct.), 15 N. Y. Supp. 79.

1. See CHANGE OF VENUE, vol. 3, p. 100. A few later decisions may here be noted. An action by an alien in a *Colorado* state court, against a *New York* corporation, is not transferable to the federal circuit court for the *Colorado* district. *Harold v. Iron Silver Min. Co.*, 33 Fed. Rep. 529.

An action in a *Colorado* state court by a *Colorado* corporation, against a citizen of *Minnesota* and a citizen of *Wisconsin*, is transferable to the federal court for the *Colorado* district. *Pitkin County Min. Co. v. Markell*, 33 Fed. Rep. 386.

In *California*, where a corporation had manifested no interest in a suit to compel the specific performance of a share-holder's contract to transfer his share, he was held entitled to a change to the county of his domicile. *Sayward v. Houghton*, 82 Cal. 628.

In an action for breach of warranty of a machine, instituted in A county, where the contract was not made or to be performed, the defendant corporation was held to be entitled to a change to B county, where it had its principal

place of business, although it also did business in A county. *Byrum & Stockton Combined Harvester, etc. Works*, 91 Cal. 657.

In a suit to quiet title, it is no ground for the change, that neither the residence of the defendants nor the land is in the county where it was instituted. *Pennie v. Visher*, 94 Cal. 323.

In *Michigan*, the provision in the *Michigan* Annot. Stat., § 6499, for change to the county whereof the party or his attorney of record is a resident refers to a *bona fide* attorney of record and not to one simulating substitution after the proceeding for removal has begun. *Kelley v. Simpson*, 79 Mich. 392.

The case cannot be sent to a county where no one of the parties or their attorneys resides. *Simpson v. Kelley*, 81 Mich. 116.

In *Montana*, as to the relative importance of the fact of the defendant's residence in the second county, see *Wallace v. Owsley*, 11 Mont. 219.

In *New York*, in an action by a woman residing in Orange county against her husband living apart, in Kings county, under an agreement of separation, his application for a change of venue to his domicile was held to be properly refused. *Lyon v. Lyon*, 36 Hun (N. Y.) 455.

2. See CHANGE OF VENUE, vol. 3, p. 101.

3. In *California*, an involuntary intervener may demand a change, although the defendant did not. *Howell v. Stetefeldt Furnace Co.*, 69 Cal. 153.

In *Colorado*, a disqualified judge can not compel either party to proceed under the statute for a change. *O'Connell v. Gavett*, 7 Colo. 40.

In *Illinois*, the statutory requirement that all the defendants join in the application, does not import that a merely nominal defendant must be included. *Hill v. Gruell*, 42 Ill. App. 411.

In *Indiana*, an applicant to remove an administrator is not entitled to a change from the county nor from the judge. *Bowen v. Stewart*, 128 Ind. 507.

One who was joined and answered before, and filed a cross-complaint after the change, is not therefore entitled to

4. When the Motion May Be Made.—This also has already been considered,¹ and only the later cases may be noted here.²

a second change. *Griffith v. Dickerman*, 123 Ind. 247.

After a change on the application of one defendant, a change cannot be granted on another defendant's application. *Willard v. Ames*, 130 Ind. 351.

In *Iowa*, upon application by an officer of a corporation, his being such must be established otherwise than by mere averment in the affidavit. *McGovern v. Keokuk Lumber Co.*, 61 Iowa 265.

The court cannot make the change on its own motion. Objection thereto is not waived by going to trial in the second court. *Bennett v. Carey*, 57 Iowa 221.

In *Missouri*, the application must proceed from a party appearing to have some vested interest in the subject-matter. Thus, in a proceeding for confirmation of an administrator's report, it was held that the widow could not apply. *In re Whitson's Estate*, 89 Mo. 58.

In *New York*, the plaintiff cannot change the amendment as of course. Under *New York Code Civ. Proc.*, § 418, the summons, being the "mandate of the court," can, if irregular, only be corrected by motion. *Wadsworth v. Georger*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 202.

In *Texas*, the trial court may, on its own motion, change the venue of a criminal case. *Woodson v. State*, 24 Tex. App. 153.

1. See CHANGE OF VENUE, vol. 3, p. 102.

2. For the construction of the *Arkansas* statute prescribing the practice on the change, as to the time of the motion and transmission of the papers, see *Hudley v. State*, 36 Ark. 237; *Haglin v. Rogers*, 37 Ark. 491.

The requirement of the *California Code Civ. Proc.*, § 396, that the motion be in writing, is not met by a merely written notice thereof. *Pennie v. Vishner*, 94 Cal. 323. An amended affidavit may relate back to the time of filing the original. *Palmer v. Barclay*, 92 Cal. 199.

In *Colorado*, the applicant's alleged ignorance, until recently, of the extent of the prejudice created by certain newspaper articles, was held not to bring the case within the exception in the *Colorado Rev. Stat.*, § 634 (Annot.

Stat. 1891, § 4633), forbidding a change after the first term, "unless the cause shall have arisen subsequent to such term." *Roberts v. People*, 9 Colo. 458.

In *Illinois*, the application must be made at the earliest opportunity, and the state's attorney be notified. *Haskins v. People*, 14 Ill. App. 198.

The fact that the opposite party appears and resists the application, will not excuse a failure to give the statutory notice of the motion. *Miller v. Pence*, 132 Ill. 149.

In *Indiana*, the application may be made on the trial day, under a rule requiring the time to be "not later than the day fixed for the trial." *Hoke v. Applegate*, 88 Ind. 530.

The motion for the change is properly overruled, if no sufficient excuse be shown for its noncompliance with the rule of court as to the time thereof. *Lott v. State*, 122 Ind. 393.

As to when a lawyer's engagement upon a trial—he being the defendant—will not excuse his failure to apply seasonably for the change, see *Bernhamer v. State*, 123 Ind. 577.

When the defendant's motion for the change has been granted, but he neglects to pay the costs, the plaintiff may perfect the change by a seasonable payment thereof. *Michigan Mut. L. Ins. Co. v. Naugle*, 130 Ind. 79.

For construction of the *Iowa* statute as to the time of the motion, and other matters of practice in the change, see *Perkins v. Jones*, 55 Iowa 211; *Wint v. Berryhill*, 55 Iowa 411; *Parker v. Norris*, 56 Iowa 295; *Hall v. Royce*, 56 Iowa 359; *Allerton v. Eldridge*, 56 Iowa 709; *Omaha, etc., R. Co. v. O'Neill*, 81 Iowa 463; *Kelley v. Cosgrove*, 83 Iowa 229.

An objection, that a foreclosure suit is brought in a county without the jurisdiction, may be made at any time; it is not waived by any alleged consent, and may properly be raised by demurrer. *Orcutt v. Hanson*, 70 Iowa 514.

The motion comes too late, if first made after issue joined. *McNamara v. Eustis*, 46 Minn. 311.

In *Minnesota*, extension of the time to answer does not extend the time to move for the change. *Allen v. Coates*, 29 Minn. 46.

In *Missouri*, the motion comes too late if first made when the cause is

5. **The Affidavit.**—The principles relating to the requirements of the affidavit have been treated already.¹ Additional cases will be found in the appended note.²

reached for trial, without previous notice to the opposite party. *Summers v. Western Home Ins. Co.*, 45 Mo. App. 46.

In *New York*, upon a new state of facts, the motion may, as a matter of right, be renewed after a prior refusal. *Veeder v. Baker*, 83 N. Y. 156. So after a change granted, two trials, and the death of one defendant, a case was retrierred. *Abrahams v. Bensen*, 22 Hun (N. Y.) 605.

As to the seasonableness, within the *New York* Code Civ. Proc., § 986, of a demand for change served with the amended answer, see *Penniman v. Fuller, etc., Co.*, 62 Hun (N. Y.) 473; 133 N. Y. 442. As to when, within section 798, thirty days' notice is in apt time, see *Lesser v. Williams* (Supreme Ct.), 5 N. Y. Supp. 97.

In an action for slander, an application for a change, made before serving an answer, on the ground that a material witness could not attend in the first county, was held premature. *Briasco v. Lawrence* (Supreme Ct.), 4 N. Y. Supp. 94.

No notice to the defendant is required on the transfer of an indictment from the *New York* general sessions to the oyer and terminer. *People v. Carolin*, 115 N. Y. 658.

In *North Carolina*, the application may sometimes be admitted *nunc pro tunc*. *Shaver v. Huntley*, 107 N. Car. 623.

In *South Carolina*, the motion should be made before the cause is reached on the docket. *Blakely v. Frazier*, 11 S. Car. 122.

In *Texas*, a defendant going to trial before disposal of his plea to the jurisdiction, waives it. *Watson v. Baker*, 67 Tex. 48.

In *Wisconsin*, a motion based on the ground of prejudice of the judge, comes too late if first made after a reference and the report of the referee. *Duffy v. Hickey*, 68 Wis. 380. So, also, if first made after the trial was begun. *Allis v. Meadow Spring Distilling Co.*, 67 Wis. 16.

In the *Wisconsin* Rev. Stat., § 2624, the words, "at the first term at which the action shall be noticed for trial," do not import necessity of an actual no-

tice; nor that the motion must be made at the first term at which the action could be noticed for trial. *Main v. McLaughlin*, 58 Wis. 628.

The provision of the *Wisconsin* Rev. Stat., § 2625, that "the court shall change the place of trial of any action upon the application of any party there to, who shall file his affidavit that he has good reason to believe, and does believe, that he cannot have a fair trial of such action on account of the prejudice of the judge, naming him," is absolute; and the right accrues upon such filing before the adjournment of the term, and opportunity for both parties to be heard upon the motion. *Fatt v. Fatt*, 78 Wis. 633.

1. See CHANGE OF VENUE, vol. 3 p. 104.

2. The *Alabama* constitutional requirement that the accused "be confronted by the witnesses against him," refers to the trial proper, and not to the preliminary motion for change of venue. The objection that counts affidants are not cross-examined, goes to the sufficiency of the evidence, and not to its competency. *Hussey v. State*, 87 Ala. 121.

In *California*, it is held that an averment that the principal place of business of a corporation is in S., imports its "residence" in S., within the *California* Code Civ. Proc., § 395. *Cohn v. Central Pac. R. Co.*, 71 Cal. 488.

In *Colorado*, application for change on the ground of prejudice of the inhabitants, "shall be supported by the affidavits of at least three reputable citizens of the county, and not of kin to the defendant." *Colorado* Annot. Stat. 1891, § 4616. Less than three is insufficient. *Babcock v. People*, 1 Colo. 517.

In *Florida*, the affidavit must state the facts on which is based the belief that a fair trial cannot be had. *Irvin v. State*, 19 Fla. 872.

A mere averment that the adverse party had been mayor of a city in the county for three terms, and had great influence over the inhabitants, was held to be insufficient without proof of undue influence. *Greeno v. Wilson*, 21 Fla. 492.

The affidavit must state facts, and no

6. Effect of the Change.—Questions relating to the effect of a change of venue have been discussed.¹ Some additional light may be thrown upon the matter by the later cases cited below.²

merely the statutory language. *Johnson v. Wakulla County*, 28 Fla. 720.

The requirement in the *Iowa* Code, § 2590, that the affidavit be by "three disinterested persons not related to the party making the motion, nearer than the fourth degree," imports that in case of two movers, no one of the three be so related to either mover. *Fairburn v. Goldsmith*, 58 Iowa 339.

Admission of counter-affidavits is within the sound discretion of the judge. *Walker v. Nettleton*, 50 Minn. 305.

Mere affidavits are not, within the *Missouri* Rev. Stat., § 1859, "legal and competent evidence," to establish the petition for a change. *State v. Bohanan*, 76 Mo. 562.

In *Montana*, the affidavit should state facts, not mere conclusions. *Kennon v. Gilmer*, 5 Mont. 257; 51 Am. Rep. 45.

As to the comparative weight of averments in affidavits and counter-affidavits, concerning prejudicial newspaper statements, see *In re Davis' Estate*, 11 Mont. 1.

In *New Mexico*, the affidavit must not be on mere information and belief. *Territory v. Kelly*, 2 N. Mex. 292.

In *New York*, an affidavit for a change for convenience of witnesses must state that, without the testimony of every witness named, the applicant cannot safely proceed to the trial, as he is advised by his counsel, and verily believes. *Carpenter v. Continental Ins. Co.*, 31 Hun (N. Y.) 78.

In *Pennsylvania*, not the mere making of the affidavits, but the satisfying the court of the truth and weight of the averments, entitles a party to the change. *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St. 444.

In *Texas*, where the state files counter-affidavits, the burden of proof, under the *Texas* Code Crim. Proc., § 583, rests upon the accused. But he cannot object, if the court imposes the burden upon the state. *Pierson v. State*, 21 Tex. App. 14.

The court may inquire into the motives of the compurgators. *Smith v. State*, 31 Tex. Crim. Rep. 14.

In *Wisconsin*, an affidavit founded on the prejudice of the judge, and which stated that the affiant "has

reason to fear and does fear that he cannot have a fair trial," was held not equivalent to the statutory expression "has reason to believe and does believe," and to be insufficient. *Smith v. Clarke*, 70 Wis. 137. Compare *Albert v. State*, 66 Md. 325; 59 Am. Rep. 159.

The requirement in the *Wisconsin* Rev. Stat., § 4809, to "make oath that from prejudice or other cause," etc., imports that the facts constituting the cause, etc., shall be stated. *Hager v. Falk*, 82 Wis. 644.

1. See CHANGE OF VENUE, vol. 3, p. 105.

2. In *Arizona*, a party appearing in the second court, and asking a continuance, waives objection to the transfer. *Solomon v. Norton* (*Arizona*, 1886), 11 Pac. Rep. 108.

In *Arkansas*, the jurisdiction of the court to which the change is made, does not attach until the filing of the transcript duly certified under seal. *Ball v. State*, 48 Ark. 94.

In *Illinois*, an objection to the certificate of the transcript, upon a change in a criminal case, comes too late if first raised after the verdict. *Tucker v. People*, 122 Ill. 588.

In a criminal case, the second court will not assume to question the regularity of the order making the change. *People v. Zane*, 105 Ill. 662.

The order's mention of the name of the judge to try the case on the change is mere surplusage. *Story's Will*, 20 Ill. App. 183.

An objection to the sufficiency of the clerk's certificate to the transcript, is waived by going to trial. Objection to the regularity of the change, or to the jurisdiction, is waived by the verdict. *Langford v. People*, 134 Ill. 444.

In *Indiana*, a motion for a continuance made after the change, is a waiver of any irregularities in the transmission of the transcript. *Mannix v. State*, 115 Ind. 245.

In a criminal case, the defendant's waiver of non-compliance with the statute, as to filing the transcript in the second court, will not give jurisdiction thereto. *Fawcett v. State*, 71 Ind. 590.

A record in a criminal case that, after a change, there was a continuance "by consent of parties," raises the presump-

7. Review by Courts of Appeal.—As a motion for a change of venue is addressed to the discretion of the trial court, the appellate court will not, as a general rule, interfere, unless in the case of an abuse of discretion.¹

tion that the defendant voluntarily appeared, and this is a waiver of irregularity in the transcript. *Burrell v. State*, 129 Ind. 290.

An applicant for the change was held to be estopped to plead to the jurisdiction of the original court to which the case was returned, and judgment was rendered without appearance of the other party. *Coleman v. Floyd*, 131 Ind. 330.

In *Kentucky*, after an improper change and denial of the plaintiff's motion for a remand, his asking for a confession of judgment on the pleadings is a waiver of his right to object to the jurisdiction. *Howe v. Stevenson*, 84 Ky. 576.

Under the *Mississippi* Code, § 3061, leaving the change to the judge's discretion, he may impose conditions as to costs, and cause a *feri facias* to issue therefor. *Rattray v. State*, 61 Miss. 377.

Where a suit is instituted in the proper county, under the *Mississippi* Code, § 2418, the granting of a change on the alleged ground that this was not the proper county, will not confer jurisdiction in the second county. *Baum v. Burns*, 66 Miss. 124.

In *Missouri*, a petition for partition, and for an accounting for rents of land in the county, cannot, after a change to another county, be amended so that judgment can be rendered, as in ejectment, for the detention, etc. *Fields v. Maloney*, 78 Mo. 172.

The second court does not acquire jurisdiction until the first loses it. *In re Whitson's Estate*, 89 Mo. 58.

The second court retains jurisdiction until the final determination, and after a reversal by the supreme court, notwithstanding the defendant's withdrawal of his application. *State v. Hayes*, 88 Mo. 344.

Objection to the change comes too late, if first raised in the court to which the cause has been removed. *Squires v. Chillicothe*, 89 Mo. 226.

Under the *Missouri* Rev. Stat., § 1870, where the transcript is not properly certified, the clerk of the court to which the case is removed, may rule the other clerk to perfect it. The latter could

perfect it without rule. *State v. Haws*, 98 Mo. 188.

A change of venue at the instance of A, one defendant, does not affect the rights of B, another defendant, who did not join in the application, and who never appeared to the action, and was served only by publication. The court so held, on B's petition in Hickory county, to set aside a sheriff's deed of land therein, the sale having been under execution on a judgment rendered in Pettis county, after change thereto from Hickory county, on A's application. *Holland v. Johnson*, 80 Mo. 34.

In *Texas*, an erroneous recital, by the clerk who certified to the transfer, as to the signing of the indictment, was held immaterial. *Robinson v. State*, 24 Tex. App. 4.

1. See CHANGE OF VENUE, vol. 3 p. 108.

Only upon a clear showing of abuse of judicial discretion will the decision of the court, as to the granting or refusal of the change, be interfered with on appeal. *People v. Vincent*, 95 Cal. 425; *Stephens v. Bradley*, 24 Fla. 201; *Adams v. State*, 28 Fla. 511; *Reinholt v. State*, 130 Ind. 467; *Thorpe v. Bradley*, 75 Iowa 50; *Stafford v. Com.* (Ky. 1892), 18 S. W. Rep. 11; *State v. Hunt*, 91 Mo. 490; *State v. Rider*, 95 Mo. 474; *State v. Loe*, 98 Mo. 609; *Com. v. Cleary*, 148 Pa. St. 26; *Martin v. State*, 21 Tex. App. 11.

The court so held where the record failed to disclose all the evidence on which the first court acted thereon. *Williams v. Dickenson*, 28 Fla. 90; and also so held where the statements thereon were conflicting, *State v. Beck*, 7; Iowa 616; *Hamilton v. Des Moines etc., R. Co.*, 84 Iowa 131; *White v. Chicago, etc., R. Co.*, 5 Dakota 508; *Hasson v. Com.* (Ky. 1889), 11 S. W. Rep. 286; and so held under *California* Penal Code, §§ 1033-1035, when the defendant's application is supported by his affidavit alone, *People v. Elliott*, 80 Cal. 296. So, also, under *Iowa* Code, § 4374; *State v. Billings*, 77 Iowa 417; also, under *Kansas* Gen. Stat., §§ 5238-5239; *State v. Reno*, 41 Kan. 674. Especially is this true where the statute expressly leaves the question of change

to the discretion of the first court. *Quinn v. State*, 123 Ind. 59.

The overruling of the application for the change, based merely on an affidavit as to the state of public opinion in the county, is a mere matter of fact and discretion, and presents no question of law for review; and this, though in a territory—e. g., *Montana*—where an appeal lies. *Kennon v. Gilmer*, 131 U. S. 22.

In *Alabama*, where the statute requires an application for a change to be made "as early as practicable before the trial," and the application is renewed at the trial term, the appellate court will consider only the refusal of the last application. *Hawes v. State*, 88 Ala. 37.

In *California*, an appeal from an order denying the change does not operate as a stay. *Howell v. Thompson*, 70 Cal. 635.

In *Idaho*, the fact that there was a slight preponderance in favor of the application, is not ground for disturbing the decision of the trial court refusing the change, if no palpable abuse of discretion appears. *Hyde v. Harkness*, 1 Idaho 601.

Under the *Indiana Rev. Stat.*, § 177, in case of an offense not punishable by death, the question of a change of venue for alleged prejudice of the people, is wholly within the discretion of the trial court. *Droneberger v. State*, 112 Ind. 105.

In *Michigan*, the decision of the supreme court commissioner, as to the judge's disqualification, is reviewable by the supreme court; it being a question of law whether the testimony brings the case within the *Michigan Annot. Stat.*, §§ 6496-6499. *Curtis v. Wilcox*, 74 Mich. 69.

In *Mississippi*, in reviewing the refusal of the change in a criminal case, the supreme court will consider the facts, that the jury was obtained before the defendant's peremptory challenges were exhausted; that his witnesses responded promptly; and that the court, after seeing the temper of the jurors on their *voir dire*, refused a motion for a new trial. *Cheatham v. State*, 67 Miss. 335; 19 Am. St. Rep. 310.

In *Missouri*, when, after the change, the indictment is quashed, and the defendant is re-arrested under a new indictment, a statutory application, and not a *mandamus*, is the proper proceeding to have the indictment certified to the second court. *State v. Normile*, 108 Mo. 121.

In *Nebraska*, if a justice fails to make the change, as required by the *Nebraska Code*, § 958a, the remedy is not by *mandamus*, but on error to the district court. *State v. Cotton*, 33 Neb. 561.

Under the *New Hampshire* bill of rights, the supreme court may order a change of venue in a criminal case. *State v. Albee*, 61 N. H. 423; 60 Am. Rep. 325.

In *North Carolina*, the appellate court will presume that the examination of evidence required by the *North Carolina Code*, §§ 196-197, was had; and a finding that there could be a fair trial in the original county, is conclusive. *Albertson v. Terry*, 109 N. Car. 8.

In *Ohio*, when a party complies with the requirements of the statute for a change of venue, and the affidavit shows the judge to be interested, the clerk must make the order and certificate for a change of venue. *State v. Shaw*, 43 Ohio St. 324.

Under the *Pennsylvania Act* of 1875, making the change a matter of judicial discretion, *mandamus* will not issue on its refusal. *Newlin's Petition*, 123 Pa. St. 541.

In *Tennessee*, under the constitutional guaranty in a criminal case, if a change has been made, the record should show that the defendant applied for it, the reasons therefor, and his assent thereto. *State v. Denton*, 6 Coldw. (Tenn.) 539.

In *Texas*, upon impeachment of the means of knowledge of the defendant's compurgators, a refusal to put them upon the stand will not be reviewed by the appellate court. *Scott v. State*, 23 Tex. App. 521.

In *Virginia*, in a criminal case, jurors may be summoned from another county, if qualified ones cannot be conveniently found. *Virginia Code* 1887, § 4024. If the prisoner failed to ask for such summoning, and there is no proof that the jury was not impartial, the appellate court will not reverse for the refusal of the change. *Wright v. Com.*, 33 Gratt. (Va.) 880.

In *West Virginia*, when it is doubtful whether the circuit court intended to remove the entire cause, or only a petition for relief as to part of a certain fund, the entire cause will be considered removed, if this is necessary for administering full justice. *Baltimore, etc., R. Co. v. Vanderwerker*, 33 W. Va. 191.

VERDICT.—(See also ACTIONS, vol. 1, p. 178; APPEAL, vol. 1 p. 616; CRIMINAL PROCEDURE, vol. 4, p. 729; DAMAGES, vol. 5 p. 1; DAY, vol. 5, p. 86; INDICTMENT, vol. 10, p. 450; INSTRUCTIONS, vol. 11, p. 236; INTEREST, vol. 11, p. 379; JEOPARDY, vol. 11, p. 926; JUDGE, vol. 12, p. 2; JUDGMENTS, vol. 12, p. 58 JURY AND JURY TRIAL, vol. 12, p. 318; LARCENY, vol. 12, p. 761; LIQUIDATED DAMAGES, vol. 13, p. 847; NEW TRIAL, vol. 16, p. 500; NONSUIT, vol. 16, p. 720; PARTIES TO ACTIONS, vol. 17, p. 470; PLEADING, vol. 18, p. 467; QUESTIONS OF LAW AND FACT, vol. 19, p. 598; RECORD, vol. 20, p. 473; STATUTES, vol. 23, p. 140; SUNDAY, vol. 24, p. 528; TRESPASS, vol. 26, p. 568 TROVER, vol. 26, p. 711.)

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I. ETYMOLOGY AND DEFINITION.—The word “verdict” is derived from the Latin, and results from the coalition of the two words, *vere*, truly, and *dictum*, a saying.¹ It is a member of the very numerous family of legal terms, and in this sense it has been defined “The unanimous decision made by a jury and reported to the court, on matters lawfully submitted to them in the course of a trial of a cause.”²

II. VARIOUS KINDS OF VERDICTS—1. **General Verdict**—*a. DEFINITION.*—A general verdict is that by which the jury pronounce generally upon any or all of the issues, either in favor of the plaintiff or defendant.³

1. 3 Bl. Com. 377; Webster's Dict.; Century Dict.

2. Bouv. Law Dict.

3. Bouv. Law Dict.; Co. Litt. 228; 4 Bl. Com. 360. See numerous statutory definitions in the codes of various states.

An apt description of a general verdict is noted in the opinion of the court in *Smith v. Ireland*, 4 Utah 187. “A general verdict,” said Lane, C. J., “is a direct statement of a conclusion of law, and an indirect statement of the facts from which the conclusion is drawn; it expressly affirms the law, and inferentially the facts.”

In *Bacon Abr., tit. “Verdict”* (C) it appears, “A general verdict is so called, because the whole matter in issue is thereby found generally.”

Criminal Cases.—A response in general terms to the indictment is what is termed a general verdict. *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

A verdict which finds in general terms in favor of one party or the other, may, nevertheless, be a general verdict, though special facts are stated, as the grounds of the jury's conclusion. *Lawson v. Hilgenberg*, 77 Ind. 221; *Caldwell v. Brown*, 43 Tex. 216; *Shifflet v. Morelle*, 68 Tex. 382.

When Proper—Criminal Case—Louisiana.

ana.—The only verdict, under the law that the jury can render in a criminal case, is a general verdict of guilty or not guilty, which is a decision on both the law and the fact. *State v. Jurche*, 17 La. Ann. 71.

Criminal Case—Colorado.—A general verdict is according to the course of the common law, in conformity to which all trials for criminal offenses are to be conducted, except where a different mode is pointed out. *Kollenberger v. People*, 9 Colo. 233.

Separate Counts—Same Offense.—Where there are several counts in an indictment, charging the commission of the same offense in as many different ways, a general verdict is proper. Separate verdicts of guilty on each count might be repugnant. *State v. Rounds*, 76 Me. 123.

When Improper.—Where two inconsistent causes of action are alleged, a general verdict cannot be sustained. *Schofield v. Miltimore*, 74 Wis. 194. Similarly it has been held, that when two causes of action are submitted to the jury at the same time, a general verdict for the plaintiff is erroneous. *McHoney v. German Ins. Co.*, 44 Mo. App. 426.

When Sufficient.—In an action to recover several penalties due plaintiff, by

b. RIGHT TO RETURN.—(See infra, this title, Special Verdict—Right to Return.)

reason of defendant's passing plaintiff's toll-gate without paying toll, although the causes of action embraced in the suit were distinct and separate, a general verdict of not guilty is sufficient, though, if the jury had found for the plaintiff, a separate verdict on each count might have been requisite. *Hannibal, etc., Plank Road, etc., Co. v. Bowling*, 53 Mo. 311. And see *State v. Henslee*, 54 Mo. 518.

In *Mooney v. Kennett*, 19 Mo. 554; 61 Am., Dec. 576, it was said "that a general finding for the defendant, on a petition containing several causes of action, may be sustained; but where the finding is for the plaintiff, every consideration of propriety requires that there should be a verdict in each cause of action, and this will all be blended in one judgment."

Where there are several issues, a finding upon either of which for the defendant would discharge him, the jury may find a general verdict, and are not bound to find upon each issue separately. *State Bank v. Cason*, 10 Ark. 479.

Where the questions of fact, presented by an issue under the first count, were in some respects different from those involved in that upon the second count, so that evidence given under one might not have been competent under another, but the amount which the plaintiff was entitled to recover was the same under both, and the issues were tried together, a general verdict was held to be sufficient. *Connecticut L. Ins. Co. v. McMurdy*, 89 Pa. St. 363.

May Be Set Aside, But Not Changed.

—When the jury pronounces a general and absolute verdict, the judge may set aside, though he cannot change, their finding. Where the jury declared the defendant, in an indictment for perjury, guilty, the judge has the power to set aside this verdict, but not to go further. He has no power, in the face of such verdict, to pronounce him innocent. *State v. Curtis*, 6 Ired. (N. Car.) 247.

What It Includes.—A general verdict for the defendant, in an action of trespass to try title, necessarily includes the finding in his favor of every material fact well pleaded touching his right to the relief sought. *Hamilton v. Rice*, 15 Tex. 382. And see also *Wells v. Barnett*, 7 Tex. 584; *Hardy v. DeLeon*, 5 Tex. 211; *Smith v. Johnson*, 8 Tex.

418; *McLaughlin v. Kelly*, 22 Cal. 211; *Krause v. Cutting*, 32 Wis. 687; *Stat. v. Lee*, 80 Iowa 75; *Van Pelt v. Otter*, 2 Sweeney (N. Y.) 202.

A general verdict of guilty is a finding only of the facts sufficiently pleaded. Where, therefore, neither count upon the indictment sets forth larceny, a verdict of larceny cannot be sustained. *Com. v. Moore*, 99 Pa. St. 570.

Conditional Verdicts.—In the case of *Coolbaugh v. Pierce*, 8 S. & R. (Pa.) 418, which was an action of ejectment the jury returned a verdict for the plaintiffs "conditioned that the defendant shall, by the first day of next June, deposit a deed or acquittance of his part of the orchard now in possession of the plaintiffs, and \$40 in cash, together with costs of suit; then, judgment to be entered for the defendant." The defendant having complied with the conditions of the verdict within the time prescribed, the court directed judgment to be entered in his favor. This judgment was attacked by the plaintiffs in error on the ground that a conditional verdict is unauthorized by law, but *Gibson, J.*, in sustaining the judgment, said: "In this state an action of ejectment approaches very near to a bill in equity, and the verdict of a jury imposing conditions on the party in whose favor it is rendered and perform the office (though imperfectly) of the decree. In our sister states, at least in those that enjoy the benefit of a separate administration of equity, such a verdict would not be sustained; with us it is sustained from necessity."

Again, in *Roland v. Miller*, 3 W. & S. (Pa.) 390, which was an action on debt on a bond for the purchase-money of land, the jury found a conditional verdict. They were allowed to find for the plaintiff the amount due on the bond, principal and interest to be paid when a certain incumbrance which was proved to exist should be removed from the land purchased by the defendant from the plaintiff. And see *Frantz v. Brown*, 1 P. & W. (Pa.) 257; *Nichols v. Wolfersberger*, 5 S. & R. (Pa.) 167; *Decamp v. Feay*, 5 S. & R. (Pa.) 323; 9 Am. Dec. 372; *McCormack v. Crall*, 6 Watts (Pa.) 207; *Adams v. Smith*, 19 Pa. St. 182; *Hoeverler v. Mugele*, 6 Pa. St. 348; *Bower v. Fenn*, 90 Pa. St. 359; 35 Am. Rep. 662.

c. REQUISITES OF VERDICT—(1) *In General*.—The rule that a verdict must be supported by evidence adduced at the trial, is too well established to require more than the bare statement of the fact;¹ and that it is peculiarly the province of the jury to say what amount of evidence is necessary for this purpose, is conceded with the same universality.² A verdict must be reasonable; not inconsistent nor contradictory in its provisions;³ for example, a verdict finding the defendant guilty of larceny of certain property and of receiving the same property knowing it to have been stolen, is liable to this objection;⁴ and in a suit instituted for the recovery of a certain sum of money, where the defendant pleaded tender of a part, a verdict finding “no cause of action” was held

1. *U. S. v. Chaffee*, 2 Bond (U. S.) 147; *Gatlin v. Wilcox*, 26 Ark. 309; *Gillett v. Fuller*, 2 Ill. App. 144; *Uphike v. Abel*, 60 Barb. (N. Y.) 15; *Simpson v. Buck*, 5 Lans. (N. Y.) 335; *Blosser v. Harshbarger*, 21 Gratt. (Va.) 214.

2. *Weight of Evidence*.—Although a verdict be considered against the weight of evidence, the action of the court below in refusing to grant a new trial, will not be interfered with; but where there is no evidence to support a verdict at all, it is the duty of the court to set it aside. *Low v. Pardee*, 48 Ill. 466; *O'Herrin v. State*, 14 Ind. 420; *Wishmier v. Behymer*, 30 Ind. 102; *Moellering v. Kayser*, 110 Ind. 533; *Allen v. Sykes*, 5 J. J. Marsh. (Ky.) 611; *Cardaillac v. Duthu*, 21 La. Ann. 219; *Carroll v. Doughty*, 21 La. Ann. 374; *Glenn v. Ferguson*, 21 La. Ann. 385; *Bancker v. Marti*, 21 La. Ann. 587; *Baker v. Briggs*, 8 Pick. (Mass.) 122; 19 Am. Dec. 311; *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *Cicily v. State*, 21 Smed. & M. (Miss.) 202; *Watts v. Douglass*, 10 Mo. 676; *Eaton v. Joint School Dist.*, 23 Wis. 374; *NEW TRIAL*, vol. 16, p. 554.

Where the evidence is conflicting, the verdict should not be set aside, as against the evidence, except in extraordinary cases, where it is manifest that the jury have either mistaken or abused their trust. *Baker v. Briggs*, 8 Pick. (Mass.) 122; 19 Am. Dec. 311.

3. Where three defendants were tried on an indictment for robbery, the proof against all being precisely the same, if a jury acquit two of the defendants and find a third guilty, their verdict must be set aside, and particularly where the indictment was for robbery in the first degree, being accompanied by violence and the con-

viction being for robbery in the third degree, where from the evidence the accused was clearly guilty of robbery with force and violence if he was guilty of any crime at all. *People v. Massett* (Supreme Ct.), 7 N. Y. Cr. Rep. 393. See *Weinecke v. State*, 34 Neb. 14.

In *Hall v. Spivey*, 65 Ga. 693, which was a case involving the title to certain land, the issue was, whether the title was in the claimant, or in the representatives of a certain intestate. The jury returned a verdict finding the title to be in the claimant, and also found an inconsistent right of dower in the land. The verdict was set aside.

A verdict finding damages for the plaintiff, on a count alleging non-performance of a contract, and at the same time finding for the defendant on a counter-demand based solely upon the contract, is invalid for inconsistency. *Johnson v. Labarge*, 46 Mo. App. 433.

4. *Com. v. Haskins*, 128 Mass. 60.

North Carolina.—The code of this state, section 1191, expressly permits the joining in an indictment of a count for larceny with one for receiving stolen goods knowing them to have been stolen; and a general verdict in such a case is good, if either count be sufficient. *State v. Carter* (N. Car. 1893), 18 S. E. Rep. 517.

Wisconsin.—Under the statutes of *Wisconsin*, which provide the same penalty for one who receives, conceals, or aids in concealing property knowing it to have been stolen, as is prescribed for the stealing of the property, where one is charged in separate counts with both crimes, a general verdict of guilty is sufficient without specifying the count to which it relates. *Nelson v. State*, 52 Wis. 534.

The local statutes should be consulted in questions of this sort.

void for inconsistency, in this instance, with the pleadings.¹ The jury may not negative a fact admitted by the pleadings,² for if they do this, they transcend their authority. It is only the controverted points, those facts distinctly affirmed on the one side and negatived on the other, with which they have to do.³ The jury are, of course, controlled by statutory directions, to which they should conform their verdict.⁴ Their findings should also

1. *Brayton v. Delaware County*, 16 Iowa 44. See also *Hall v. Spivey*, 65 Ga. 693.

2. *Burnett v. Stearns*, 33 Cal. 468; *Hill v. Den*, 54 Cal. 20; *Tracy v. Craig*, 55 Cal. 91; *Silvey v. Neary*, 59 Cal. 97; *Walker v. Brem*, 67 Cal. 599; *Bancker v. Marti*, 21 La. Ann. 587; *Sage v. Evins*, 32 La. Ann. 1271; *Watts v. Greenlee*, 2 Dev. (N. Car.) 87.

Findings should be confined to the facts put in issue by the pleadings, and upon such facts as are admitted by the pleadings, no findings are required. If, however, findings are made upon admitted facts, they should be in harmony with the facts as admitted and not in conflict with them. *Walker v. Brem*, 67 Cal. 599.

Where the defendant in an action of slander pleaded that the alleged slanderous words were spoken more than six months before the commencement of the suit, and the plaintiff pleaded infancy at the time of speaking the words and bringing the suit, a verdict that the words were spoken within six months before the writ was sued out was held to be void. *Watts v. Greenlee*, 2 Dev. (N. Car.) 87.

3. The jury is selected and sworn to try the issues joined between the parties. To the decision of those issues they must be confined, and the issues are the propositions affirmatively stated by one and negatively by the other party. Confined to the decision of the questions thus raised, it is not competent for the jury to go beyond the pleadings, to ignore matter which they are sworn to inquire into, or to affirm and pass upon an issue of their own creation, inconsistent with the joinder of pleading. *Sage v. Evins*, 32 La. Ann. 1271. See also *Walker v. Brem*, 67 Cal. 599.

4. A jury cannot fix the punishment for certain crimes at a smaller period than the minimum time prescribed by law as punishment for the offense of which they convict. Thus, where a jury might legally commute the pun-

ishment of a prisoner from that of death to imprisonment in the penitentiary: from ten to twenty-one years, they had no authority to bring in a verdict declaring him guilty of the offense charged but fixing his punishment at five year imprisonment. *Murphy v. State*, Coldw. (Tenn.) 516.

Where imprisonment in the penitentiary for a term of one year or less is forbidden by statute, it was held that the court had no right to receive a verdict violating this provision. *Alabama Code*, § 4492; *Ex p. Goucher* (Ala 1894), 15 So. Rep. 601.

The *Wisconsin Revised Statute* provide that "in all actions of replevin it shall be necessary for the plaintiff whether the defendant be present or not to prove all the allegations of his complaint, and on such proof, the justice or the jury shall find as well the value of the goods and chattels specified in the complaint, and assess the damage which he has sustained by the unjust detention of the property replevied, as that the plaintiff is entitled to the possession of the property." It is further provided that "if, on trial of the issues joined the jury shall find for the defendant, the justice or jury shall assess adequate damages for the caption and detention of the goods or chattels replevied." In this existing state of the law, an action of replevin was brought for a chestnut sorrel horse, the plea being simply no guilty, and the verdict of the jury, "we find no cause of action." It seems that this verdict did not comply with either of the statutory requirements, nor did it respond to the plea of property which it was held was put in issue by the defendant's general denial. *Ford v. Ford*, 3 Wis. 399.

Though a statute declares that the question of fraudulent intent is one of fact and not of law, where the circumstances are such as render the act conclusively fraudulent in law, the jury are not at liberty to contradict this conclusive legal presumption. *Stevens v. Fisher*, 19 Wend. (N. Y.) 181. See

be consistent with the instructions of the court,¹ and not indirect, indefinite, nor argumentative.² The verdict of a jury requiring

also *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319.

Where, however, a certain state of facts is declared merely presumptive evidence of fraud, the jury is at liberty to find against this *prima facie* presumption. *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319.

Conformable to General Legal Principles.—If the fact to be found by the jury consists of distinct integral parts, some of law and some of fact, which must exist and be proved before such mixed fact can be said to be legally established, a verdict finding the fact, without the evidence of such legal prerequisites, would be a verdict against law and should be set aside. *Bryant v. Commonwealth Ins. Co.*, 13 Pick. (Mass.) 543.

The plaintiffs sued the city for grading and filling in certain streets, by means of which the water was caused to stand upon their lands to their great damage, etc. The jury returned a verdict: "Believing in the lot is no living stream, we, the jury, find for the defendant." The evidence tended to prove that a living stream ran across the plaintiff's lot, which was dammed up by the improvements, although the evidence varied in regard to the character of the stream. It was, however, clearly shown that water ran in it for most of the year. The jury, it seems, founded their verdict upon the fact that the stream was not a living one, which must mean one constantly running, thus holding, as a matter of law, that the city in making improvements had a right to dam up any watercourse, and thereby flood the lands of others where it does not form a permanent stream. In this view of the law the jury were mistaken, and the court should have set aside the verdict. For this error, the judgment was reversed and the cause remanded for a new trial. *Rose v. St. Charles*, 49 Mo. 509.

1. *Rex v. Atwood*, 2 Leach 522; *Rex v. Woodfall*, 5 Burr. 2661; *Levi v. Milne*, 4 Bing. 195; *Rex v. Dean of St. Asaph*, 3 T. R. 428, note; 4 Bl. Com. 361; *U. S. v. Battiste*, 2 Sumn. (U. S.) 243; *U. S. v. Wilson*, 1 Baldw. (U. S.) 99; *Georgia v. Brailsford*, 3 Dall. (U. S.) 1; *Pierson v. State*, 12 Ala. 149; *Batre v. State*, 18 Ala. 119; *Washington v. State*, 63 Ala. 136;

35 Am. Rep. 8; *Sweeny v. State*, 35 Ark. 586; *Emerson v. Santa Clara County*, 40 Cal. 543; *Tounsens v. State*, 2 Blackf. (Ind.) 163; *Warren v. State*, 4 Blackf. (Ind.) 150; *Jewert v. Smart*, 11 Iowa 505; *Morss v. Johnson*, 38 Iowa 430; *Limburg v. Peoria German F. Ins. Co.* (Iowa, 1894), 57 N. W. Rep. 626; *Union Pac. R. Co. v. Hutchinson*, 40 Kan. 51; *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 150; *Com. v. Knapp*, 10 Pick. (Mass.) 478; 20 Am. Dec. 534; *Bryant v. Insurance Co.*, 13 Pick. (Mass.) 543; *Com. v. Kneeland*, 20 Pick. (Mass.) 222; *Com. v. Porter*, 10 Met. (Mass.) 263; *Coffin v. Coffin*, 4 Mass. 25; 3 Am. Dec. 189; *State v. Snow*, 18 Me. 346; *Hamilton v. People*, 29 Mich. 173; *Hardy v. State*, 7 Mo. 607; *Pierce v. State*, 13 N. H. 536; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *People v. Crosswell*, 3 Johns. Cas. (N. Y.) 345; *Jacobsohn v. Belmont*, 7 Bosw. (N. Y.) 14; *Montgomery v. State*, 11 Ohio 424; *Pennsylvania v. Bell*, Add. (Pa.) 160; 1 Am. Dec. 298; *Kelton v. Bevins*, *Cooke* (Tenn.) 107; 5 Am. Dec. 670; *Davenport v. Com.*, 1 Leigh (Va.) 588; *Com. v. Garth*, 3 Leigh (Va.) 761; *Smith v. Tate*, 82 Va. 657. See NEW TRIAL, vol. 16, p. 552; QUESTIONS OF LAW AND FACT, vol. 19, p. 598.

Right of Court to Direct Verdict.—See INSTRUCTIONS, vol. 11, p. 258.

2. The issue was whether the prisoner was or was not insane, and the court held that a verdict that he was "sufficiently sane in mind and memory to distinguish between right and wrong," was defective, as it did not directly find anything certain on the point in issue, but avoided it by an argumentative finding. *Freeman v. People*, 4 Den. (N. Y.) 9; 47 Am. Dec. 216.

"On or About."—A verdict that a certain erection was completed on or about the 5th of April, 1879, is not so indefinite as to be a nullity in law, especially where the evidence on the point is confusing, there being enough evidence to sustain the finding. *Sturges v. Green*, 27 Kan. 235.

A verdict, "we, the jury, find the defendant guilty as charged in the indictment, and that he be sentenced to the state prison for a term of two years," was objected to on the ground

mutual acts to be done between the plaintiff and defendant, the performance of which cannot be compelled, is ineffectual and void as a verdict to be valid and complete must be of such a character as to be readily enforceable by the legal process of the court in which the judgment is pronounced.¹

(2) *Number of Jurors*.—Usually the members of a jury are twelve in number,² whose unanimous concurrence is necessary

that it did not, with sufficient certainty, fix the punishment of the convict; it being insisted that the language should have been that the defendant be imprisoned at hard labor in the state prison, etc. However, as the defendant was sentenced to the state prison pursuant to the verdict in the usual and legal form, the law determining how he was to be disposed of on his arrival at the prison, the verdict was held to be good. *O'Herrin v. State*, 14 Ind. 420.

Where a verdict fixes the punishment of the defendant at five years' imprisonment, it is sufficient, though it does not specify the place of confinement, since, under the statute, confinement for more than twelve months must be in the penitentiary. *Clemons v. State*, 92 Tenn. 282. See also *Cross v. State*, 132 Ind. 65.

Where two defendants were indicted for unlawfully marking six hogs, it was proved that one of the defendants claimed one of the hogs and marked it; two were claimed by the other defendant and marked by him, but no joint act was proved, nor no concurrence in separate acts. The jury brought in a general verdict of guilty, and it was held that the general conviction could not be supported, and that to justify a sentence in such a case the verdict must ascertain the number of hogs marked. *State v. Nichols*, 12 Rich. (S. Car.) 672.

1. *Glass v. Blair*, 4 Pa. St. 196; *Bruck v. Mansbury*, 102 Pa. St. 35.

2. See JURY AND JURY TRIAL, vol. 12, p. 318; *Vaughn v. Scade*, 30 Mo. 600; *Den v. Baldwin*, 3 N. J. L. 945; *Scott v. Scott*, 110 Pa. St. 387; *Bullard v. State*, 38 Tex. 504; 19 Am. Rep. 30.

Twelve Not a Necessary Number.—In most of the states we are so accustomed to juries of twelve men, that we are apt to lose sight of the fact that while that was a favorite number of the common law, in which Lord Coke finds surprising virtue and ample sanction in the fact that there were twelve apostles,

twelve tribes, twelve stones, etc. (31 Co. Litt. 459), yet it is not a necessary number. 4 Min. Inst. (2d ed.) 736.

Under the laws and constitution of *Mississippi*, there is no jury known for the trial of issues except that which consists of twelve good and lawful men who are tried, elected, and sworn. *Wolfe v. Martin*, 1 How. (Miss.) 30; *Dixon v. Richards*, 2 How. (Miss.) 771; *Scott v. State*, 70 Miss. 247. But see opinion of Thacher, J., in *Tillman v. Ailles*, 5 Smed. & M. (Miss.) 373; 43 Am. Dec. 520, where it is contended that an issue of assumpsit may be tried by a jury of thirteen, though if the number were less than twelve the verdict would be invalid.

The provision in the *Missouri* constitution, to the effect that trial by jury shall remain inviolable, in substance means that the trial shall be by twelve men; they shall all and each of them be good and lawful men; they must have a good fame, possess integrity and intelligence; they must not be aliens, vagrants, outlaws, nor under conviction of crime. *Missouri Bank v. Anderson*, 1 Mo. 244.

The constitution of *Texas* directs that petit-juries in the district courts shall be composed of twelve men. It also provides that when, pending the trial of any case, one or more jurors not exceeding three, die or are disabled from sitting, the remainder of the jury shall have the power to render a verdict. It also adds that parties may by consent, agree in a particular case, to try with a less number, but that no verdict shall be rendered in any cause except upon the concurrence of all the members of the jury trying the same. *Houston, etc., R. Co. v. Waller*, 56 Tex. 331. See also this case for a construction of the phrase "disabled from sitting."

Less Than Twelve.—"The trial of a criminal cause by a jury consisting of a less number than twelve is unauthorized by law," said the court in *Aller v. State*, 54 Ind. 461, "and the verdict

for a verdict.¹ Generally in civil causes,² and in some instances

in such a case is void." See also *Jackson v. State*, 6 Blackf. (Ind.) 461; *Hill v. People*, 16 Mich. 351. A jury may be waived altogether in criminal cases less than capital, upon agreement of the parties, but where there is a jury at all, it must consist of twelve men. *Brown v. State*, 8 Blackf. (Ind.) 561.

Alienage of Jurors.—A verdict rendered by a jury, two of whom are aliens, is erroneous. However, it is not void, and hence cannot be regarded as a nullity. *Foreman v. Hunter*, 59 Iowa 550.

1. *Addin v. Blake*, 2 J. J. Marsh. (Ky.) 40; *Lawrence v. Stearns*, 11 Pick. (Mass.) 501; *Perry v. Mays*, 2 Bailey (S. Car.) 354; *Houston, etc., R. Co. v. Waller*, 56 Tex. 331; *Com. v. Gibson*, 2 Va. Cas. 70; *State v. Austin*, 6 Wis. 205.

A verdict was brought into court, read by the clerk, and assented to by the jury. The clerk then, in open court, saw fit to amend the verdict in an immaterial point, but before the amended verdict could be read one of the jurors was taken ill and retired. The remaining eleven agreed to the amended verdict, yet as the twelve did not assent to it the verdict was held a nullity. *Com. v. Gibson*, 2 Va. Cas. 70.

In the constitution of *Texas*, which went into effect the 18th of April, 1876, there was an article providing that in all civil cases, and in criminal cases below the grade of felony, nine members of the jury concurring might render a verdict. The legislature, however, was vested with power by the constitution to change this rule, which it did in August of the same year, restoring that which had formerly prevailed. See *Bowen v. Davis*, 48 Tex. 101.

Where an intended juror had been sworn, but a stranger appeared in his place, answered to his name, and was put on the jury, the verdict rendered was held to be invalid, as it was the verdict of only eleven men. *Dayton v. Church* (Brooklyn City Ct.), 7 Abb. N. Cas. (N. Y.) 367.

Concurrence in Same View.—In *Murray v. New York L. Ins. Co.*, 96 N. Y. 614, it was held not to be necessary that a jury, in order to find a verdict, shall all agree in a single view of the transaction disclosed by the evidence; if their conclusion may be justified by either of two interpretations of the

evidence, the verdict may not be impeached by showing that part of the jury proceeded upon one interpretation and part upon another. However, *Morton, J. in Dorr v. Fenno*, 12 Pick. (Mass.) 521, thought differently, declaring that if the jury did not all agree upon the same ground that the verdict might be set aside.

The case of *Biggs v. Barry*, 2 Curt. (U. S.) 259, depended on two points: first, considerations touching the right of stoppage *in transitu*, and secondly, concerning an alleged fraudulent sale. The jury found generally for the plaintiff, but, upon being questioned, it appeared that some considered the plaintiff entitled to a recovery on one ground and some on another; for this reason, the verdict was set aside.

2. *Durham v. Hudson*, 4 Ind. 501; *Ayres v. Barr*, 5 J. J. Marsh. (Ky.) 286; *Oldham v. Hill*, 5 J. J. Marsh. (Ky.) 300; *Ross v. Neal*, 7 T. B. Mon. (Ky.) 407; *Berry v. Kenney*, 5 B. Mon. (Ky.) 120; *Roach v. Blakey*, 89 Va. 767.

In *Ross v. Neal*, 7 T. B. Mon. (Ky.) 407, which was an action for malicious prosecution, the jury rendered a verdict for the plaintiff in the lower court. The defendant appealed, and, among other assignments of error, contended that the verdict was rendered by a jury of thirteen men. *Mills, J.*, in delivering the opinion of the court, said: "It must be admitted that twelve is the right number in such a case as this, and if there were not twelve, but a deficit in the number, it might vitiate the verdict. But here the party had his twelve and one more, and the complaint is, an excess in number, and the grounds of it must be that the verdict was liable to be influenced by at least one more person than the law allowed in the jury room, acting upon the case. If this exception to the verdict had been taken in the inferior court, we have no doubt it must have vitiated the verdict. . . .

But," continues the judge, "would it be proper to permit him to attack the verdict here for the first time? We conceive not." In *Berry v. Kenney*, 5 B. Mon. (Ky.) 120, the same position is maintained.

Judgment entered upon a verdict of eleven jurors, unless the defendant was in court to waive the objection to the number, is erroneous. *Ayres v. Barr*, 5 J. J. Marsh. (Ky.) 286.

in criminal prosecutions,¹ the parties have been allowed to waive a numerical irregularity; and in the former class of actions unanimity of consent has been in the same manner dispensed with.²

(3) *Mode of Deliberation*.—(See also JURY AND JURY TRIAL, vol. 12, p. 378; NEW TRIAL, vol. 16, p. 593).—When it becomes the duty of the jury to pronounce on the issues of fact submitted to them for their decision, their verdict should be the creature of sound judgment, dispassionate consideration, and conscientious reflection.³

The lack of all constraint is an essential characteristic of their deliberations, and influences tending to impair the free exercise of their discretion, within legal bounds, invalidate a verdict

Writ of Inquiry.—Where it appears that on a writ of inquiry only nine jurors were sworn, the judgment will be reversed, unless there is a waiver of record, express or implied, of objection to the number. *Oldham v. Hill*, 5 J. J. Marsh. (Ky.) 300.

1. A verdict in a misdemeanor case rendered by eleven jurors will not be set aside for this reason, if defendant's counsel, by consent duly entered of record, agreed that one of the jurors might be withdrawn. *Com. v. Daily*, 12 Cush. (Mass.) 80; *State v. Borowsky*, 11 Nev. 119.

2. In *Northern Bank v. Buford*, 1 Duv. (Ky.) 335, it seems that the parties agreed that a majority of the jurors might render a verdict upon which judgment should be entered. This operated as a mere agreement to dispense with the unanimous concurrence, and not as a submission to arbitrators, whose award should be final.

Where consent to a majority verdict was obtained by one party, in possession of information regarding the jury which, had his opponent known, would have prevented an agreement, the verdict should be set aside. *Snow v. Hardy*, 3 Minn. 77.

3. **Free and Deliberate Finding.**—Nothing short of a free and deliberate finding, made upon a conscientious conviction of the judgments of the jurors, will satisfy the law. *Merseve v. Shine*, 37 Iowa 253.

Passion or Prejudice.—Where the verdict manifests the influence of passion or prejudice it should be set aside. *Jeffrey v. Keokuk, etc.*, R. Co., 51 Iowa 439; *Damrille v. St. Louis, etc.*, R. Co., 27 Mo. App. 202.

Presumption of Passion or Prejudice.—It was contended, in *Conrad Seipp Brewing Co. v. Doody*, 25 Ill. App.

305, that the size of the verdict, and the fact that the court required a remittitur of one-third thereof, is conclusive proof that the verdict was the result of passion or prejudice. This contention was not allowed to prevail by the appellate court.

Damages Upon Erroneous Grounds.—Where a verdict showed upon its face that the damages were assessed upon a basis unwarranted alike by the pleadings, the evidence, the charge of the court, and the law governing the case it must be set aside. *Holden v. Belmont*, 32 Ohio St. 585.

Duty of the Jury.—It is the duty of the jury to find a verdict upon the evidence given in the course of the trial and upon that alone. Of course, its weight and credit should be judged by them in the light of their own experience, and that should be done without any addition to it, or modification of it arising out of the peculiar scientific requirements, or actual knowledge of the facts in controversy by one or more of their number. The law is imperative in exacting that oral evidence given upon the trial of civil and criminal cases be detailed under the solemnity of an oath properly administered to the witness, and without any distinction in the character of the information to be conveyed, whether it consists in deductions of science or the knowledge of facts. The universal prevalence and application of this rule excludes jurors from communicating with others for the purpose of influencing their conclusions the knowledge of any fact, and the existence of any scientific opinions bearing upon the questions submitted to their decision. If a juror has acquired knowledge concerning any circumstances of the case, or has arrived at scientific conclusions bearing upon the controversy pending before the jury, that it is

rendered under such circumstances.¹ Hence, all coercion employed

important for the jurors upon the panel to know, it is his duty to be sworn and examined the same as any other witness in the case, and under the responsibility of his oath to state the facts known to him, or the opinions formed by him, in the presence of the parties. *People v. Zeiger*, 6 Park Cr. Rep. (N. Y.) 355.

An action was brought by the plaintiff to recover upon an agreement made by the plaintiff with the defendant for working his farm on shares, alleging in his complaint, among other things, that the defendant appropriated and used more than his half share of the milk and butter, and omitted to pay his half of the school tax. The plaintiff also claimed a large quantity of corn, oats, and potatoes used by the defendant, as well as for work done, beef sold, and money loaned. The defendant, in his answer, pleaded a denial and set-off. The evidence at the trial was very uncertain as to the quantity of corn, oats and potatoes, milk and butter, which the plaintiff claimed the defendant had appropriated. Nevertheless, the jury returned a verdict for \$45, in the face of testimony so uncertain that a verdict for any definite amount could not have rationally been rendered. It was held that such a verdict could only have been determined by the wildest conjecture and was not based upon any calculation warranted by the testimony, and such mere conjecture was insufficient. *Simpson v. Buck*, 5 Lans. (N. Y.) 337.

Compromise Verdicts Condemned.—In the case of *Richardson v. Coleman*, 131 Ind. 210, the trial judge charged the jury, in relation to their verdict, that the law expected and tolerated reasonable compromises and fair concessions on their part. The supreme court held this to be erroneous, and in commenting thereon uses the following language: "The law does not expect any compromise on the part of the jurors. It expects every juror to exercise his individual judgment, and that when a verdict is agreed to, it will be the verdict of each individual juror. In arriving at a verdict, the juror should not indulge in undue pride of personal opinion, and he should not be unreasonable or obstinate, and he should give due consideration to the views and opinions of other jurors and listen to their arguments with a willingness to be convinced, and yield to their

views if induced to believe they are correct. But the law does not expect, nor does it tolerate, the agreement by a juror upon a verdict, unless he is convinced that it is right; in other words, unless it is his verdict—a verdict which his conscience approves, and he, under oath, after a full consideration, believes to be right. To say that jurors may compromise upon a verdict, is to say that twelve jurors, all differing widely in their views as to what verdict ought to be returned, without any of them changing their views, may agree upon a verdict which is not believed to be right by any considerable number of the jurors, but agreed to as a matter of expediency in order to dispose of the case, without the approval of the consciences of any considerable number of the panel approving of it. The instruction tells the jurors the law expects them to make concessions and compromises, and agree upon a verdict which their consciences do not approve, but they should do so as a matter of expediency, in order to dispose of the case."

See INSTRUCTIONS, vol. 11, p. 258.

In the case of *Goodsell v. Seeley*, 46 Mich. 623; 41 Am. Rep. 183, the court, in speaking of the jurors compromising, says: "The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide, and yield for the mere purpose of an agreement."

Compromise Verdicts Not Necessarily Illegal.—*Harrison v. Powell*, 24 Ga. 530. And see *Randolph v. Lampkin*, 90 Ky. 551.

It was assigned for error, in *Owens v. Missouri Pac. R. Co.*, 67 Tex. 679, that the verdict rendered was a compromise verdict, and hence invalid. The supreme court disposed of this objection by declaring that there are but few verdicts returned giving damages for tort in which the amount is not the result of a compromise between the members of the jury.

1. *Georgia R. Co. v. Cole*, 77 Ga. 77; *Merseve v. Shine*, 37 Iowa 253; *Fangrieve v. Moberly*, 29 Mo. App. 141. In this last case it was observed that trial courts cannot be too careful of unduly influencing the minds of the jury, or swerving them from the dictates of an enlightened conscientious judgment; but within proper bounds, and especially in cases where, from the

on the part of the judge,¹ remarks having the effect of hastening the operation of their minds,² all threats and unwarrantable

character of the issue and the evidence, there can be little toleration of obvious unreasonable obstruction to a judgment, the court may urge upon the jury the propriety and importance of reaching the conclusion under the law and evidence.

1. Where the verdict cannot be regarded as the result of deliberate judgment, but as having been brought about by the supposed paramount duty of the jury to agree upon a verdict, rather than by free and unbiased conviction of what their verdict ought to be, and upon the interference of the court it appears to have had such effect upon the jury, their verdict ought to be set aside. *Randolph v. Lampkin* 90 Ky. 551; *Edens v. Hannibal*, etc., R. Co., 72 Mo. 212.

There ought not to be anything in the conduct of the court towards a jury which would appear to press them to give up rational doubts or disregard difficulties which may arise in their minds upon the evidence of the case. *State v. Austin*, 6 Wis. 205.

Duress.—After a jury had been engaged in their deliberations about twenty-four hours, they sent word to the judge that they were unable to agree upon a verdict. The judge replied that "he did not believe it yet," and that it was essential they agree that night, as he was going away and wouldn't be back for several days, and the jury might not be discharged until his return. This information seemed to have the effect of adjusting the irreconcilable differences of the jury, with the admirable result of a verdict in less than an hour, but the judgment rendered thereon was very promptly and properly reversed by the appellate court. *Pierce v. Pierce*, 38 Mich. 412.

A Judge May Urge an Agreement to a Reasonable Extent.—It is both proper and commendable that a judge, after the labor and expense of a trial, should endeavor, by all legitimate means, to secure a verdict. To this end he may properly urge a jury to engage in their deliberations in a spirit of liberal concession. He may properly explain to them the theory of trial by jury; that its object is to give the parties the united judgment of twelve minds upon the question at issue between them.

He may properly invite their attention to the importance, both to the parties and to the public, in agreeing upon a verdict, that thus the time and expense of a trial may be saved. These and other considerations may, and frequently ought to be urged upon the consideration of the jury, to induce them to make an honest and faithful effort to bring their minds together and thus agree upon a verdict. But beyond this he is not at liberty to go. *Green v. Telfair*, 11 How. Pr. (N. Y. Supreme Ct.) 260; *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551. And see *Cranston v. New York Cent.*, etc. R. Co., 103 N. Y. 614; *Conners v. Walsh*, 131 N. Y. 590; *Darling v. New York*, etc., R. Co., 17 R. I. 708; *Houston v. Ladies' Union Branch Assoc.*, 8 Ga. 203.

Where a court said to the jury, "This jury is, in the eye of the law, as capable of deciding this case and reaching a verdict as any that may be impaneled hereafter, and I am supposed to give you some further opportunity to consider your verdict. Go to your room and make an honest effort to agree, and follow the rule which I have given you and I do not think it will trouble you in agreeing." This was held in *Parke v. Georgia R. Co.*, 83 Ga. 539, to be not undue pressure of the jury to a verdict, though it went, perhaps, to the allowable limit. See also *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Austin v. Appling*, 88 Ga. 54; *NEW TRIAL*, vol. 16, p. 522.

Detention of Jury.—It has been declared to be in the discretion of the trial judge to refuse to discharge the jury until they arrive at a verdict. *Wilson v. New York Cent.*, etc., R. Co. (Supreme Ct.), 20 N. Y. Supp. 65. See also *Darling v. New York*, etc., R. Co. 17 R. I. 708.

2. After the submission of the evidence and charge of the court, the jury having been sent to their room about half past eight o'clock Saturday night and some time before twelve o'clock the judge having sent the sheriff to inquire of the jury whether they were likely to agree, and having received from the jury a reply that they were not, it was error to call them in about half an hour afterward and tell them

interference equally avoid the resulting verdict.¹ Litigants in a cause before a jury, are entitled to the exercise of this reasonable discretion and deliberate reflection.² For this reason the jury is not

that it "was nearly twelve o'clock, that, the next day being Sunday, they would have to cease their deliberations until after midnight of the next day; that during that time they were not to discuss the verdict, or anything connected with the case; that they would have to keep together during the entire day and night; that the sheriff would provide a place for them to sleep together, and that they would be furnished with their meals, but at their own expense." It is not to be wondered, that thus admonished, an agreement was promptly reached, nor that the verdict was held to be fatally defective. *Henderson v. Reynolds*, 84 Ga. 159. And see *Nelling v. Industrial Mfg. Co.*, 78 Ga. 260.

Remarks to Hasten Jury.—In *McIntyre v. People*, 38 Ill. 514, the court informed the jury as they retired, that he would hold court open for a specific time to see if they would be able to agree, and if they should not, that he would adjourn until the next morning. It was urged that these words were calculated to prejudice the prisoner by hastening the action of the jury. However, as the jury did not, in fact, agree for several hours after the time indicated by the judge, it could not be maintained that the remarks of the judge had this effect, and the appellate court also adds that, in its opinion, men qualified to act as jurors, and having in charge the life of a fellow being, would hardly be influenced by such remarks.

Admonition to Agree.—After the jury, in a case before a justice of the peace, had retired to deliberate, the justice, in the absence of both parties and their counsel, and without their consent, entered the jury room and held a consultation with them about the case. The foreman of the jury stated that they could not agree, and the justice replied that, on account of the great amount of time consumed, and the expense entailed in the trial of "these law suits," he thought they ought to agree. The jury soon found a verdict. It did not appear that the justice manifested any partiality or had any motive for coercing a verdict. It was, nevertheless, maintained that the jury, after it retires, must remain untrammelled and uninfluenced by any advice which the

justice may, though honestly, give in regard to their verdict, without the consent of parties; and on this ground the judgment was reversed. *Valentine v. Kelly*, 54 Hun (N. Y.) 78.

Promise of Judicial Clemency.—Where the jury, after retiring, asked the court whether or not, if they brought in a verdict of guilty, they could depend upon the clemency of the court toward the prisoner, and the court replied that they could, whereupon a verdict of guilty was rendered, such verdict was set aside. *McBean v. State*, 83 Wis. 206.

Remarks by Officer in Charge.—In the case of *Thomas v. Chapman*, 45 Barb. (N. Y.) 98, it appeared that the officer in charge of the jury stated to them that the court had adjourned and left orders for him (said officer) to lock up the jury and keep them all night, unless they agreed upon a verdict; that the case was clear for the plaintiff, and that the jury had better agree and go home; that if they did not soon, he should lock them up for the night. The verdict was set aside by the appellate court on the ground that such statements were calculated to influence the verdict.

1. *Green v. Telfair*, 11 How. Pr. (N. Y. Supreme Ct.) 260; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

Unwarrantable Interference.—An illustration of what the supreme court of *Alabama* justly declares a most unprecedented and unwarranted interference with the deliberations and province of the jury, occurred in *Perkins v. State*, 50 Ala. 154, where the jury, after having retired to consider their verdict, and not having returned, after several hours, the presiding judge, in the absence of the defendant and his attorney, sent for the jury and inquired why they did not find a verdict. When informed that they could not agree, he said to them that he would keep the court open until they did agree, and that under the charge of the court they had nothing to do but convict the defendant, or that they themselves would be guilty of moral perjury.

2. *Knight v. Fisher*, 15 Colo. 176; *Houk v. Allen*, 126 Ind. 568; *Ryerson v. Kitchell*, 3 N. J. L. 998; *Memphis, etc., R. Co. v. Pillow*, 9 Heisk. (Tenn.) 248.

allowed to substitute chance devices, whose contingent result determines what their verdict shall be.¹ True, these experiments may be adopted by the jury for the purpose of ascertaining, for their own information, what the average estimate or opinion is,² although such methods are regarded by the courts with

Where the jury agreed that three of their number should settle the controversy as to the amount of their verdict, the finding of the jury was set aside. It was held that the remaining jurors surrendered their own judgment and their own will and voice in the settlement of this important question, and were mere instruments for the registration of the judgments of the three jurors selected to ascertain the amount they should render by their verdict. *Memphis, etc., R. Co. v. Pillow*, 9 Heisk. (Tenn.) 248.

Verdict Without Retiring.—A jury may, if they choose, render their verdict without retiring from the court room; for example, in *Board of Trustees v. Baker*, 24 Ill. App. 231, the defendant offered no evidence in his behalf, and it was assigned for error that the court refused to decide upon a demurrer to the plaintiff's evidence, interposed by counsel for the defendant, when the plaintiff had rested, but permitted the jury to consider the evidence introduced, and to find and return a verdict without leaving the court room. See also *Conner v. Jackson*, 50 Ala. 384.

Jurors Taking Notes.—The jurors should not be allowed to take notes of the evidence deduced, for such a practice is well calculated to divert the attention from the evidence, as it would naturally be progressing while such notes were being made. The juror should register the evidence, as it is given, on the tablets of his memory, and not otherwise. *Cheek v. State*, 35 Ind. 492. But the act of a juror in taking notes of the evidence is not misconduct sufficient to set aside the verdict, where he, upon being admonished by the court of the impropriety of his act, ceases taking notes. *Batterson v. State*, 63 Ind. 531.

Assessment of Damages—Latitude of Discretion.—Although in the assessment of damages the jury has a great and useful latitude in cases of tort, and mixed cases of negligence and tort, where no precise standard of damages is established, in cases of contract, express or implied, where a mere calculation furnishes a uniform standard of right, the jury should indulge in no

capricious or conjectural estimate. *Walker v. Smith*, 4 Dall. (Pa.) 390.

1. Intelligent Reflection.—Jurors are bound by their oaths and consciences to act intelligently—not blindly. They cannot discharge this responsibility by agreeing that the verdict, or any material part thereof, shall be determined by any process, the result of which is unknown to them at the time of the agreement. *Knight v. Fisher*, 11 Colo. 176.

Where a minority of two jurors decided among themselves that the tossing up of a coin should decide whether they would agree with the majority and thus make the verdict unanimous this was held to be a gambling verdict and as such was set aside. *Donner v. Palmer*, 23 Cal. 40.

Thus, a verdict arrived at by casting lots is invalid. *Obear v. Grey*, 68 Ga. 182; *Wright v. Illinois, etc., Telephone Co.*, 20 Iowa 195; *Merseve v. Shine*, 3; *Iowa* 253; *Wright v. Abbott*, 160 Mass. 395; *Mitchell v. Ehle*, 10 Wend. (N. Y.) 595.

Deliberate Judgment.—"A verdict," says the court, in *Burke v. Magee*, 2; *Neb.* 156, "should be the result of deliberate judgment, not a chance or hazard."

2. Merely Experimental.—The practice of marking on slips of paper the amount which each juror is willing to find, and dividing the aggregate by twelve, simply resorted to for the purpose of seeing "how near they could come together," without any previous agreement to abide by the result, does not invalidate a verdict rendered for the quotient. *Conklin v. Hill*, 2 How. Pr. (N. Y.) 6; *Lee v. Clute*, 10 Nev. 149; *Batterson v. State*, 63 Ind. 531; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31; *Haight v. Hoyt*, 50 Conn. 583; *St. Clair v. Missouri Pac. R. Co.*, 29 Mo. App. 76; *Dodge v. Carroll*, 59 N. H. 237. As to this practice in criminal cases, see *Cochlin v. People*, 93 Ill. 410; *Batterson v. State*, 63 Ind. 531; *Glidewell v. State*, 15 Lea (Tenn.) 133; *Warren v. State*, 9 Tex. App. 619; 35 Am. Rep. 745; *Thompson's Case*, 8 Gratt. (Va.) 638.

disfavor;¹ and where there is no previous agreement to abide by the result of such an operation, a subsequent finding, identical in terms or amount, will not be disturbed on this account.² But let a previous agreement to adopt the contingent and altogether uncertain result of the experiment be shown, and all jurisdictions seem to be uniform in proclaiming the absolute nullity of such a verdict.³

1. A Reprehensible Practice.—The practice of jurors marking severally the amount of damages which they individually were in favor of finding for the plaintiff, and dividing the aggregate of these amounts by the number of jurors, is a reprehensible one. A fair verdict, the deliberate opinion of the jurors upon the evidence, could scarcely in this manner be obtained. Some of the jurors would mark a much larger sum than their candid judgment would sanction, in order to make up the expected deficiency of others, and so the honest jurors would be deceived, and a dishonest verdict obtained. *Haight v. Hoyt*, 50 Conn. 583.

As a Last Resort.—Where, in an action for damages, the witnesses differ as to the value of the property injured, the ordinary rules of weighing testimony, such as honesty, disinterestedness, opportunity for knowledge and intelligence, should be resorted to before attempting to reach a satisfactory result by averaging the values sworn to. *Harvey v. Boswell*, 65 Ga. 550. And see *Kansas City R. Co. v. Ryan*, 49 Kan. 1.

Instruction as to Impropriety.—The court may instruct the jury that it is an improper proceeding for them to arrive at a verdict by each setting down the amount, if any, he is in favor of awarding the plaintiff, and dividing the aggregate by twelve. *Sharp v. Kansas City Cable R. Co.*, 114 Mo. 94.

2. Wilson v. Berryman, 5 Cal. 44; 63 Am. Dec. 78; *Hunt v. Elliott*, 77 Cal. 588; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131; *Guard v. Risk*, 11 Ind. 156; *St. Louis, etc., R. Co. v. Myrtle*, 51 Ind. 566; *Ruble v. McDonald*, 7 Iowa 90; *Hendrickson v. Kingsbury*, 21 Iowa 379; *Thompson v. Perkins*, 26 Iowa 486; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31; *Baily v. Beck*, 21 Kan. 337; *Johnson v. Husband*, 22 Kan. 277; *Kinsley v. Morse*, 40 Kan. 591; *Kansas City, etc., R. Co. v. Ryan*, 49 Kan. 1; *Parham v. Harney*, 6 Smed. & M. (Miss.) 55; *Burke v. Magee*, 27

Neb. 156; *Lee v. Clute*, 10 Nev. 149; *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Moses v. Central Park, etc., R. Co.* (C. Pl.), 23 N. Y. Supp. 23; *Conklin v. Hill*, 2 How. Pr. (N. Y.) 6; *Dorr v. Fenno*, 12 Pick. (Mass.) 520; *Forbes v. Howard*, 4 R. I. 364; *Luft v. Lingane*, 17 R. I. 420; *Bennett v. Baker*, 1 Humph. (Tenn.) 399; 34 Am. Dec. 655; *Elledge v. Todd*, 1 Humph. (Tenn.) 43; 34 Am. Dec. 616; *Handley v. Leigh*, 8 Tex. 129; *Pruitt v. State*, 30 Tex. App. 156; *Birchard v. Booth*, 4 Wis. 67.

Previous Agreement.—If jurors previously agree to a particular method of arriving at a verdict and to abide by the contingent result at all events, without reserving to themselves the liberty of dissenting, the verdict should be set aside, but if the mode is adopted merely for the sake of arriving at a reasonable amount, without binding the jurors by the result, the verdict should stand. *Lee v. Clute*, 10 Nev. 149.

Quotient as Term of Imprisonment.—The fact that the jury, in fixing upon the term of imprisonment to be served by the defendant, took the quotient, resulting from the aggregate of the periods indicated by each juror divided by the number of jurors, as a proposition merely of the term of imprisonment, is not improper, if not done pursuant to a previous agreement to accept such quotient as such term. *Batterson v. State*, 63 Ind. 531.

3. Wilson v. Berryman, 5 Cal. 44; 63 Am. Dec. 78; *Hunt v. Elliott*, 77 Cal. 588; *Dixon v. Plums* (Cal. 1893), 31 Pac. Rep. 931; *Knight v. Fisher*, 15 Colo. 176; *Pawnee Ditch, etc., Co. v. Adams*, 1 Colo. App. 250; *Schoolfield v. Brunton* (Colo. 1894), 36 Pac. Rep. 1103; *Flood v. McClure* (Idaho, 1893), 32 Pac. Rep. 254; *Roy v. Goings*, 112 Ill. 656; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131; *Guard v. Risk*, 11 Ind. 156; *Chicago, etc., R. Co. v. McDaniel*, 134 Ind. 166; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31; *Hendrickson v. Kingsbury*, 21 Iowa 379; *Thompson v.*

(a) **How Improper Methods of Arriving at Verdict May Be Shown.**—The general rule of law on this subject, as it exists both in *England* and in the *United States*, forbids the reception of a juror's testimony introduced for the purpose of impeaching the verdict in which he has concurred.¹ Hence, it follows that a resort to illegal practices in the jury room, whereby litigants are deprived of the exercise of that sound judgment, and thoughtful consideration of the merits of the controversy, which they have a right to expect

Perkins, 26 Iowa 486; Fuller v. Chicago, etc., R. Co., 31 Iowa 211; Darland v. Wade, 48 Iowa 547; Ruble v. McDonald, 7 Iowa 90; Johnson v. Husband, 22 Kan. 277; Werner v. Edmiston, 24 Kan. 109; Allard v. Smith, 2 Metc. (Ky.) 297; Dorr v. Fenno, 12 Pick. (Mass.) 520; Parham v. Harney, 6 Smed. & M. (Miss.) 55; Burke v. Magee, 27 Neb. 156; Lee v. Clute, 10 Nev. 149; Smith v. Cheetham, 3 Cal. (N. Y.) 57; Dana v. Tucker, 4 Johns. (N. Y.) 487; Harvey v. Rickett, 15 Johns. (N. Y.) 87; Roberts v. Failis, 1 Cow. (N. Y.) 238; Joyce v. State, 7 Baxt. (Tenn.) 273; Williams v. State, 15 Lea (Tenn.) 129; 54 Am. Rep. 404; East Tennessee, etc., R. Co. v. Winters, 85 Tenn. 240; Bennett v. Baker, 1 Humph. (Tenn.) 399; 34 Am. Dec. 655; Elledge v. Todd, 1 Humph. (Tenn.) 43; 34 Am. Dec. 616; Forbes v. Howard, 4 R. I. 364; Luft v. Lingane, 17 R. I. 420; Handley v. Leigh, 8 Tex. 129.

Even where it is uncertain whether or not there was a previous agreement to abide by the quotient, it having been shown that at least four of the jurors believed themselves so bound, a verdict so rendered should be set aside. Johnson v. Husband, 22 Kan. 277.

Verdict by Lot.—The jury being unable to find a verdict, one of the jurors proposed that a certain number of ballots be cast, and that a verdict be rendered for the party receiving the majority of the ballots. This was agreed to, and a verdict rendered in pursuance thereof. Upon appeal, the court maintained that the parties were thus deprived of their right to a verdict according to the consciences of the majority of the jury, and that as the verdict was the mere creature of an agreement in which the jurors had bound themselves in advance, it must not stand. Houk v. Allen, 126 Ind. 568.

Where the jury had been out some twelve hours, they agreed that a certain number of ballots be cast and counted, and if either the plaintiff or

defendant received a majority of the ballots so cast that the verdict should be returned for the party receiving such majority, and the agreement was carried out, a verdict being returned in accordance therewith. The court held that a verdict could not be arrived at law fully in that way, and in the opinion it was said: "It is very clear that the right of the parties were not determined according to the judgment or conscience of the members of the jury, as was their right, but that the verdict was the mere creature of the agreement to which the jurors bound themselves in advance of the verdict." Houk v. Allen 126 Ind. 568.

Where an agreement on the part of the jurors, that the amount of the recovery should be determined by each marking down a sum and dividing the aggregate by twelve, rendered the verdict invalid in part, it was held that the valid portion might be permitted to stand if the defendant would enter a remittitur as to the excess. Fuller v. Chicago, etc., R. Co., 31 Iowa 211.

No Express Agreement.—In William v. State, 15 Lea (Tenn.) 129; 54 Am. Rep. 404, it did not appear that there had been any express previous agreement to abide by the quotient, but the court nevertheless, held that it was not the deliberate judgment of each member of the jury upon the evidence, and hence that it must be set aside.

1. In *England*, it seems to have been settled finally that the affidavit of a juror will not be received to show that the verdict was determined by lot Vaise v. Delaval, 1 T. R. 11; Owen v. Warburton, 1 Bos. & P. 326; Strake v. Graham, 7 Dowl. Pr. Cas. 223; Aylett v. Jewell, 2 W. Bl. 1299.

Where some of the jurors subsequently confessed to the defendant's attorney that the jury drew lots to determine their verdict, such evidence was held to be incompetent to establish ground for a new trial. Aylett v. Jewell, 2 W. Bl. 1299.

In the *United States*, there has been some conflict of judicial opinion upon the question, especially in the earlier cases, but the practice appears now to be generally settled to reject the testimony of the jurors when offered to impeach their verdict. *Bulls' Case*, 14 Gratt. (Va.) 613. To this effect see the following adjudications:

Harrison v. Rowan, 4 Wash. (U. S.) 32; *Stanton v. State*, 13 Ark. 317; *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *State v. Freeman*, 5 Conn. 348; *Coker v. Hayes*, 16 Fla. 368; *Goodwin v. Bryan*, 16 Fla. 396; *State v. Doone*, 1 R. M. Charlt. (Ga.) 1; *Anderson v. Green*, 46 Ga. 361; *Forester v. Guard*, 1 Ill. 74; 12 Am. Dec. 141; *Browder v. Johnson*, 1 Ill. 44; *Smith v. Eames*, 4 Ill. 76; 36 Am. Dec. 515; *Butts v. Tuthill*, 10 Iowa 585; *Taylor v. Giger*, Hard. (Ky.) 595; *Johnson v. Davenport*, 3 J. J. Marsh. (Ky.) 390; *Doran v. Shaw*, 3 T. B. Mon. (Ky.) 411; *Woodward v. Leavitt*, 107 Mass. 453; 9 Am. Rep. 49; *Prussel v. Knowles*, 4 How. (Miss.) 90; *Jones v. Edwards*, 57 Miss. 28; *State v. Shock*, 68 Mo. 552; *Phillips v. Stewart*, 69, Mo. 149; *State v. Woods* (Mo. 1894), 27 S. W. Rep. 1114; *Dearborn v. Newhall*, 63 N. H. 301; *Brewster v. Thompson*, 1 N. J. L. 32; *Randall v. Grover*, 1 N. J. L. 175; *Kennedy v. Kennedy*, 18 N. J. L. 450; *Hutchinson v. Consumers' Coal Co.*, 36 N. J. L. 24; *Hackley v. Hastie*, 3 Johns. (N. Y.) 252; *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Jackson v. Dickenson*, 15 Johns. (N. Y.) 309; 8 Am. Dec. 236; *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am. Rep. 544; *Hodgkins v. Mead* (Brooklyn City Ct.), 5 N. Y. Supp. 433; *Moore v. New York El. R. Co.* (C. Pl.), 8 N. Y. Supp. 329; *O'Brien v. Merchants' F. Ins. Co.*, 38 N. Y. Super. Ct. 482; *People v. Hartung*, 4 Park Cr. Rep. (N. Y.) 315; *Taylor v. Everett*, 2 How. Pr. (N. Y.) 23; *Dayton v. Church* (Brooklyn City Ct.), 7 Abb. N. Cas. (N. Y.) 367; *Green v. Bliss*, 12 How. Pr. (N. Y. Supreme Ct.) 428; *Clum v. Smith*, 5 Hill (N. Y.) 560; *Thomas v. Chapman*, 45 Barb. (N. Y.) 98; *State v. McLeod*, 1 Hawks (N. Car.) 344; *State v. Smallwood*, 78 N. Car. 563; *Jones v. Parker*, 97 N. Car. 33; *Hulet v. Barnett*, 10 Ohio 459; *Cluggage v. Swan*, 4 Binn. (Pa.) 150; 5 Am. Dec. 400; *Willing v. Swasey*, 1 Browne (Pa.) 123; *White v. White*, 5 Rawle (Pa.) 61; *Tucker v. Kingston*, 5 R. I. 558; *Price v. McIlvain*, 3 Brev. (S. Car.) 419; *Cheney v. Holgate*,

Brayt. (Vt.) 171; *Price v. Warren*, 1 Hen. & M. (Va.) 385; *Thompson's Case*, 8 Gratt. (Va.) 641; *Bull's Case*, 14 Gratt. (Va.) 613; *Read v. Com.*, 22 Gratt. (Va.) 924; *Stephoe v. Flood*, 13 Gratt. (Va.) 323. And see *Wilson v. People*, 4 Park. Cr. Rep. (N. Y.) 619; *Koerner v. Rankin*, 11 Gratt. (Va.) 420.

Connecticut.—The verdict in *Warner v. Robinson*, 1 Root (Conn.) 194, was obtained by marking down the amount which each juror favored and dividing the aggregate by twelve; which proceeding being proved by inquiry of the jurors, the verdict was set aside. The courts of this state, however, have come to take a different view of the question, for *Hosmer, C. J.*, delivering the opinion of the court, in *State v. Freeman*, 5 Conn. 348, and considering the question of the admissibility of the testimony of jurors to impeach their verdict, concludes by saying: "The opinion of almost the whole legal world is adverse to the reception of the testimony in question, and, in my opinion, on invincible foundations." *Meade v. Smith*, 16 Conn. 346.

Illinois.—In an early *Illinois* case, it was held that the affidavit of a juror who tried the cause may be received to prove improper conduct on the part of the jury. *Sawyer v. Stephenson*, 1 Ill. 24. This position, however, did not long remain unassailed, for in the case of *Forester v. Guard*, 1 Ill. 74; 12 Am. Dec. 141, the court says: "The statements of jurors ought not to be received to impeach their verdicts." Later, in *Smith v. Eames*, 4 Ill. 76; 36 Am. Dec. 515, this case of *Forester v. Guard* is cited and the rule laid down therein approved, subject, however, to one exception. "There is one class of cases," say the court, "where the affidavits of jurors may be received to impeach their verdict, and that is where a part of them swear that they never consented to any verdict."

Massachusetts.—In *Grinnell v. Phillips*, 1 Mass. 540, one of the jury, being offered as a witness by the defendant, was admitted to be sworn and examined respecting the conduct of the jury in finding the verdict. This authority, however, is regarded as overruled in *Woodward v. Leavitt*, 107 Mass. 453; 9 Am. Rep. 49. See also *Whitney v. Whitman*, 5 Mass. 405; *Bridge v. Eggleston*, 14 Mass. 245; 7 Am. Dec. 209; *Hannum v. Belchertown*, 19 Pick. (Mass.) 311; *Cook v. Castner*, 9 Cush.

(Mass.) 266; *Bridgewater v. Plymouth*, 97 Mass. 382.

New Jersey.—In the case of *Morrow v. McLennen*, 3 N. J. L. 477, it seems that certain acts of misconduct on the part of the jury were established by the affidavit of one of the jurors in the case, and the same facts were corroborated in several respects by the affidavit of the officer in charge of the jury. The court does not advert to, nor does its attention seem to have been called to the fact that the knowledge was acquired from a member of the jury, but it simply proceeds to condemn the occurrences in the jury room as disclosed by the affidavit of the juror, and judgment rendered on the verdict was reversed.

The case of *Brewster v. Thompson*, 1 N. J. L. 32, expressly declares that the verdict may not be impeached by the affidavit of one of the jurors as to the misconduct of the jury. This seems to be the opinion of the court in *Kennedy v. Kennedy*, 18 N. J. L. 450, and it is so held in *Hutchinson v. Consumers' Coal Co.*, 36 N. J. L. 24. We suppose, on the authority of these cases, that the doctrine may be regarded as settled in this state, notwithstanding the case of *Morrow v. McLennen*, 3 N. J. L. 477.

New York.—In *Smith v. Cheetham*, 3 Cai. (N. Y.) 57, the majority of the court were of the opinion that confessions of the jurors to the constable, as well as their affidavits stating that the amount of their verdict was ascertained by each juror marking down an amount, and then dividing the aggregate by twelve, were admissible to establish the fact. This decision was rendered in 1805. That the rule has since changed may be seen by reference to the adjudications in this state cited in the list of cases above. For example, *Harris, J.*, in the case of *People v. Hartung*, 4 Park. Cr. Rep. (N. Y.) 315, says: "No rule of law is better settled than that the evidence of the jurors is not to be allowed for the purpose of impeaching or in any way impairing the effect of their verdict. The doctrine has now been established in *England*. It has been maintained with singular steadiness and unanimity in the *United States*."

But aside from all adjudications, the doctrine rests upon the clearest principles of public policy. It is infinitely better that irregularities, which undoubtedly sometimes occur in the jury room, should be tolerated rather than to throw open the doors and allow

every disappointed party to intrude into its secrets. The most enlightened jurists have united in deprecating the mischiefs which would flow from such a license."

Balcom, J., in *Green v. Bliss*, 12 How. Pr. (N. Y. Supreme Ct.) 428, said: "The law is too well settled to admit of argument, that the affidavits of jurors are not receivable to impeach their verdict, for mistake or error in respect to the merits of the case; or of their own misconduct, or that of their fellows."

"*Mischievous and Dangerous*."—Motion for a new trial was made on the ground of misconduct of the foreman of the jury who tried the cause. To prove this misconduct, numerous affidavits were produced setting forth declarations of certain of the jurors, after the delivery of their verdict in court. A motion for a new trial was refused. *Day, J.*, delivering the opinion of the court, said: "It would be a most mischievous and dangerous thing to allow verdicts to be overturned or set aside upon the loose, random declarations of jurymen after they have been discharged, not on oath, to third persons, concerning the circumstances upon which they made up their verdict while they were on oath, previous to their delivering their verdict into court. It would open such a door for tampering with weak and indiscreet men that it would render all verdicts insecure; and, therefore, the law has widely guarded against all such after declarations and has considered them as unworthy of notice. Indeed, so cautious has the law been upon this subject that the court will not receive even the affidavits of jurors themselves, to impeach their own verdicts after they are delivered in, and recorded in court." *Price v. McIlvain*, 3 Brev. (S. Car.) 419.

In *Price v. Warren*, 1 Hen. & M. (Va.) 385, the court unanimously affirmed the judgment of the district court, refusing a new trial on the affidavits of two of the jurors that they were alone influenced in finding for the plaintiff by a fact stated in the jury room by one of the jury, the ground assigned for such refusal being because it would be dangerous to attempt a new trial on such information from the jurymen, and the new trial would be against the justice of the case. See also *Shobe v. Bell*, 1 Rand. (Va.) 39.

In *Tucker v. Kingstown*, 5 R. I. 558,

of the jury, must, if at all, be established by the testimony of the officer in charge, or some chance witness to the proceeding.¹

affidavits of jurymen as to what took place in the jury room, and the grounds upon which they found their verdict, were offered to impeach the verdict and rejected.

A Pernicious Practice.—"It would be a most pernicious practice, and in its consequences dangerous to this much valued mode of trial, to permit a verdict, openly and solemnly declared in court, to be subverted by going behind it and inquiring into the secrets of the jury room to find out from some of the members of that body what was the process by which they or others had come to the result declared by their verdict." Washington, J., in *Harrison v. Rowan*, 4 Wash. (U. S.) 32.

Seriously Objectionable.—In *Stanton v. State*, 13 Ark. 317, it is declared that there are serious objections to the practice of allowing a juror, who concurred in rendering a verdict, to make an affidavit to impeach it.

Misconduct of Party—Admissible.—In *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. (N. Y. Supreme Ct.) 7, it was held that, while the affidavits of jurors would not be received to impeach the verdict for mistake or error in respect to the merits, in order to prove irregularity or misconduct on the part of the juror testifying, or of his fellows, there is no objection to the reception of such testimony for the purpose of showing improper conduct on the part of one of the parties to the cause. *Thomas v. Chapman*, 45 Barb. (N. Y.) 98.

Misconduct of Officer—Admissible.—Affidavits of jurors may be received to show the misconduct of the officer in charge. *Thomas v. Chapman*, 45 Barb. (N. Y.) 98.

But this is not the doctrine as declared in *Doran v. Shaw*, 3 T. B. Mon. (Ky.) 411. Here it is held that the evidence of jurors is not admissible to prove the improper conduct of the attending officer, unless upon the prosecution of such officer for such improper conduct.

In admitting the affidavit of a juror to prove the misconduct of one of the parties, or the officer in charge, it might not infrequently happen that it would necessarily involve an account of his (the juror's), own impropriety, as where a juror swears that he only agreed to the verdict in consequence of the state-

ment of the officer. In such case, it would seem that such portion of the testimony (in conformity with the well established rule as stated in the text) as applies to the juror's misconduct, will be ignored, and only such part as tends to prove the misconduct of the officer, or a party to the suit, will be regarded. *Thomas v. Chapman*, 45 Barb. (N. Y.) 98.

In a few States the general rule excluding the testimony of jurors to impeach their verdict, does not prevail. This is noticeably the case in *Iowa*, *Tennessee*, and *Texas*.

Iowa.—In this state, the practice of establishing by the affidavits of jurors the fact that the verdict was the result of the "average process," has been approved. See *Wright v. Illinois*, etc., Telephone Co., 20 Iowa 195; *Darland v. Wade*, 48 Iowa 547.

In *Tennessee*, it has been held that the testimony of jurors is admissible, and may be sufficient to set aside a verdict on the ground of their misconduct. It was so held in the case of *Crawford v. State*, 2 Yerg. (Tenn.) 60; 24 Am. Dec. 467, which was a capital prosecution. In this instance, affidavits of jurymen were received to the effect that one member of the jury assented to the verdict, under the impression that the governor would yield to the recommendation of the jury to pardon the prisoner; for this reason, a new trial was awarded. This case was followed by *Cochran v. State*, 7 Humph. (Tenn.) 544, under circumstances very similar. It is admitted, however, in *Hudson v. State*, 9 Yerg. (Tenn.) 408, to be a dangerous principle which should not be extended a single step beyond the extent to which it had already been carried. In *Norris v. State*, 3 Humph. (Tenn.) 333; 39 Am. Dec. 175, the court, adhering to this latter view, examined the prior cases on the subject to ascertain to what extent the practice had prevailed, and modified the rule accordingly.

In *Texas*, there is a statute providing that such misconduct of the jury as affects the fairness of the trial vitiates the verdict and may be shown by the affidavit of a juror. *Paschall's Texas Digest*, art. 3187; *Anschilds v. State*, 6 Tex. App. 524; *Jack v. State*, 26 Tex. 4.

1. The testimony of the sheriff in

This rule, however, does not exclude the affidavits of jurymen to prove honest mistake on the part of the jury,¹ misentry of the

charge is competent to disclose what transpires in the jury room. In *Wilson v. Berryman*, 5 Cal. 44, 63 Am. Dec. 78, the fact that the verdict was arrived at by the average process, was established by the testimony of the sheriff and the verdict accordingly set aside. See *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Morrow v. McLennen*, 3 N. J. L. 477; *Kennedy v. Kennedy*, 18 N. J. L. 450; *Harrison v. Rowan*, 4 Wash. (U. S.) 32.

In *Wright v. Abbott*, 160 Mass. 395, a verdict for the plaintiff was set aside and a new trial granted, on the testimony of the deputy sheriff in charge of the jury to the effect that they had arrived at their verdict by lot. The plaintiff excepted to the admission of this affidavit, but Field, C. J., in sustaining its admissibility, said that while it was certainly not the duty of the officer in charge to listen to the deliberations of the jury, that if he had done so, his testimony could not be excluded.

The objection that the admissibility of the testimony of the officer in charge of the jury, places the verdict entirely at his mercy, is deprived of its force by a reference to the rule which, though excluding affidavits of jurors to impeach, yet admits such testimony in support of the verdict. This, it is said, will always be found a sufficient check against corruption on the part of the officer in charge. *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78. And see *Green v. Bliss*, 12 How. Pr. (N. Y. Supreme Ct.) 428, where the affidavit of the constable was not allowed to overturn the verdict in opposition to the sworn declarations of two of the jury supporting the verdict. In this case it was held that the affidavit of the constable, who had charge of the jury, to the effect that the jury did not agree upon the verdict that was signed and sealed by their foreman, before he allowed them to separate, is the *felo de se* of his credibility; he violated his sworn duty to keep the jury together until they agreed on a verdict, or his affidavit is untrue.

Chance Witness.—In the case of *Vaise v. Delaval*, 1 T. R. 11, where the verdict was obtained by tossing up a coin, Lord Mansfield said that the court could not receive an affidavit to this ef-

fect from any of the jurors themselves, in whom such conduct was a very high misdemeanor, but that the court must derive its knowledge from some other source, as from some person who saw the transaction through a window or by some other means.

Thus, in *Harrison v. Rowan*, 4 Wash. (U. S.) 32, the testimony of the keeper of the inn where the jury were confined was offered for the purpose of impeaching the verdict, and was received.

As a matter of course, the affidavit of a party based upon information and belief, derived from the statement of members of a jury, is entitled to no more weight than the affidavit of the juror himself. If it were, the rule excluding the testimony of the jurors themselves would be deprived of its salutary effect. *Coker v. Hayes*, 16 Fla. 368.

1. In *Johnson v. Davenport*, 3 J. J. Marsh. (Ky.) 390, the court, in refusing a new trial, said: "The testimony of one or more of the jurors to prove such misconduct in a jury as would invalidate their verdict, or to question the purity of the motives by which they had been influenced in rendering it, or to explain the ground, either of law or of fact, which influenced them, with a view to impeaching the verdict which they had returned, is inadmissible according to the whole current of modern decisions. . . . The dangerous tendency of receiving testimony of the jurors, for such a purpose, is too obvious to require comment." "It is, indeed, very difficult," the court continues, "to lay down any precise rule, the application of which to each particular case would be sufficient to determine whether the affidavits of the jurors ought to be received to invalidate their verdict. It seems to be universally agreed, that if received at all, it should be with great caution, and we are of opinion, that their admissibility should be confined to cases of mistake clearly made out, and which may be conceded as true, without subjecting the jury to any imputation of impure motives or palpable impropriety of conduct; and in relation to the proof of which mistake by their affidavits, there should be no reasonable ground for suspicion, that they might have been tampered with."

verdict,¹ misdirection by the judge,² or that there was in truth no verdict, as where it was only agreed to by a portion;³ nor has

Mistake as to Legal Effect.—In *Moffett v. Bowman*, 6 Gratt. (Va.) 219, a motion was made for a new trial, founded on the affidavit of nine of the jurors stating that the verdict as returned and recorded did not contain the verdict which they intended to render, and that the same was returned by them under a mistake as to its legal effect. The manner in which the mistake was made was also stated in the affidavit. The trial court overruled the motion, but the appellate court, being of opinion, from the evidence adduced on the motion for a new trial, that the intention of the jury was not accomplished by their verdict, and not being satisfied with the verdict on the merits, reversed the judgment and awarded a new trial.

Erroneous Use of Legal Terms.—In *Littell v. Larrabee*, 2 Mc. 37; 11 Am. Dec. 43, the action was a writ of entry, and the court received the affidavits of jurors to show that they intended to find for the tenant, whereas, by mistake in the legal terms, they returned a verdict for demandant and thereon set the verdict aside.

Belief That Majority Prevails.—In *Cochran v. Street*, 1 Wash. (Va.) 79, the jury were divided in opinion, but the minority believing that the opinion of the majority was to prevail, therefore, concurred in the verdict. The court admitted that to meddle with the verdict of the jury upon the evidence of some of the jurors is a delicate business, and should be proceeded in with caution to prevent the mischief of the jurymen being tampered with, and referred with approbation to the decision of Lord Mansfield in *Vaise v. Delaval*, 1 T. R. 11. But as it was clear that the verdict was found under a mistake, the fact having been proved by a large majority of the jury and denied by none of them, and it not appearing that there had been any tampering with them to obtain the information, the court awarded a new trial. See also *Bull's Case*, 14 Gratt. (Va.) 630.

Mistake in Announcing.—The affidavits of jurors are competent evidence to prove a mistake in announcing the verdict actually agreed on. *Cogan v. Eben*, 1 Burr. 383; *Jackson v. Dickinson*, 15 Johns. (N. Y.) 309; 8 Am. Dec. 236; *Sargent v. —*, 5 Cow. (N. Y.) 106;

Smith v. Cheetham, 3 Cal. (N. Y.) 57; *Thomas v. Chapman*, 45 Barb. (N. Y.) 98; *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am. Rep. 544; *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32; *Cochran v. Street*, 1 Wash. (Va.) 79.

1. Affidavits of jurymen as to the extent and character of their private deliberations, cannot be received to impeach or qualify their verdict, but where the verdict has been erroneously stated to the court or erroneously entered by the clerk, the affidavits of jurors may be received to correct such error. *Dayton v. Church* (Brooklyn City Ct.), 7 Abb. N. Cas. (N. Y.) 367; *Jackson v. Dickinson*, 15 Johns. (N. Y.) 309; 8 Am. Dec. 236; *Sargent v. —*, 5 Cow. (N. Y.) 106.

The question submitted to the jury in *Jackson v. Dickinson*, 15 Johns. (N. Y.) 309; 8 Am. Dec. 236, was as to usury in a certain mortgage, and they found by their verdict that there was usury in the note, but meaning another note than that connected with the mortgage. On returning their verdict, the court inquired of the jury if they intended to find that the usury in the note was connected with the mortgage, to which one of the jury replied that they did not intend to so find. But the judge did not hear this reply and entered the verdict. The affidavits of the jurors were, against objections, received to show these facts, and a new trial was granted thereon.

2. It has been held that the affidavits of jurors are admissible to show a mistake in making up their verdict, which arises from circumstances arising at the trial, which are equivalent to a misdirection by the judge. *Sargent v. —*, 5 Cow. (N. Y.) 106; *Ex p. Caykendoll*, 6 Cow. (N. Y.) 53.

3. *Smith v. Eames*, 4 Ill. 76; 36 Am. Dec. 515; *Bull's Case*, 14 Gratt. (Va.) 630.

But where a verdict has been returned by the foreman, read to the jury without dissent, and the jury have separated, an affidavit of one of them that he did not agree to the verdict, so it is held in *Breck v. Blanchard*, 27 N. H. 100, cannot be received. And see *Clark v. Read*, 5 N. J. L. 486.

The rule on this subject, as approved in *Doran v. Shaw*, 3 T. B. Mon. (Ky.) 411, is that jurors may not be permitted

there ever been objection to a resort to such evidence in support of the verdict,¹ with the qualification, adopted in some jurisdictions, that only such testimony as has reference to the individual conduct of a juror may be offered, and not that respecting the conduct of the jury as a whole.²

to impeach the verdict which they have rendered, though they may prove that there was no verdict, or show that the verdict as rendered was not intended. See also *Taylor v. Giger*, Hard. (Ky.) 595; *Steele v. Logan*, 3 A. K. Marsh. (Ky.) 394.

1. *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *Barlow v. State*, 2 Blackf. (Ind.) 114; *Sawyer v. Hopkins*, 22 Me. 268; *Tenny v. Evans*, 13 N. H. 462; 40 Am. Dec. 166; *Kennedy v. Kennedy*, 18 N. J. L. 450; *Hackley v. Hastie*, 3 Johns. (N. Y.) 252; *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Green v. Bliss*, 12 How. Pr. (N. Y. Supreme Ct.) 428; *Moore v. New York El. R. Co.*, 15 Daly (N. Y.) 506; *O'Brien v. Merchants' F. Ins. Co.*, 38 N. Y. Super. Ct. 482; *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am. Rep. 544; *Hodgkins v. Mead*, 119 N. Y. 166; *Koiner v. Rankin*, 11 Gratt. (Va.) 420. And see *State v. Hascall*, 6 N. H. 352.

It appears in the opinion of the court, in *Dana v. Tucker*, 4 Johns. (N. Y.) 487, "The better opinion is, and such is the rule adopted by the court, that the affidavits of jurors are not to be received to impeach a verdict, but they will be admitted in exculpation of the jurors, and in support of their verdict."

Affidavits to Explain.—That the affidavits of jurors are admissible to explain the verdict, would seem a natural deduction from the rule allowing such testimony in support; for an explanation which would validate a verdict otherwise invalid for uncertainty or ambiguity, certainly would be in the nature of testimony to uphold, support, or sustain. That the affidavits of jurors are competent to explain their verdict, see *Hodgkins v. Mead* (Brooklyn City Ct.), 16 Civ. Pro. Rep. (N. Y.) 434; *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am. Rep. 544. This is denied, however, in *Lloyd v. McClure*, 2 Greene (Iowa) 139. In this case the court said: "The affidavits of the jurors were introduced in explanation of their verdict and in relation to what items they had allowed and what rejected. Jurors are not permitted in this manner

to explain or justify a verdict. When their verdict has been attacked, they have in some instances been permitted to introduce affidavits in support of their verdict; but according to the settled doctrine, for no other purpose." In another *Iowa* case, *Ward v. Thompson*, 48 Iowa 588, it is held that "affidavits of jurors are not admissible to show the understanding of the members of the jury."

2. Some English adjudications go to the extreme of holding that the affidavit of a juror may not be received respecting any occurrence in the jury room, whether to impugn, or in support of their verdict. In *Straker v. Graham*, 7 Dowl. Pr. Cas. 223, Baron Alderson said: "It is entirely against public policy to allow a juror to make affidavit of anything that passes in agreeing to a verdict." This statement was quoted with approval by Chief Justice Tindall in *Burgess v. Langley*, as reported in 1 D. & L. 21. *Raphael v. Bank of England*, 17 C. B. 161, was a similar instance; upon the offer of affidavits of jurors in support of a motion for a new trial, Willes, J., said: "If the affidavits are to be taken as a statement of something that passed in the jury room, they clearly are not admissible."

However, this rule was held not to exclude the testimony of a juror as to his own individual conduct, but only as to the deliberations in the jury room, or other circumstances relating to the trial. Thus, in *Ramadge v. Ryan*, 9 Bing. 333, upon motion for a new trial, affidavits were produced that one of the jurors, on the day before the trial, had expressed his surprise about a verdict in a similar case and said: "I shall be on the jury to-morrow, and I will take care that the verdict does not go that way." The court thereupon granted a rule to show cause. Tindall, C. J., saying that the juror would "then have an opportunity of answering the matters with which he is now charged." The juror made an affidavit denying the words alleged to have been used by him, which the court received, and on the strength of it refused a new trial. At

It must be admitted that some judicatures have, with much earnestness and force, and upon grounds not only plausible but substantial, argued in favor of allowing a member of a jury to testify to a resort to those devices productive of chance and quotient verdicts;¹ but the great weight of authority, and particularly of

the hearing of the rule, the foreman of the jury also made an affidavit stating that neither he nor any of the jurors was influenced by anything which the accused juror said or did at the trial, but the court refused to receive it, and observed that those in support of the application, referred only to the conduct of the juror before he entered the jury box.

In *Addison v. Williamson*, 5 Jur. 466, Baron Alderson admitted an affidavit of a juror, offered in support of the verdict, to operate so far as to contradict his having made declarations attributed to him by affidavits of other persons, but excluded so much of it as stated other circumstances relating to the trial. To the same effect, see *Standewick v. Hopkins*, 14 L. J. Q. B. 16; *Rolle, C. J.*, in *Taylor v. Webb*, Trials per Pais 224.

In the *United States* it has been similarly held in several of the states, that the testimony of jurors, even in support of the verdict, is not admissible where it includes statements as to the general conduct of the jury during the progress of the trial, or the mode in which their verdict was arrived at, or made up. But still conforming to the English view of the subject, it is held that this does not exclude the testimony of a juror to facts touching his own conduct or acts when separated from his fellows, or acts or declarations of other persons with or to him. *Capen v. Stoughton*, 16 Gray (Mass.) 364; *Bridgewater v. Plymouth*, 97 Mass. 382; *Woodward v. Leavitt*, 107 Mass. 453; 9 Am. Rep. 49; *Heffron v. Gallupe*, 55 Me. 563; *McCorkle v. Binns*, 5 Binn. (Pa.) 340; 6 Am. Dec. 420. See also *Haskell v. Becket*, 3 Me. 92; *Taylor v. Greely*, 3 Me. 204; *Sawyer v. Hopkins*, 22 Me. 268.

1. In *Wright v. Illinois, etc.*, Tel. Co., 20 Iowa 209, after an extensive review of the authorities on this subject, it is held that each case seems to have been decided, not on any recognized or fixed principle, but upon its own supposed merits, according to the individual views of the judge delivering the opinion of the court deciding the case; and although previous cases are

sometimes cited, the question seems very often to have been treated as one of first impression. Under such circumstances, it is necessarily impossible to deduce a general rule from, or state one that will be consistent with, all the cases. The court continues: "While we do not feel entirely confident of its correctness, nor state it without considerable hesitation, yet we are not without that assurance, which, under the circumstances, justifies us in laying down the following as the true rule: That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations of judgment, or other matter resting alone in the juror's breast." The court explains: "That the verdict was obtained by lot, for instance, is a fact independent of the verdict itself, and which is not necessarily involved in it. While every verdict necessarily involves the pleadings, the evidence, the instructions, the deliberation, conversations, debates and judgments of the jurors themselves; and the effect or influence of any of these upon the juror's mind, must rest in his own breast, and he is and ought to be concluded thereon by his solemn assent to and rendition of the verdict. To allow a juror to make affidavit against the

modern decisions, is arrayed against the admissibility of such evidence.¹

(4) *Responsiveness*.—The members of a jury are sworn to try the issues joined between the parties. When, therefore, their verdict does not include a finding upon every controverted matter-of-fact material to the merits of the cause, such partial performance of their duty is as inoperative and ineffective as no performance at all.² A verdict may be defective in this respect, either by

conclusiveness of the verdict, by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature are, though untrue, incapable of disproof, would be practically to open the jury room to the importunities and appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness. But to receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow jurors; and to hear such proof would have a tendency to diminish such practices, and to purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them.³ See *Wilkins v. Bent*, 66 Iowa 531.

1. See authorities to this effect cited *supra*, to support the statement in the text as to the general rule on the subject treated in this subdivision.

2. *Miller v. Trets*, *Ld. Raym.* 324; *Finymore v. Sanky*, *Cro. Eliz.* 133; *Hooper v. Sheperd*, *Str.* 1089; *Green v. Cole*, 2 *Saund.* 257; *Bishop v. Kaye*, 3 *B. & A.* 605; *Grice v. Ferguson*, 1 *Stew. (Ala.)* 36; *Traun v. Wittick*, 27 *Ala.* 571; *Nonemaker v. State*, 34 *Ala.* 211; *Dominick v. State*, 4 *Ala.* 680; 91 *Am. Dec.* 496; *St. Clair v. Caldwell*, 72 *Ala.* 527; *People v. Kinsey*, 51 *Cal.* 279; *People v. Helbring*, 59 *Cal.* 567; *People v. Fuqua*, 61 *Cal.* 377; *Kilbourn v. Waterous*, *Kirby (Conn.)* 424; *Smith v. Raymond*, 1 *Day (Conn.)* 189; *Favor v. State*, 5 *Ga.* 249; *Reed v. State*, 8 *Ind.* 200; *Jenkins v. Parkhill*, 25 *Ind.* 473; *H. G. Old's Wagon Works v. Coombs*, 124 *Ind.* 62; *Alexandria Mining Co. v. Painter*, 1 *Ind. App.* 587; *Bess v. Sheperd*, 2 *Bibb (Ky.)* 225; *State v. Heas*, 10 *La. Ann.* 195; *Hampton v. Watterson*, 14 *La. Ann.* 236; *State v. Guillory*, 42 *La. Ann.* 581; *State v. Benjamin*

(*La.* 1893), 14 *So. Rep.* 71; *Gerrish v. Train*, 3 *Pick. (Mass.)* 124; *Com. v. Call*, 21 *Pick. (Mass.)* 509; 32 *Am. Dec.* 284; *Stiles v. Granville*, 6 *Cush. (Mass.)* 458; *Brown v. Chase*, 4 *Mass.* 436; *Holmes v. Wood*, 6 *Mass.* 1; *Meighen v. Strong*, 6 *Minn.* 177; 80 *Am. Dec.* 441; *McCoy v. Rives*, 1 *Smed. & M. (Miss.)* 592; *Groves v. Bailey*, 24 *Miss.* 588; *Fenwick v. Logan*, 1 *Mo.* 401; *Schweickhardt v. St. Louis*, 2 *Mo. App.* 571; *State v. Robb*, 90 *Mo.* 30; *Holman v. Kingsbury*, 4 *N. H.* 105; *Jewett v. Davis*, 6 *N. H.* 518; *Scudder v. Bloomfield*, 3 *N. J. L.* 950; *Bemus v. Beekman*, 3 *Wend. (N. Y.)* 667; *Van Benthuyzen v. DeWitt*, 4 *Johns. (N. Y.)* 213; *Thompson v. Button*, 14 *Johns. (N. Y.)* 84; *Lockwood v. Bartlett (Supreme Ct.)*, 7 *N. Y. Supp.* 481; *Vines v. Brownrigg*, 2 *Dev. (N. Car.)* 537; *State v. Jennings*, 104 *N. Car.* 774; *Hanly v. Levin*, 5 *Ohio* 227; *Ward v. Taylor*, 1 *Pa. St.* 238; *Solliday v. Com.*, 28 *Pa. St.* 13; *State v. Robinson*, 31 *S. Car.* 453; *Nixon v. Bullock*, 9 *Yerg. (Tenn.)* 414; *Hall v. York*, 16 *Tex.* 18; *Gulf, etc., R. Co. v. James*, 73 *Tex.* 12; *Garland v. Davis*, 4 *How. (U. S.)* 131; *Patterson v. U. S.*, 2 *Wheat. (U. S.)* 221; *French v. Thompson*, 6 *Vt.* 54; *Triplett v. Micou*, 1 *Rand. (Va.)* 269; *Gardner v. Vidal*, 6 *Rand. (Va.)* 106; *Buckner v. Blair*, 2 *Munf. (Va.)* 336; *Green v. Dulany*, 2 *Munf. (Va.)* 518; *Hite v. Wilson*, 2 *Hen. & M. (Va.)* 268; *Swain v. Roys*, 4 *Wis.* 50; *Hoiss v. State*, 79 *Wis.* 513.

An action was brought on a charter party whereby the defendant was to pay fifty guineas a month, the plaintiff claiming five hundred pounds, to which the defendant pleaded that he had paid fifty guineas a month for all the time the ship was in his service. Issue having been taken, the jury found that three hundred and fifty-seven pounds remained unpaid, but said nothing as to the rest of the five hundred pounds. The judgment entered on this verdict was reversed. *Hooper v. Sheperd*,

a variance from the issue joined,¹ or by failing to determine one of several material issues.² A forcible illustration of a verdict invalid for the former reason, was afforded by an action of assumpsit instituted against a guardian for a promise made by an extravagant ward, the guardian pleading that he never promised, while

Stra. 1089; *Fynymore v. Sanky*, Cro. Eliz. 133.

In *Jenkins v. Parkhill*, 25 Ind. 473, which was an action against two defendants, the plaintiff's complaint contained four paragraphs. The jury tried the case and returned a verdict for the plaintiff upon the first two paragraphs of the complaint as against both defendants, and upon the last two paragraphs of the complaint as against one only of the defendants, finding neither for nor against the other defendant on the last two paragraphs. In the lower court, there was a motion for a *venire facias de novo*, on the ground that the verdict was defective in not finding for or against one of the defendants on the issues joined in the last two paragraphs of the complaint, but the motion was overruled, as was also the motion for a new trial. On appeal, it was held by the supreme court that the *venire facias de novo* should have been awarded, the court, in effect, saying: "If the jury finds but part of the matter put in issue, and says nothing as to the rest, the verdict is ill, and a *venire facias de novo* shall issue if no judgment has been given; but if judgment has been pronounced, it will be reversed."

1. **Substantial Variance from Issue.**—In an action of debt on a bond, with condition, the issue submitted to the jury was whether the condition had been performed or not. Instead of determining this question, the verdict declared that the bond in the declaration mentioned, was the deed of the defendant, and that there was justly due upon said bond a certain sum of money. Under such circumstances, an opportunity was afforded for the application of the rule that a verdict is bad if it varies from the issue in a substantial matter, or if it finds only a part of that which is in issue. The reason of this rule is obvious. It results from the nature and the end of the pleading. *Patterson v. U. S.*, 2 Wheat. (U. S.) 221.

In *Groves v. Bailey*, 24 Miss. 588, the plaintiffs in error commenced suit by attachment against the defendants in

error, on the ground that said defendants "had concealed their effects," so that the plaintiffs' claim could not be made by the ordinary process of law. The defendants appeared and pleaded to the attachment, "that they had not concealed their effects so that the plaintiffs' claim could not be made by law." To this plea, the plaintiffs replied that "at the time of suing out the attachment, the defendants had concealed their effects, so that the plaintiffs' claim could not be made by ordinary process of law." Upon the issue thus presented a jury was impaneled, who found "that the defendants were not concealing their effects at the time of suing out such attachment, so that the claim of the said plaintiffs would be defeated, and that there was not good cause to sue out the attachment." The appellate court declared that the verdict of the jury was clearly not in accordance with the issue made by the parties. The affidavit and replication both stated that the concealment had taken place before the attachment was sued out, and the verdict said that the defendants were not concealing their effects as at the time of suing out the writ. This may have been true and not inconsistent with the affidavit and replication, which did not speak of a concealment of effects then going on, but of one having already taken place. The fact that the concealment had been accomplished would only make the fact found by the verdict true, but immaterial, that the defendants were not, at the date of the writ, concealing their effects. The judgment pronounced on this verdict was reversed.

Under *Sanborn & Berryman* Annot. Stat., § 4697, which provides that when a special plea of insanity is interposed in a criminal case, that issue is to be first tried by a jury, and their verdict thereon must be confined to that issue, a verdict in such a case, "we find the man sane when he committed the crime," shows that the jury misconceived the issue submitted to them, and it should be set aside and a new trial granted. *Hoiss v. State*, 79 Wis. 513.

2. "The general rule," says the court,

in *Wood v. McGuire*, 17 Ga. 361; 63 Am. Dec. 246, "is that the verdict must comprehend the whole issue or issues submitted to the jury in a particular cause; otherwise, the judgment founded on it must be reversed." The rule is the same where the verdict does not find the whole of a single issue, but only a part thereof, as where it does not find all of several issues. *Bemus v. Beekman*, 3 Wend. (N. Y.) 667.

Undetermined Issues.—In *Meighen v. Strong*, 6 Minn. 117; 80 Am. Dec. 441, which was an action instituted for the purpose of determining an adverse claim of the defendants to certain real property, brought under an act of legislature designing to give a party in possession of real property, the same facilities for testing the merits of adverse claims of title that are always at hand for those who are excluded from the possession, but claim an estate therein, adverse to that of the occupant; the plaintiff made the necessary allegation as to his possession, and the defendants by their answer put his possession directly in issue. The verdict of the jury was in special form and ignored this issue. The supreme court held, on this account, that the verdict fell far short of determining the issue joined between the parties, and hence not sufficient to warrant a judgment.

Where issue was joined upon the right of property in two slaves, Charles and Fannie, and the verdict found in favor of the defendant was for two negroes, Charles and Lucy, the verdict was adjudged improper. *McCoy v. Rives*, 1 Smed. & M. (Miss.) 592.

In an action of detinue for eight slaves, the jury found for the plaintiff and assessed the value of the slaves sued for, naming, however, only seven of them. The verdict was held to be insufficient. *Traun v. Wittick*, 27 Ala. 571.

In *Miller v. Trets*, 14 Raym. 324, an information was exhibited against the defendant for selling lace and silks. The jury found him guilty of selling lace but said nothing as to the silks; the verdict was not sustained.

By statute in *Alabama*, unlawful detainer and forcible detainer are made distinct injuries; hence, where the complaint was for forcible entry and detainer, a verdict declaring the defendant guilty of unlawful detainer only, does not respond to both issues. *Grice v. Ferguson*, 1 Stew. (Ala.) 36.

Inconclusiveness.—A minor, leaving his father's house in one state, traveled

into an adjoining state for the purpose of obtaining employment. His employer, failing to pay him the agreed compensation, was sued therefor, upon the attainment of full age by the party. The jury were instructed, and properly, as it was held that the plaintiff might recover if his father had emancipated him, or given him his time while he worked for the defendant, or waived the right to recover for his services. Under this instruction, the jury returned a verdict that there was "no evidence that the plaintiff, during the time that he was in the employ of the defendant, was legally emancipated." A general verdict for the defendant was thereupon drawn up by the court and affirmed by the jury. The supreme court declared that the judgment rendered thereon could not be allowed to stand, as the finding of the jury did not necessarily disprove the plaintiff's right to recover. *Stiles v. Granville*, 1 Cush. (Mass.) 458.

A and B were sued in covenant for the alleged non-performance of the stipulations of a bond. The suit abated on account of the death of one of the defendants, and the jury returned a verdict: "That the surviving defendant hath not paid the plaintiff the debt in the declaration mentioned, as the plaintiff by replying hath alleged." The appellate court held that such a verdict was defective in that it did not negative the payment of the money by the deceased defendant. *Triplet v. Micou*, Rand. (Va.) 269. And see *Buckner v. Blair*, 2 Munf. (Va.) 336; *Green v. Du lany*, 2 Munf. (Va.) 518.

Where the question involved in the issue was whether certain parties had promised jointly, a verdict simply that they were not partners, as had been alleged, was not responsive to the issue. The parties might have promised jointly, although not partners. *Jewett v. Davis*, 6 N. H. 518.

Where the declaration charged that the defendant promised to do a particular act, and the defendant pleaded that he promised jointly with another, so that the issue was, whether he promised jointly or alone, a verdict that the defendant "did undertake and promise in manner and form as the plaintiff complained," was considered insufficient for it did not decide whether he promised jointly or alone. *Bishop v. Kaye*, 3 B. & Aid. 605.

In an action of detinue, the defendant pleaded, first, *non detinet*; second

the jury returned a verdict to the effect that the ward promised;¹

a release; third, Statute of Limitations. Issue was taken on the second and third pleas, and to that of the Statute of Limitations the plaintiff replied a former suit and a non-suit therein, and that the present action was commenced within a year and a day. On this replication, issue was taken by the defendant. The jury returned a verdict to the effect that the defendant did detain, etc., and further found that the Statute of Limitations was no bar assessing the damages at a certain amount. As there was no response to the defendant's plea of release, the supreme court reversed the judgment founded on such defective verdict. *Vines v. Brownrigg*, 2 Dev. (N. Car.) 537.

Replevin.—One Roys commenced an action of replevin, against a certain Swain, for the unjust detention of personal property. Swain pleaded a general issue and property in himself. The jury found the property replevied to be in the plaintiff, and assessed the value and damages, but failed to find expressly that the defendant unjustly detained the property, although, as the supreme court said, "they doubtless intended to do so." Nevertheless, it was decided that the judgment must be reversed. *Swain v. Roys*, 4 Wis. 50.

In *trespass de bonis asportatis*, the defendant pleaded, first, not guilty, and secondly, in bar, that he took the goods as the property of a third person by virtue of a writ of attachment. Issue was joined, and the jury found that the goods were the property of the plaintiff at the time of the taking, and assessed damage. Error having been brought, the verdict was decided to be defective, since while it may have been true, yet the plaintiff might have bailed the goods to the third person for a time which had not expired, in which case he could not maintain trespass—or the goods might have been in the possession of this third person, under such circumstances as to be legally liable to the attachment as his property. *Holman v. Kingsbury*, 4 N. H. 105; *Gerrish v. Train*, 3 Pick. (Mass.) 124.

On a suit by the indorsee of a promissory note against the maker, the defendant replied, transfer of the note after maturity to the plaintiff, failure of consideration, and set-off against the payee. A verdict "in favor of the plaintiff" was held insufficient. *Hamp-ton v. Walteson*, 14 La. Ann. 236.

Assault and Battery.—In an action of trespass for assault and battery, the defendant pleaded, first, not guilty, second, a justification. A jury being impaneled to try the issues, they returned a verdict of guilty generally, without alluding to the justification. It was held that the verdict only replied to the doing of the act, and that the justification was not inquired into; hence that the judgment was erroneous and must be reversed. *Fenwick v. Logan*, 1 Mo. 401.

Where issue was joined upon an assault and battery, on the pleas of not guilty and *son assault demesne*, a verdict finding the defendant guilty was thought insufficient to sustain a judgment against him, but it was admitted that such a verdict might be cured by amendment in the proper court. *Hanly v. Levin*, 5 Ohio 227.

The defendant, who was tried on an indictment for assault with a deadly weapon, with intent to inflict great bodily injury, pleaded not guilty and former acquittal. There was a simple verdict of guilty, without in terms responding to the plea of former acquittal. The judgment was reversed, and the cause remanded. *People v. Helbing*, 59 Cal. 567. And see *People v. Kinsey*, 51 Cal. 279; *People v. Fuqua*, 61 Cal. 377.

Where a party was tried on an indictment for murder, a verdict of guilty of an assault with intent to kill was held to be not sufficiently responsive to the charge in the indictment, and the verdict, therefore, fatally defective. *State v. Guillory*, 42 La. Ann. 381.

Under an indictment for assault with intent to kill, the jury found the defendant guilty "of an aggravated assault and battery." In this case, the finding was held sufficiently responsive to the charge in the indictment. *State v. Robinson*, 31 S. Car. 453. And see *State v. Jennings*, 104 N. Car. 774.

Where the first count in an indictment, though artificially drawn, contains the substantial requisites of an indictment for manslaughter, a general verdict of guilty, fixing the punishment, was naturally held sufficiently responsive to the indictment. *Reed v. State*, 8 Ind. 200. In *State v. Robb*, 90 Mo. 30, a verdict finding the defendant guilty of the "charges in the indictment" was held sufficiently responsive.

1. *Brown v. Chase*, 4 Mass. 436. The

and where the jury find merely as to costs, ignoring the merits of the controversy, the verdict is liable to the same objection.¹ For the latter irregularity a verdict has been declared void, where, to an indictment for obtaining goods under false pretenses, the defendant pleading not guilty and former acquittal, the verdict being simply "guilty" with no response to the plea of *autrefois acquit*.² Thus, also, if A, B and C be sued jointly by D, and a jury sworn to try the issues as to them all, a verdict finding the issues as to A and B only, and saying nothing as to C, would not be received, or a judgment rendered upon such verdict would be reversed.³ However, the findings of a jury are viewed with

court in this case proceeded to give judgment against the guardian, which was, of course, reversed by the appellate tribunal.

1. *Finding Merely as to Costs.*—A jury in *Hall v. York*, 16 Tex. 18, returned a verdict in the following words: "We, the jury, agree that the plaintiff pay the costs in this case." Such a verdict was held to be non-responsive to the issue, and in delivering the opinion of the court, Wheeler, J., said: "The form of a verdict is not material, so that it be intelligible, and find substantially the material issue or issues submitted by the pleadings, for the decision of the jury. But nothing is better settled than that the verdict must find the very point in issue between the parties; or if it does not it will not support a judgment." In this case, the verdict is manifestly insufficient in this respect. See also *Green v. Cole*, 2 Saund. 257.

In *Ford v. Taggart*, 4 Tex. 492, the plaintiff sued the defendant for shooting his stock, and the defendant answered that they had broken into his inclosure, etc. The jury returned a verdict to the effect that they found "the damages equal," and that each party should "pay equal proportions of the cost incurred, and go out of court." It was held that such a verdict "did not find any issue properly presented by the pleadings," and it was too clear for argument that such a verdict was bad and would not support a judgment.

2. *Dominick v. State*, 40 Ala. 680; 90 Am. Dec. 496; *Nonemaker v. State*, 34 Ala. 211; *Solliday v. Com.*, 28 Pa. St. 13.

3. *Several Defendants.*—*Schweichardt v. St. Louis*, 2 Mo. App. 571.

In *Kilbourn v. Waterous, Kirby* (Conn.) 424, which was an action of

trespass against a number of defendants, who severally pleaded not guilty, the verdict for the plaintiff omitting to mention two of the defendants, was, on motion, set aside by the court as not comporting with the issue; and where, in a suit against two, the jury found against both of the defendants upon the first paragraph of the complaint and against one of the defendants upon the second paragraph, finding nothing as to the other defendant upon the second paragraph, the verdict was held to be "ill for not finding the whole issue," and a *venire de novo* awarded. *Jenkins v. Parkhill*, 25 Ind. 473. Nevertheless, in an action against several defendants for wrongful detention, etc., it was held that the jury might return a verdict against one defendant though they could not agree as to the others. *Lockwood v. Bartlett* (Supreme Ct.), 7 N. Y. Supp. 481. Also, where to an action of trespass there were several defendants, a verdict which failed to find either for or against two of the defendants was directed to be cured by entering a *nolle prosequi* as to them. *Ward v. Taylor*, 1 Pa. St. 283.

In *Gulf, etc., R. Co. v. James*, 73 Texas 12, and *Alexandria Min. Co. v. Painter*, 1 Ind. App. 587, it is maintained that if the jury undertake to mention the defendants by name in their verdict for the plaintiff, a silence as to any defendant is to be construed a verdict in his favor. See *Kinkler v. Jurica* (Tex. 1892), 19 S. W. Rep. 359.

Where no issue is joined between the plaintiff and one of several defendants, made so for a merely collateral purpose, a general verdict in favor of the plaintiff would be regarded as responsive to the whole issue. *H. G. Old's Wagon Works v. Coombs*, 124 Ind. 62; *Golden Gate Mill, etc., Co. v. Joshua*

great leniency,¹ and, as it has been expressed: "Though the verdict may not conclude formally or punctually to the words of the issue, yet if the point in controversy can be concluded out of the

Hendy Mach. Works, 82 Cal. 184. See also *Garza v. State* (Tex. Crim. App. 1892), 20 S. W. Rep. 752.

In an action against several defendants, if two of them answer and a third makes default, the verdict is properly confined to those who answer, as there is no issue as to the one who has not appeared. *Golden Gate Mill, etc., Co. v. Joshua Hendy Mach. Works*, 82 Cal. 184. And see *State v. Chambers*, 45 La. Ann. 36; *Blue v. McCabe*, 5 Wash. 125.

Where the merely formal defendants do not appear, the case proceeding against the only substantial defendant, the fact that the verdict is for the "defendants," without specifying which of them, is a mere clerical error, and constitutes no ground for reversal. *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 609. And see *Sims v. State*, 87 Ga. 569; *Parrish v. McNeal* (Neb. 1893), 55 N. W. Rep. 222.

In an action against a warehouse company and one Morgan, to recover the value of property stored with a warehouse company, it was proved that the warehouse company after bailment, surrendered possession of the warehouse where the goods were stored, together with the possession of said goods to the defendant, Morgan, who, at the time of the loss was in possession of the warehouse and property. Both defendants answered the complaint. At the trial, the jury rendered a verdict against the defendant, Morgan, for \$325, the foreman saying, in answer to a question, that the jury had not taken into account the responsibility of the warehouse company. About a week after the trial of the action, the defendants moved, upon notice of motion, to set aside the verdict as irregular, or to dismiss the complaint against the warehouse company, which motion was denied; and the supreme court held properly so, maintaining that the defendants were liable severally and not jointly, each being responsible for any injury occurring while in possession and control of the property, so that there was no irregularity in the verdict as against Morgan, and that the judge could not, after the lapse of such a time, dismiss the complaint as to the other defendant, although he might have done so at the trial. *Kaufman v.*

People's Cold Storage, etc., Co. (City Ct.), 30 N. Y. Supp. 831.

1. *Foster v. Jackson*, Hob. 52a, 54a; *Hawks v. Crofton*, 2 Burr. 698; *Sawyer v. Fitts*, 4 Stew. & P. (Ala.) 365; *Moody v. Keener*, 7 Port. (Ala.) 218; *Tippin v. Petty*, 7 Port. (Ala.) 441; *Wittick v. Traun*, 27 Ala. 562; 62 Am. Dec. 778; *Huntington v. Ripley*, 1 Root (Conn.) 321; *Wood v. McGuire*, 17 Ga. 361; 63 Am. Dec. 246; *Small v. Hicks*, 81 Ga. 691; *Worford v. Isabel*, 1 Bibb (Ky.) 247; 4 Am. Dec. 633; *Crozier v. Gano*, 1 Bibb (Ky.) 257; *Pickett v. Richet*, 2 Bibb (Ky.) 178; *Miller v. Shakelford*, 4 Dana (Ky.) 271; *Jones v. King*, 30 Minn. 368; *Leftwich v. Day*, 32 Minn. 512; *Moriarty v. McDevitt*, 46 Minn. 136; *Allen v. Aldrich*, 29 N. H. 63; *Thompson v. Button*, 14 Johns. (N. Y.) 84; *Nixon v. Nunnery*, 9 Ired. (N. Car.) 28; *Kerr v. Hawthorne*, 4 Yeates (Pa.) 170; *Boon v. Planters' Bank*, 3 Humph. (Tenn.) 84; *Lincoln v. Cambria Iron Co.*, 103 U. S. 412; *Lewis v. Childers*, 13 W. Va. 1.

Intent of Jury—How Ascertained—In considering a verdict, with a view to its sufficiency, the first object is to ascertain what the jury intended to find, and this is to be done by considering the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to pleadings. If the meaning of the jury can be ascertained, and a verdict on the point in issue can be made out, the court will mold it into form and make it serve. A verdict should be construed with the view that it shall rather stand than fall. *Miller v. Shakelford*, 4 Dana (Ky.) 271.

Liberality of Construction.—The extreme liberality which some courts show in the construction of a verdict is well illustrated in the case of *Small v. Hicks*, 81 Ga. 691. In this case, Small sued Hicks and Walker upon a promissory note; Hicks pleaded usury, and Walker pleaded that he was a mere surety on the note, and that, at the time he became surety, it was understood and agreed between the parties that Hicks should give Small a mortgage, with waiver of homestead and exemption upon certain personal property, to secure the payment of the note; that

findings, the court shall work it into form and make it serve." This inclination in favor of the sufficiency of a verdict, also sanctions the approval of a finding, which, though it may not respon-

the mortgage was accordingly given, but that in taking the mortgage, Small took more than a lawful rate of interest from Hicks, and thereby rendered the security valueless and the homestead waiver of no effect, so that Hicks could take a homestead in the property, which he did; in consequence of which, Walker's risk and liability were increased, and that he was therefore discharged from his liability as surety. On the trial of the case, the jury returned a verdict as follows: "We, the jury, find one and sixty-two hundredths dollars usury, and also find for B. F. Walker." Upon appeal, the supreme court in effect said: "We think the verdict is entitled to a reasonable intendment, and that the judgment entered against Hicks for the amount of the principal and interest due on the note, except the small amount of usury stated in the verdict, and directing that Walker be discharged, was proper. Hicks pleaded usury and the jury found a certain amount of usury, thus sustaining the plea that it was an usurious transaction, and this was equivalent to finding the remainder of the debt in favor of the plaintiff; hence, judgment could be made certain from the pleadings in the case."

The utmost favor is always extended to verdicts. They are not to be construed as strictly as pleadings are. Whenever the court can collect the clear meaning of the jury from the finding, it is bound to mould it into form and make it serve. *Wittick v. Traun*, 27 Ala. 562; 62 Am. Dec. 778; *Moody v. Keener*, 7 Port. (Ala.) 218; *Tippin v. Petty*, 7 Port. (Ala.) 44.

1. *Denison, J.*, in *Hawks v. Crofton*, 2 Burr. 698. And see *Stearns v. Barrett*, 1 Mason (U. S.) 153; *Lincoln v. Cambria Iron Co.*, 103 U. S. 412; *Toulmin v. Lesesne*, 2 Ala. 359; *Russell v. Wheeler*, 1 Hempst. (U. S.) 3; *Huntington v. Ripley*, 1 Root (Conn.) 321; *Wood v. McGuire*, 17 Ga. 361; 63 Am. Dec. 246; *Small v. Hicks*, 81 Ga. 691; *Chittendon v. Evans*, 48 Ill. 52; *Toler v. Keiher*, 81 Ind. 383; *Crozier v. Gano*, 1 Bibb (Ky.) 1; *Pickett v. Richet*, 2 Bibb (Ky.) 178; *State v. Alfred*, 44 La. Ann. 582; *Browne v. Browne*, 22 Md. 103; *Rembaugh v. Phipps*, 75 Mo.

422; *Allen v. Aldrich*, 29 N. H. 63; *Middleton v. Quigley*, 12 N. J. L. 352; *Thompson v. Button*, 14 Johns. (N. Y. 84; *Kerr v. Hawthorne*, 4 Yeates (Pa. 170; *Carter v. Graves*, 9 Yerg. (Tenn. 446; *Boon v. Planters' Bank*, 3 Humph (Tenn.) 84; *Robb v. Parker*, 4 Heisk (Tenn.) 58; *Burton v. Bondies*, 2 Tex 204; *McMurray v. O'Neill*, 1 Call (Va. 246; *Wausau Boom Co. v. Plumer*, 41 Wis. 118.

The general rule is, that the verdict must comprehend the whole issue of issues submitted to the jury in the particular cause, otherwise, the judgment rendered on it may be reversed. To comply with the requirements of this rule, however, it is generally held, that if the verdict is not expressed formally and punctually in the words of the issue, yet if the point in issue can be concluded from the finding of the jury the court will work the verdict into form and make it serve. *Middleton v. Quigley*, 12 N. J. L. 352.

The converse of this proposition is also true. Hence it is declared, that if the point on which the verdict is given be so uncertain that it cannot be clearly ascertained whether the jury meant to find the issue or not, it cannot be helped by intendment. *Gerrish v. Train*, 3 Pick. (Mass.) 124; *Coffin v. Jones*, 11 Pick. (Mass.) 44; *Jewett v. Davis*, 6 N. H. 518; *Stearns v. Barrett* 1 Mason (U. S.) 170.

Substantial Omissions.—In *Kerr v. Hartshorne*, 4 Yeates (Pa.) 170, Chief Justice Tilghman very properly limits the authority of the court to cases where the jury have expressed their meaning in an informal manner, and say the court has no power to supply substantial omissions. He also maintains that it is the duty of the court to support the verdict of the jury, if it may legally be done. The court has no power to supply substantial omissions, but if the jury have expressed their meaning in an informal manner the court not only may, but is bound to, mould it into form. See also *Wood v. McGuire*, 17 Ga. 361; 63 Am. Dec. 246.

Test of Sufficiency.—In *Burton v. Bondies*, 2 Tex. 204, it is said that "the test of the sufficiency of a verdict is this

in terms to each and every issue,¹ yet it is manifest that the contemplation and determination of each point in controversy, formed an element in the general conclusion;² or where it is equally clear that if there had been a distinct pronouncement on each issue presented by the pleadings, the general effect of the verdict

Is it so certain that the court can give judgment upon it?" "This," said the court, "was the test applied in the case of *Hawks v. Crofton*, 2 Burr. 699, where the principle of the decisions was said by Lord Mansfield to be 'That where the intention of the jury is manifest and beyond a doubt, the court will set right matters of form and the mere act of the clerk;' and the general rule was recognized 'That verdicts are not to be taken strictly like pleadings, but that the court will collect the meaning of the jury, if they give such a verdict that the court can understand them.' And in *Pickett v. Richet*, 2 Bibb (Ky.) 178, the court say 'Verdicts are to be favorably construed, and technical objections to the want of form in wording them, disregarded. If it can be inferred from the verdict that the jury have found the point in issue, it is the duty of the court to work and mould it into form according to the real justice of the case; a rule founded in good sense and conducive to the ends of justice.'

It is an established principle that the courts will sustain the verdict of a jury if its legal sense or legal effect makes a response to the pleadings. *Boon v. Planters' Bank*, 3 Humph. (Tenn.) 84. And it is also maintained that the courts will so mould and construe a verdict as to make it legal if possible, and will never give to it the opposite construction, unless forced by the terms in which it is expressed. *Toulmin v. Lesesne*, 2 Ala. 359; *McMurray v. O'Neill*, 1 Call (Va.) 246.

Though a verdict need not follow the language of the issue, it must be responsive to it, and so expressed as to show that the jury decided the questions submitted to them. *Toulmin v. Lesesne*, 2 Ala. 359.

In *Lincoln v. Cambria Iron Co.*, 103 U. S. 412, which was an action of assumpsit to which the defendant made a general denial of the allegations of the declaration, equivalent to a plea of non-assumpsit with notice of special matter, the jury found the defendant "guilty in manner and form as it is alleged in the declaration," and assessed damages. *Bradley, J.*, in delivering the opinion of

the supreme court, said: "The form of the verdict is defective, . . . but this is a mere clerical error, properly amendable. It substantially finds the issues made by the pleadings." The verdict, in effect, said that the defendant did promise, and violated his promise, as alleged in the declaration.

1. Specific Response to Each Issue.—

It may be stated, as a general rule, that juries must, by their verdicts, respond specifically to all the issues made by the pleadings, and if they omit any one, their verdict will be set aside, or if judgment be rendered thereon, it will be erroneous. *Ronge v. Dawson*, 9 Wis. 242. And in *Traun v. Wittick*, 27 Ala. 570, it is laid down as an elementary principle, that a verdict is void if it only finds a part of the issue.

In *Rex v. Cockerill*, And. 260, a distinction was sought to be drawn between a cause in which several distinct matters were in issue, and where there were several issues upon the same matter. The court said, nevertheless, that a separate verdict should be given on each issue, for otherwise it would not appear on which pleading it was founded, so that possibly it might be given on a part which was immaterial.

When suit is brought on a bond for the performance of covenants, and breaches are assigned by the plaintiff, the jury should assess damages for each breach which is found to have been committed. *Van Benthuyssen v. DeWitt*, 4 Johns. (N. Y.) 213.

Upon a declaration of several counts, each containing a separate cause of action, the decision of the jury should be had on each issue. *Seibert v. Allen*, 61 Mo. 482; *Ranney v. Bader*, 48 Mo. 539.

Where there are two issues of fact, and the verdict of the jury answers to one only, there should be a *venire facia de novo*. *Hite v. Wilson*, 2 Hen. & M. (Va.) 268.

2. *Rex v. Cockerill*, And. 260; *Biggs v. Barry*, 2 Curt. (U. S.) 259; *Glenn v. Sumner*, 132 U. S. 152; *Tippin v. Petty*, 7 Port. (Ala.) 441; *St. Clair v. Caldwell*, 72 Ala. 527; *Smith v. Raymond*, 1 Day (Conn.) 189; *State v. Jacques*

(La. 1893), 14 So. Rep. 213; *Sutton v. Dana*, 1 Met. (Mass.) 383; *Hodges v. Raymond*, 9 Mass. 316; *Porter v. Rummary*, 10 Mass. 64; *French v. Hanchett*, 12 Pick. (Mass.) 15; *Browne v. Browne*, 22 Md. 103; *Stout v. Calver*, 6 Mo. 254; 35 Am. Dec. 438; *Mooney v. Kennett*, 19 Mo. 554; 61 Am. Dec. 576; *Taylor v. Short*, 38 Mo. App. 21; *Jenks v. Hallet*, 1 Cal. (N. Y.) 60; *Thompson v. Button*, 14 Johns. (N. Y.) 84; *Bemus v. Beekman*, 3 Wend. (N. Y.) 667; *Law v. Merrills*, 6 Wend. (N. Y.) 268; *Atlantic, etc., Co. v. Purifoy*, 95 N. Car. 302; *Hanly v. Levin*, 5 Ohio 238; *Markwood v. Doriat*, 21 Ohio St. 637; *Garland v. Bugg*, 1 Hen. & M. (Va.) 374; *Danville v. Waddell*, 27 Gratt. (Va.) 452; *Black v. Thomas*, 21 W. Va. 709.

The verdict of a jury which necessarily disposes of all the issues in the case is sufficient, although it may not respond separately to each several issue or fact presented by the pleadings. Thus, in *West Virginia*, the statute provides that, in actions of debt or assumpsit, when the defendant files an account of set-off, the jury on the trial of the issue in the case, shall ascertain the amount to which the defendant is entitled and apply it as a set-off against the plaintiff's demand, and if the said amount be more than the plaintiff is entitled to, shall ascertain the amount of the excess, including principal and interest. However, where the verdict was simply for a gross sum in favor of the defendant, it was sustained, as it was held that the verdict under the issues was necessarily a finding that the account of the defendant exceeded the amount to which the plaintiffs were entitled, to the extent of that finding. *Black v. Thomas*, 21 W. Va. 709.

Upon a suit on a promissory note, the defendant replied non-assumpsit and payment, and the verdict was rendered upon the general issue. Chancellor Walworth, speaking for the court, said: "The court has no power to supply substantial omissions in a verdict, but if the jury have expressed their meaning in an informal manner only, yet with sufficient certainty to show that they must have passed upon and decided the whole issue, it is the duty of the court to mould it into form. In the present case, it would have been impossible to obtain a verdict in favor of the plaintiff on the general issue, if the defendant had established his plea of payment. On the last plea, the defendant

held the affirmative, and payment can be given in evidence under the general issues as well as under the special plea. Whatever would have entitled the defendant to a verdict under the latter, must necessarily have entitled him to a verdict under the former. This, therefore, though not in form, was, in substance, a verdict for the plaintiff on both issues." *Law v. Merrills*, 6 Wend. (N. Y.) 268.

In a certain action of assumpsit, the pleas were non-assumpsit and set-off. The jury found for the plaintiff generally, without in terms responding to the plea of set-off. The supreme court held that, though the finding was for the plaintiff generally, it was not inconsistent with the idea that the jury had considered the defendant in the plea of set-off, and had come to the conclusion that he was not entitled to any credit on that plea. Hence, the judgment was not disturbed. *Stout v. Calver*, 6 Mo. 254; 65 Am. Dec. 438.

Upon the trial of several issues from the orphan's court, the jury returned their verdict generally for the defendants, who were the *caveatees* supporting the will of a testator; but from the character of the issues, it was absolutely certain that the jury could not have so found without deciding every issue in favor of the defendants. The verdict was not disturbed. *Browne v. Browne*, 22 Md. 113.

In the case of *Porter v. Rummary*, 10 Mass. 64, the facts were, that the defendant to a writ of right pleaded not guilty and a plea of *non tuum* and disclaimer, to which the plaintiff replied that the defendant was in possession, and on which issue was joined as well as on the plea of not guilty. On these issues, the jury returned a general verdict of not guilty; judgment was rendered for the defendant, and the plaintiff prosecuted his writ of error. It was held by the supreme court of *Massachusetts* that the judgment was well enough, for the jury could not have returned the verdict they did, unless they had also passed on the special issue.

Where the defendants, in an action *quare clausum fregit*, pleaded not guilty as to the force and arms, and a special justification as to the residue, the jury returned a general verdict of not guilty, the court held such verdict to be sufficient, as the jury could not have so found if the defendants had failed in proving their justification.

must have been the same.¹ Where there are several separate and distinct issues involved, the determination of any one of which might decide the fate of a cause, the verdict should specify on

Hodges v. Raymond, 9 Mass. 316; Hanly v. Levin, 5 Ohio 238; Taylor v. Short, 38 Mo. App. 21.

In an action for the breach of a contract, the petition stated the contract sued upon in certain specific terms. The answer denied the allegations relative to the terms of the contract, setting forth the contract in other terms and claiming damages for the breach thereof. A verdict entitling the defendant to recover a specified sum, in effect finds the contract as stated in the answer and its breach as there alleged, and is sufficiently responsive to all issues. Markwood v. Doriati, 21 Ohio St. 637.

In *detinue*, the defendant pleaded *non detinet* and a special plea in bar, to which pleas there was a general replication denying the truth of them both and issues were joined. A general verdict for the plaintiff was considered sufficiently responsive to both issues. Garland v. Bugg, 1 Hen. & M. (Va.) 374.

Where several issues were distinctly presented by the pleadings, and the verdict found "all the issues in favor of the defendant," such a finding was construed as a verdict on each issue. Glenn v. Sumner, 132 U. S. 152.

Replevin.—In an action of replevin, the jury found a verdict for the plaintiff generally where the defendant had pleaded, first *non cepit*, second, an avowry, averring that the goods taken were the property of the defendant. The finding was objected to on the ground that it ignored the second plea, but the appellate court declined to disturb the judgment on this ground. It was maintained that it was very evident that the jury would not have found the defendant guilty upon the general issue, if he had made out his justification according to the avowry. Also that the intention of the jury could not be mistaken, and that the omission to enter a verdict applicable particularly to the second issue, is a mere matter of form which the court may rectify. Thompson v. Button, 14 Johns. (N. Y.) 84. Under similar circumstances in Bemus v. Beekman, 3 Wend. (N. Y.) 668, a different position is assumed, for here it is declared that a verdict for the plaintiffs, in an action of replevin upon

the plea of *non cepit*, determines no question between the parties where a plea of property is interposed, except the taking, and this results from the peculiar character of this action and the situation of the parties. Hence, such a verdict assessing no damages and in response to the plea of property, simply holding it not to be in the defendant, but not finding it in the plaintiff, was held to be defective in substance.

The court in this last case comments on the decision of this question in Thompson v. Button, 14 Johns. (N. Y.) 84, and the contradiction is sought to be reconciled by the explanation that in Thompson v. Button the determination of the court was expressly upon the ground that the intention of the jury could not be mistaken from the fact that they found the defendant guilty upon the general issue, which the court assumed would not have been done if he had made out a justification according to the avowry.

In *Wisconsin*, where both the title to, and right of possession of the property for which replevin has been brought, is put in issue, it is held that a finding generally for the plaintiff disposes of all the issues; and it is also maintained that the plea of "not guilty" to a declaration in the *cepit* and *detinet*, puts in issue as well the right of the plaintiff to the possession of the property, as the wrongful taking and detention thereof by the defendant. Ford v. Ford, 3 Wis. 399; Everet v. Walworth County Bank, 13 Wis. 420; Krause v. Cutting, 32 Wis. 687.

In *Indiana*, the practice seems to be similar, in this respect, to that of *Wisconsin*, for it is declared, in VanGundy v. Carrigan, 4 Ind. App. 333, that a general finding in an action of replevin, though both the title and right of possession are in issue, is not so defective and uncertain that judgment cannot be rendered thereon, nor is it objectionable because it does not cover all the issues. See also Rowan v. Teague, 24 Ind. 304; Crocker v. Hoffman, 48 Ind. 207; Payne v. June, 92 Ind. 252.

1. Where the fact to be determined was, whether the defendant had committed any act which would deprive

which it is founded;¹ but because there are several counts in a declaration, it does not necessarily follow that several issues are involved, since the successive counts may be but a re-statement of the same cause of action.²

The same principle which dictates the rule that juries should reply to all the material matters involved by the litigation, also prescribes a limit to their determinations. The verdict of a jury should not embrace the consideration of matters outside of and

him of the right to a certificate of discharge as an insolvent debtor, under the laws of *Massachusetts*, and a number of such acts, any one of which would have such an effect, were submitted to the jury, a verdict finding against him one such act only was declared to be sufficient. *Vennard v. McConnell*, 11 Allen (Mass.) 555.

An omission to find as to one count of an indictment which contains several, where the offense charged in the count as to which no finding is made is substantially the same as charged in the other counts, is immaterial. *U. S. v. Keene*, 1 McLean (U. S.) 429.

Where the first count in an indictment charged the defendant in a general way, and the second stated the same offense, together with the means used to consummate the criminal act, a verdict on the first count, without mentioning the second, was held to be sufficient. *Com. v. Spink*, 137 Pa. St. 255.

1. This question is sometimes regulated by statute; for instance, *Georgia* Code, par. 3960, provides, "If there are several pleas filed by the defendant, a verdict for the defendant must show upon which of the pleas it is rendered." *Williams v. Gunnels*, 66 Ga. 521.

Upon a declaration consisting of several counts, each containing a separate cause of action, the decision of the jury should be had on each issue. *Ranney v. Bader*, 48 Mo. 539; *State v. Harmon*, 106 Mo. 635; *Seibert v. Allen*, 61 Mo. 482.

In *Yarber v. State* (Tex. Crim. App. 1894), 24 S. W. Rep. 645 (where the case is reported in the briefest possible manner), this statement appears: "When both counts in an indictment are good, it is not necessary that the verdict state the count on which it is based." We submit it for what it may be worth.

2. *Hanley v. Mayor*, 6 Bing. 100; *Dillard v. Noel*, 2 Ark. 449; *Ranney v. Bader*, 48 Mo. 539; *Owens v. Hannibal*, etc., R. Co., 58 Mo. 386; *Lan-*

caster v. Connecticut Mut. L. Ins. Co. 92 Mo. 460; *Campbell v. King*, 32 Mo. App. 38; *Long v. Armsby*, 43 Mo. App. 253; *State v. Haycroft*, 49 Mo. App. 488; *Carter v. Graves*, 9 Yerg. (Tenn.) 446.

As a general rule, it is unquestionably true that the finding of the jury must embrace all the issues joined and be responsive thereto, but when all of the issues are essentially the same and such as may be distinctly and severally responded to by a general verdict for either party, there is no principle of law which requires a separate finding as to each issue, and in such case it cannot be understood what benefit either party could derive therefrom. *Dillard v. Noel*, 2 Ark. 449.

To an action of assumpsit, three pleas were put in by the defendant, and the jury returned a verdict that "they found" the issue "in favor of the plaintiff." The supreme court, in its desire to uphold the verdict and to discourage objections which might be only the result of clerical mistakes, held that the three pleas, not guilty, non-assumpsit and of special performance, made substantially but one issue, and that the word "issue" covered the whole. *Carter v. Graves*, 9 Yerg. (Tenn.) 446.

It is held, in *State v. Harmon*, 106 Mo. 635, that a verdict of guilty, upon an indictment for larceny, containing several counts each charging a distinct offense, should specify upon which counts the defendant is found guilty and upon which acquitted. This is not required, however, where all the counts relate substantially to the same transaction. *State v. Bean*, 21 Mo. 267; *State v. McCue*, 39 Mo. 112; *State v. Pitts*, 58 Mo. 556; *State v. Noland*, 111 Mo. 473.

Where there are two counts in the declaration, and the evidence is applicable to both, though the allegations in one admit of its application with more distinctness and perspicuity than in the other, the jury are not restricted in

beyond those submitted to them,¹ although if the excess in a too comprehensive finding consists merely of harmless redundancy, that portion may be regarded by the courts as surplusage, in their liberality of construction, and in such character rejected.²

In fine, a jury should determine each issue involved, and the whole of each issue.³ They should neither exceed nor fall short

their finding to either but may give a general verdict. *Porter v. Pequonnoc Mfg. Co.*, 17 Conn. 249. And see *Stamford Bank v. Ferris*, 17 Conn. 259.

1. **Facts Not in Issue.**—A verdict can legitimately find no fact that has not been put in issue. *U. S. v. Stereoscopic Slides*, 1 Sprague (U. S.) 467; *Deering v. Halbert*, 2 Litt. (Ky.) 291; *Swearengen v. Pendleton*, 4 S. & R. (Pa.) 389; *Moriarty v. McDevitt*, 46 Minn. 136; *Swan v. Smith*, 13 Nev. 257; *Hardy v. DeLeon*, 5 Tex. 211.

2. See *infra*, this title, *Surplusage*. Though a verdict in terms does not find the issue joined by the parties, if the court can collect the point in issue out of the verdict, it will be held sufficient. *Stearns v. Barrett*, 1 Mason (U. S.) 153. In this case the court, in discussing the sufficiency of a verdict, said: "There are many authorities in the books respecting this subject, some of which are not easily reconcilable with sound sense or with legal principle. From the mass of cases, however, some rules may be extracted which commend themselves to the judgment of all of us. If, for instance, the jury find the point in issue, and also another matter out of the issue, the latter finding is void, and may be rejected as surplusage. But it is otherwise, if the matter so found be contained in the issue, for then if it be material and contradictory, it cannot be rejected as surplusage. So if the point on which the verdict is given be so uncertain that it cannot be clearly ascertained whether the jury meant to find the issue or not, it cannot be helped by intendment; and *a fortiori* if it be repugnant to other facts expressly found." The court added, that where a verdict was not expressed substantially in the terms of the issue, the cause should be extremely clear which would induce a court to make it the ground of a final judgment.

Verdict Broader than Issue.—In some cases it is highly expedient, if not absolutely necessary, that the verdict should be more extensive than the issue, and find facts in addition to it. For instance, under the statutes of *Maine*, in

an action of replevin the defendant must plead the general issue, *non cepit*, on which issue must be joined, though the only question to be tried may be whether the plaintiff is the owner of the property replevied. In such a case the jury may find the formal issue in favor of the plaintiff; but they must also find that the property replevied, at the time of the taking, belonged to the plaintiff, if such is proved to be the fact. *Pejepscot v. Nichols*, 10 Me. 256.

At the request of the parties, the jury may express an opinion on matters distinct from those necessarily involved in their verdict. *Den v. Wright, Pet.* (C. C.) 72.

3. *Miller v. Trets, Ltd.* Raym. 324; *Fynmore v. Sanky, Cro. Eliz.* 133; *Hooper v. Shepherd, Stra.* 1089; *Green v. Cole*, 2 Saund. 257; *Bishop v. Kaye*, 3 B. & A. 605; *Hardy v. Bern*, 5 T. R. 636; *Rex v. Cockerell, And.* 260; *Fairfax v. Fairfax*, 5 Cranch (U. S.) 19; *U. S. v. Stereoscopic Slides*, 1 Sprague (U. S.) 467; *Patterson v. U. S.*, 2 Wheat. (U. S.) 221; *Garland v. Davis*, 4 How. (U. S.) 131; *Grice v. Ferguson*, 1 Stew. (Ala.) 36; *Sawyer v. Pitts*, 4 Stew. & P. (Ala.) 365; *Moody v. Keener*, 7 Port. (Ala.) 218; *Traun v. Wittick*, 27 Ala. 571; *Nonemaker v. State*, 34 Ala. 211; *Toulmin v. Lesesne*, 2 Ala. 359; *Domnick v. State*, 40 Ala. 680; 90 Am. Dec. 496; *Sassiter v. Thompson*, 85 Ala. 223; *St. Clair v. Caldwell*, 72 Ala. 527; *Dyer v. Hatch*, 1 Ark. 339; *Dillard v. Noel*, 2 Ark. 449; *People v. Kinsey*, 51 Cal. 279; *People v. Helbing*, 59 Cal. 567; *People v. Fuqua*, 61 Cal. 377; *Rankin v. Central Pac. R. Co.*, 73 Cal. 93; *Golden Gate Mill, etc., Co. v. Joshua Hendy Mach. Works*, 82 Cal. 184; *Kilbourn v. Waterous, Kirby* (Conn.) 424; *Smith v. Raymond*, 1 Day (Conn.) 189; *Settle v. Alison*, 8 Ga. 201; 3 Am. Dec. 393; *Tompkins v. Corry*, 14 Ga. 118; *Shell v. Sanders*, 46 Ga. 469; *Favor v. State*, 54 Ga. 249; *Van Leonard v. Eagle Co.*, 60 Ga. 545; *Kitter v. People*, 25 Ill. 27; *Hanna v. Ewing*, 3 Blackf. (Ind.) 34; *Patterson v. Salmon*, 3 Blackf. (Ind.) 131; *Fitch v. Dunn*, 3 Blackf. (Ind.) 142; *Crouch*

v. Martin, 3 Blackf. (Ind.) 266; *Huff v. Gilbert*, 4 Blackf. (Ind.) 19; *Wright v. State*, 8 Blackf. (Ind.) 385; *Reed v. State*, 8 Ind. 200; *Jenkins v. Parkhill*, 25 Ind. 473; *H. G. Old's Wagon Works v. Coombs*, 124 Ind. 62; *Alexandria Min. Co. v. Painter*, 1 Ind. App. 587; *Adams v. Main*, 3 Ind. App. 232; *Miller v. Shackelford*, 4 Dana (Ky.) 271; *Hampton v. Watterson*, 14 La. Ann. 236; *State v. Frances*, 36 La. Ann. 336; *State v. Guillory*, 42 La. Ann. 581; *Gerrish v. Train*, 3 Pick. (Mass.) 124; *Coffin v. Jones*, 11 Pick. (Mass.) 44; *Stiles v. Granville*, 6 Cush. (Mass.) 458; *Brown v. Chase*, 4 Mass. 436; *Holmes v. Wood*, 6 Mass. 1; *People v. McMillan*, 52 Mich. 627; *Meighen v. Strong*, 6 Minn. 111; 80 Am. Dec. 441; *McCoy v. Rives*, 1 Smed. & M. (Miss.) 592; *Groves v. Bailey*, 24 Miss. 588; *Fenwick v. Logan*, 1 Mo. 401; *Easton v. Collier*, 1 Mo. 421; *Hickman v. Byrd*, 1 Mo. 495; *Allison v. Darton*, 24 Mo. 343; *Parker v. Moore*, 29 Mo. 218; *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Clark v. Hannibal*, etc., R. Co., 36 Mo. 202; *Ranney v. Bader*, 48 Mo. 539; *Seibert v. Allen*, 61 Mo. 482; *State v. Robb*, 90 Mo. 30; *State v. Harmon*, 106 Mo. 635; *Holman v. Kingsbury*, 4 N. H. 105; *Jewett v. Davis*, 6 N. H. 518; *Scudder v. Bloomfield*, 3 N. J. L. 950; *Bemus v. Beekman*, 3 Wend. (N. Y.) 667; *Brockway v. Kinney*, 2 Johns. (N. Y.) 210; *Van Benthuyzen v. DeWitt*, 4 Johns. (N. Y.) 213; *Thompson v. Button*, 14 Johns. (N. Y.) 84; *Lockwood v. Bartlett* (Supreme Ct.), 7 N. Y. Supp. 481; *Watts v. Greenlee*, 2 Dev. (N. Car.) 87; *Vines v. Brownrigg*, 2 Dev. (N. Car.) 537; *Murray v. King*, 8 Ired. (N. Car.) 528; *State v. Jennings*, 104 N. Car. 774; *Hanly v. Levin*, 5 Ohio 227; *Guille v. Fook*, 13 Oregon 577; *Fisher v. Kean*, 1 Watts (Pa.) 259; *Tibbs v. Brown*, 2 Grant Cas. (Pa.) 39; *Cavene v. McMichael*, 8 S. & R. (Pa.) 441; *Ward v. Taylor*, 1 Pa. St. 238; *Solliday v. Com.*, 28 Pa. St. 13; *Connecticut Gen'l L. Ins. Co. v. McMurdy*, 89 Pa. St. 363; *Bruck v. Mansbury*, 102 Pa. St. 35; *State Bank v. Bowie*, 1 McMull. (S. Car.) 429; *Brown v. Hillegas*, 2 Hill (S. Car.) 447; *State v. Robinson*, 31 S. Car. 453; *Boon v. Planters' Bank*, 3 Humph. (Tenn.) 84; *Crutcher v. Williams*, 4 Humph. (Tenn.) 345; *Barnard v. Young*, 5 Humph. (Tenn.) 100; *Carr v. Stevenson*, 5 Humph. (Tenn.) 559; *Robb v. Parker*, 4 Heisk. (Tenn.) 58; *Nixon v. Bullock*, 9 Yerg.

(Tenn.) 414; *Kesler v. Zimmerschitte*, 1 Tex. 50; *Phillips v. Hill*, 3 Tex. 397; *Hardy v. De Leon*, 5 Tex. 211; *Hall v. York*, 16 Tex. 18; *Claiborne v. Tanner*, 18 Tex. 68; *Alston v. State*, 41 Tex. 39; *Gulf, etc., R. Co. v. James*, 73 Tex. 12; *Miller v. State*, 16 Tex. App. 417; *Munson v. State*, 21 Tex. App. 329; *French v. Thompson*, 6 Vt. 54; *Booth v. Armstrong*, 2 Wash. (Va.) 301; *Triplett v. Micou*, 1 Rand. (Va.) 269; *Gardner v. Vidal*, 6 Rand. (Va.) 106; *Buckner v. Blair*, 2 Munf. (Va.) 336; *Green v. Dulaney*, 2 Munf. (Va.) 518; *Rogers v. Chandler*, 3 Munf. (Va.) 65; *Eppes v. Smith*, 4 Munf. (Va.) 466; *Brown v. Hendersons*, 4 Munf. (Va.) 492; *Hite v. Wilson*, 2 Hen. & M. (Va.) 268; *Sturdivant v. Raines*, 1 Leigh (Va.) 481; *McMurray v. Oneal*, 1 Call (Va.) 246; *Swain v. Roys*, 4 Wis. 50; *Heeron v. Beckwith*, 1 Wis. 17; *Ronge v. Dawson*, 9 Wis. 242; *Bates v. Wilbur*, 10 Wis. 416; *Child v. Child*, 13 Wis. 17; *Appleton v. Barrett*, 22 Wis. 568; *Schofield v. Miltimore*, 74 Wis. 194; *Warner v. Hunt*, 30 Wis. 200; *Smith v. Phelps*, 7 Wis. 211; *Ford v. Ford*, 3 Wis. 399; *Wallace v. Hilliard*, 7 Wis. 627; *Krause v. Cutting*, 32 Wis. 687.

In actions against personal representatives, where issue is taken upon the plea of *plene administravit* and a verdict rendered for the plaintiff, the finding should specify, with sufficient certainty, what portion of the assets which have come to the defendant's hands remained unadministered at the time of the suing out of the plaintiff's writ. If a verdict lacks this characteristic, it will be set aside as irresponsible to the issue. *Fairfax v. Fairfax*, 5 Cranch (U. S.) 19; *Nixon v. Bullock*, 9 Yerg. (Tenn.) 414; *Booth v. Armstrong*, 2 Wash. (Va.) 301; *Eppes v. Smith*, 4 Munf. (Va.) 466; *Sturdivant v. Raines*, 1 Leigh (Va.) 481; *Gardner v. Vidal*, 6 Rand. (Va.) 106.

Where a verdict found a promise different from that alleged as inducement in the declaration, and also varied in other essential respects, it was held that, though a mere informality might be immaterial, a substantial variance rendered the verdict void. *Garland v. Davis*, 4 How. (U. S.) 131.

Where the defendant traversed a substantially defective declaration, instead of demurring to it, he cannot object to a verdict found according to the issue and the evidence. *French v. Thompson*, 6 Vt. 54.

Findings of Judge Without Jury.—The

of their authority.¹ (As to the inclusion of excess in a verdict, see *supra*, this title, *Surplusage*.)

(5) *Certainty*.—A substantial requisite of a verdict is the element of certainty,² not absolute certainty, but, as it has been

same requirements exist where a judge tries a case without a jury. Here as well, the finding must respond to the issues. Where the plaintiff, in his petition, charges an unlawful taking and that the defendant still detains the property, the defendant denying the wrongful taking and alleging a delivery lawfully made to himself, claiming a lien upon the property for keeping and feeding, a finding that the defendant did wrongfully detain the property, saying nothing about the wrongful taking and nothing as to the lien, is not a sufficient finding upon the issues, and the judgment rendered thereon was reversed. *Allison v. Darton*, 24 Mo. 343; *Jones v. Snedecar*, 3 Mo. 390; *Pratt v. Rogers*, 5 Mo. 52; *Dunbar v. Bittle*, 7 Wis. 143; *Smith v. Lewis*, 20 Wis. 350.

1. See *supra*, this title, *Responsive-ness*, and authorities cited in notes.

A jury should remember that theirs is not the province of arbitrators but of jurors, and their finding must constitute a legal verdict on which the judgment of the court may rest. An arbitrary award, therefore, though it may address itself to the sense of justice of the parties, is not a fulfillment of their duty as jurors unless it determines the actual issues involved. *Ford v. Taggart*, 4 Tex. 492.

2. *People v. Sepulveda*, 59 Cal. 342; *Smith v. Mohn*, 87 Cal. 489; *Lawrence v. People*, 2 Ill. 414; *Walker v. Walker*, 5 Ill. App. 289; *Weirick v. Hoover*, 8 Blackf. (Ind.) 379; *Pennypacker v. Capital Ins. Co.*, 80 Iowa 56; *Moriarty v. McDevitt*, 46 Minn. 136; *Gerhab v. White*, 40 N. J. L. 242; *Tryon v. Carlin*, 5 Watts (Pa.) 371; *Van Valkenburg v. Ruby*, 68 Tex. 139; *Gulf, etc., R. Co. v. Hathaway*, 75 Tex. 557; *Missouri Pac. R. Co. v. White*, 76 Tex. 102; *Munn v. Martin* (Tex. App. 1890), 15 S. W. Rep. 195; *Heiligmann v. Rose*, 81 Tex. 222; *Sherman v. Lumber Co.*, 77 Wis. 14; *Richards v. Sperry*, 7 Wis. 219.

Several Defendants.—In *Richards v. Sperry*, 7 Wis. 219, which was an action of tort against several defendants, the verdict of the jury was in these words: "The jury, in this case, say they find the defendant guilty and assess plain-

tiff's damages at \$28." On this verdict judgment was entered against all the defendants, which the supreme court reversed, resolving that such a verdict did not authorize a judgment against any, as it did not specify which one.

Similarly, it has been held that, upon an indictment against two defendants, a verdict, "we, the jury, find the defendant guilty as charged in the indictment," is void for uncertainty. *People v. Sepulveda*, 59 Cal. 342; *State v. Weeks*, 23 Oregon 3. But see *Porter v. Cotney*, 3 Ala. 314; *Steed v. Barnhill*, 71 Ala. 157.

Amendment.—Nor can such a verdict be amended to show that it was intended to convict both defendants. *State v. Weeks*, 23 Oregon 3.

However, where two defendants, although answering separately, make the same defense, a verdict "for the defendant" is not void for uncertainty, but it will be presumed to include both defendants. *Waddingham v. Dickson*, 17 Colo. 223. And see *Houston v. Ladies' Union Branch Assoc.*, 87 Ga. 203.

Two defendants, jointly indicted for an alleged offense, were jointly arraigned and pleaded not guilty. The jury returned a verdict finding "the prisoner at the bar guilty." This finding lacked the requisite certainty, as the terms of the verdict left it in doubt which of the two prisoners at the bar the jury intended to convict. *Favor v. State*, 54 Ga. 249; *Richards v. Sperry*, 7 Wis. 219; *Brannigan v. People*, 3 Utah 488.

But where, in a criminal prosecution against several defendants, the verdict finds the "prisoners at the bar guilty as charged," this is sufficient to support a judgment against them all, it being unnecessary that each defendant be designated by name. *State v. Anderson* (La. 1893), 12 So. Rep. 737. And see *Hays v. State*, 30 Tex. App. 472; *Caesar v. State*, 30 Tex. App. 274; *Little v. State*, 30 Tex. App. 597.

Also, where one defendant was jointly indicted with another person, but was tried alone, a verdict against "the within-named defendant" is not void for uncertainty. *Hughes v. Com.* (Ky. 1890), 14 S. W. Rep. 682. See also

described, certainty to a common or reasonable intent.¹ The inclination of the courts has always been in favor of the validity of a verdict, no matter what requisite may be apparently lacking, and it will be supported if, from the terms of the finding and the contents of the record, enough material can be gathered for the

State v. Lee, 80 Iowa 75; *State v. Elvins*, 101 Mo. 243; *State v. Mason*, 42 La. Ann. 714.

To the same effect, it was held in *Hronek v. People*, 134 Ill. 139, that upon a separate trial of one of several defendants, the record showing the coming of the people by the state's attorney, and J. H. (the defendant) impleaded, the selection of the jury and trial, a verdict finding the "defendant" guilty, without specifying him by name, is not too uncertain as to the party found guilty.

Action Against Partners.—In a joint action against partners a verdict finding for the "defendant," instead of the defendants, is not voidable for uncertainty. *Davis v. Suah* (Ind. 1894), 36 N. E. Rep. 122.

In an action against a corporation and several other defendants, a verdict, "we, the jury, find for the plaintiffs as against the defendants, The Alexandria Mining & Exploring Co.," is sufficiently certain and free from ambiguity. It was insisted by the appellants that it was so uncertain and ambiguous that the court could not render judgment upon it, the ambiguity being held to consist in the use of the word "defendants" in place of "defendant," the verdict being against the corporation only. This objection was not sustained, the court holding that it was quite clear that the jury found against the one defendant, and that the use of the plural noun instead of the singular was a mere clerical error. *Alexandria Min., etc., Co. v. Painter*, 1 Ind. App. 587.

Several Plaintiffs.—Though there are several plaintiffs, it has been held that a verdict, "We, the jury, find the issue for the plaintiff," is valid. *Daft v. Drew*, 40 Ill. App. 266.

Several Amounts.—In an action of assumpsit, the plaintiff's bill of particulars demanded a certain sum, but the plaintiff's counsel, in his remarks to the jury, stated that another and smaller sum would be satisfactory. A verdict finding the full amount of the plaintiff's claim was held, under the circumstances, to be ambiguous and uncertain, as it did not determine which sum the

jury intended to find. *Gerhab v. White*, 40 N. J. L. 242.

Fixed Meaning of Terms Employed.—

A verdict must be couched in terms which have a fixed meaning. Where the jury declared that the plaintiff was entitled to a certain quantity of water according to "miner's measurement," the verdict was held not sufficiently certain, as different localities have different standards of "miner's measurement." *Dougherty v. Haggin*, 56 Cal. 522.

Where matters, not properly involved by the issues, have been presented to the jury and so mingled with what should have been rightfully taken into consideration by them, as to make it doubtful upon what ground they based their verdict, a judgment rendered thereon cannot be sustained. *McFall v. Smith*, 32 Ill. App. 463.

A jury, in an action for damages, were erroneously instructed that they might give exemplary damages under the circumstances of the case. Their verdict not showing whether it included exemplary damages was set aside, though it was for an amount not greater than might have been given by way of compensation. *Patry v. Chicago, etc., R. Co.*, 77 Wis. 218.

In an ordinary case, it does not seem to be necessary that the jury should expressly state whether their verdict consists of exemplary, or merely compensatory damages. Where a suit was instituted for the purpose of recovering the value of three dogs alleged to have been poisoned by the defendant, a verdict for \$75 was returned, but the defendants insisted that as the verdict did not specify whether it consisted of actual or exemplary damages, it was insufficient to support a judgment. However, as the court is not required to submit the issues of actual and exemplary damages separately, unless requested to do so, it was held that it would be inconsistent to require the jury to make separate findings upon issues not separately submitted. *Heiligmann v. Rose*, 81 Tex. 222.

1. *State Bank v. Bowie*, 1 McMull. (S. Car.) 429. And see *Pledger v.*

Glover, 2 Port. (Ala.) 174; Alexandria Min. etc., Co. v. Painter, 1 Ind. App. 587.

In *Alabama*, under a statute declaring that if it appears to the jury that the plaintiff is over-paid, they shall give a verdict for the defendant and, withall, certify to the court how much they find the plaintiff to be indebted, a verdict, in determining the mutual demand between the plaintiff and defendant, "that they find the plaintiff indebted to the defendant in the sum of two dollars and forty cents over and above the plaintiff's demand in this behalf," is a substantial compliance with the statute, and hence such a verdict is valid. *Pledger v. Glover*, 2 Port. (Ala.) 174.

A verdict finding the plaintiff guilty of waste as charged in the declaration, where the plaintiffs waive a recovery of the place wasted, need not set out the *locus in quo* with greater particularity than to assess damages for the particular parts of the waste charged, nor need it find any part of the issue for the defendant. *Dejarnatte v. Allen*, 5 Gratt. (Va.) 499.

According to this principle, a verdict which is so uncertain that it cannot be clearly ascertained whether the jury meant to find the issue or not, is bad. *Allen v. Aldrich*, 29 N. H. 63; *Coffin v. Jones*, 11 Pick. (Mass.) 45; *Brunswick v. McKean*, 4 Me. 508; *Holman v. Kingsbury*, 4 N. H. 104; *Jewett v. Davis*, 6 N. H. 518.

And where a verdict was uncertain to such an extent that it would require the finding of another jury to ascertain the intention of the jury who found the first verdict, such a verdict must be set aside. *Heyward v. Bennett*, 3 Brev. (S. Car.) 113.

Some Instances of Verdicts Held Insufficiently Certain.—See *Jackson v. Jackson*, 40 Ga. 150; *Turbaville v. State*, 58 Ga. 545; *Ottawa Gas Light, etc., Co. v. Thompson*, 39 Ill. 598; *Richardson v. McCormick*, 47 Iowa 80; *De Clemente v. Winstanley* (Brooklyn City Ct.), 28 N. Y. Supp. 513; *Diehl v. Evans*, 1 S. & R. (Pa.) 366; *Hawkins v. Lee*, 22 Tex. 544; *Brown v. Horless*, 22 Tex. 645; *Ryan v. Hays*, 62 Tex. 42; *Smith v. Roberts* (Tex. 1890), 15 S. W. Rep. 126; *Pendleton v. Van Devier*, 1 Wash. (Va.) 381; *Richards v. Tabb*, 4 Call (Va.) 522; *Rogers v. Chandler*, 3 Munf. (Va.) 65; *Cocke v. Com.*, 13 Gratt. (Va.) 750; *Com. v. Smith*, 2 Va. Cas. 327.

The jury, in the case of *Diehl v. Evans*, 1 S. & R. (Pa.) 367, brought in a verdict in these words: "We find for the plaintiff and are of opinion that the plaintiff has already received, out of the property of the defendant, payment in full for the amount of freight to which he is entitled." In view of the fact that this was an action brought for freight and demurrage, which the plaintiff sought to recover from the defendant, it will be seen that such a verdict was altogether vague and unsatisfactory. The jury begin by finding for the plaintiff, but end by declaring that he has already been paid; then they say that the plaintiff has been paid for the freight, totally ignoring the claim for demurrage; and even if this could be treated as an intentional finding for the plaintiff, yet as the jury find no specific amount, no judgment could be rendered on it.

An action was brought for the recovery of certain personal property named in the petition of the plaintiff, and the jury returned a verdict as follows: "We, the jury, find the intervenor, Elizabeth Richardson, entitled to the following property described in her petition, viz. (naming the articles) and the damage in the sum of \$458." The property claimed by the plaintiff consisted of two mules, one colt, one lumber wagon, and one set of double harness, about which the evidence adduced at the trial was not the same; hence, as no article was named in the verdict, the supreme court held that it was impossible to tell whether the jury found the plaintiff entitled to all or only to a part of these articles, and if to a part, what part. The judgment rendered on this verdict was accordingly set aside. *Richardson v. McCormick*, 47 Iowa 80. It may be conducive to a thorough understanding of this case, as set forth by us, that the language in the quotation marks above is an exact transcript of the verdict as rendered. The words "naming the articles" appeared in parentheses in the verdict, but no articles were named.

One Ryan sued the International and Great Northern Railway Co. and R. S. Hays, its receiver, appointed by the U. S. circuit court, to recover damages for personal injuries sustained by himself while a passenger on a train belonging to the company. Ryan alleged that he received the injury at a time when the railway was in the

exclusive management and control of Hays as receiver, and in due course of time the case went to the jury. A verdict was returned as follows: "We, the jury, find at the time of the accident that R. S. Hays was receiver of the International Railroad, and since the first day of November of 1879, it has been in the possession of the International and Great Northern Railway Co.; we find for the plaintiff, John Ryan, the sum of \$2,200." This was held, by the court, to be neither a special nor a general verdict, and was not sufficient to authorize judgment. *Ryan v. Hays*, 62 Tex. 42.

Smith sued Roberts upon a promissory note, claiming a certain balance due, Roberts pleading failure of consideration. The case was tried by the jury and the following verdict rendered: "We, the jury, render verdict for the defendant, and allow plaintiff the amount per month agreed upon between him and defendant, and allow nothing for commissions." It will be observed that this verdict found first for the defendant and then for the plaintiff an indefinite amount. It was held to be insufficient to support a judgment. *Smith v. Roberts* (Tex. 1890), 15 S. W. Rep. 126.

In *Jackson v. Jackson*, 40 Ga. 150, a suit was brought on a certain promissory note on which were several credits, one of which was uncertain both as to amount and date and which was also disputed altogether on the trial. The jury found a verdict for the plaintiff for principal, interest, and costs. The jury should have found whether they allowed or disallowed the disputed credit by finding a sum certain for the plaintiff, as they did not, the judgment rendered on the verdict by the inferior court was reversed.

In the case of *Turbaville v. State*, 58 Ga. 545, the jury returned a verdict of "guilty of involuntary manslaughter without due caution and circumspection." This finding was held to be so uncertain as to justify the judge in refusing to receive it.

Some Instances of Verdicts Held Sufficiently Certain.—See *Meeker v. Childress*, Minor (Ala.) 109; *Taylor v. Rogers*, Minor (Ala.) 197; *Dyer v. Hatch*, 1 Ark. 339; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657; *Dougherty v. Ward*, 89 Cal. 81; *Mitchell v. Addison*, 20 Ga. 50; *Beers v. Flock*, 2 Ind. App. 567; *Chiles v. Jones*, 3 B. Mon. (Ky.) 51; *State v. Johnson* (La. 1894),

14 So. Rep. 295; *Moriarty v. McDevitt* 46 Minn. 136; *Gibson v. Lewis*, 27 Mo. 532; *Davenport v. Falkerson*, 70 Mo. 417; *Texas, etc., R. Co. v. Watkins* (Tex. Civ. App. 1894), 26 S. W. Rep. 760; *Heiligmann v. Rose*, 81 Tex. 222; *Grayson v. Buchanan*, 88 Va. 251; *Newton v. Allis*, 16 Wis. 197; *Little Josephine Min. Co. v. Fullerton*, 51 Fed. Rep. 521.

A verdict finding that the plaintiffs were entitled to a certain sum of money is equivalent to saying that the issues are found in favor of the plaintiffs and assessing damages at that sum. Thus, in an action for damages against the defendants for failure to deliver certain lumber received by them, whereby damage resulted to the plaintiffs, a verdict that the plaintiffs were entitled to the sum of \$2,500, is not void for uncertainty. *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657.

In an action on two bonds for \$1,000 each, executed by the defendant to the plaintiff for the last two deferred payments of purchase-money for a certain tract of land, the defendant offered a special plea of set-off, averring that the tract was represented by the vendor to contain one hundred and forty acres and that it included within its limits one-half of a certain spring which greatly added to the desirability of the property; and that relying on these representations, he contracted to purchase it. The defendant then proceeded to show that the actual number of acres contained in the said tract was only one hundred and twenty-six, and that the tract did not include the spring mentioned—placing his damage at \$3,000. The jury found for the plaintiff the debt in the declaration mentioned, and further found for the defendant as offsets to the said debt, \$600 damages for loss of one-half of the spring in controversy, and \$540 as a payment for the deficit of the fourteen acres. The verdict also provided that the difference should be applied to the payment of the bonds as they fell due. This verdict was attacked for vagueness and uncertainty, but the contention was not supported by the appellate court. *Grayson v. Buchanan*, 88 Va. 251.

In *Meeker v. Childress*, Minor (Ala.) 109, a verdict, "We, the jury, find the defendant," was upheld. The court said the entry of the verdict would have been more certain if the word "for" had been inserted before the words "the

formation of a complete verdict in all its essential details.¹ But this desire to regard a verdict as sufficient to sustain a judgment, must not divert the attention of the court from or outside of the record.² Thus, in a case of trespass to try title, when the verdict found

defendant," but taken in connection with the issue submitted and the judgment which followed it was sufficiently certain.

1. *Diehl v. Evans*, 1 S. & R. (Pa.) 366; *Hartford F. Ins. Co. v. Vanduzor*, 49 Ill. 489; *Brannin v. Foree*, 12 B. Mon. (Ky.) 506; *Com. v. Fischblatt*, 4 Met. (Mass.) 354; *Hodges v. Raymond*, 9 Mass. 316; *Porter v. Rummery*, 10 Mass. 64; *Maulding v. Rigby*, 1 How. (Miss.) 579; *Muller v. St. Louis Hospital Assoc.*, 73 Mo. 242; *Pettes v. Bingham*, 10 N. H. 514; *Parker v. Brown*, 15 N. H. 176; *Allen v. Aldrich*, 29 N. H. 75; *Fries v. Mack*, 33 Ohio St. 52; *Burton v. Bondies*, 2 Tex. 203; *James v. Wilson*, 7 Tex. 230; *Smith v. Johnson*, 8 Tex. 418; *Parker v. Leman*, 10 Tex. 116; *Galbreath v. Atkinson*, 15 Tex. 21; *New York, etc., Co. v. Gallaher*, 79 Tex. 685; *Hawks v. Crofton*, 2 Burr. 698.

However informal a verdict may be, if it is responsive to all issues and its meaning be clear, it will be held good, but if its construction is doubtful, no judgment can be rendered upon it. *Van Valkenburg v. Ruby*, 68 Tex. 139.

If the meaning of the jury in their verdict is certain from its terms, or becomes so when rendered in the light afforded by the pleadings of which it is a duty of a court to take judicial notice, it is sufficiently certain for all practicable purposes. *Fries v. Mack*, 33 Ohio St. 52.

A verdict, "We, the jury, find the paper in evidence is not the will of Martin Muller," was attacked for uncertainty on the ground that two wills had been read in evidence, and the jury did not distinctly say which one. The court held, however, that there could be no question as to which was meant by the jury, as the pleadings in the case specifically described a certain one as the writing, the validity of which was contested. *Muller v. St. Louis Hospital Assoc.*, 73 Mo. 242.

The *Kentucky Code of Practice*, § 371, provides that a verdict finding for the debt in the declaration mentioned, is sufficiently certain. *Brannin v. Foree*, 12 B. Mon. (Ky.) 506.

In *Mississippi*, in *Maulding v. Rigby*,

1 How. (Miss.) 579, the verdict, "We, of the jury, find for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of the same, etc.," was held to be a sufficient finding.

2. *Dougherty v. Ward*, 89 Cal. 81; *Fromme v. Jones*, 13 Iowa 474; *Bartle v. Plane*, 68 Iowa 227; *Cates v. Nickell*, 42 Mo. 169; *Burghart v. Brown*, 60 Mo. 24; *Poulson v. Collier*, 18 Mo. App. 583; *Howell v. State*, 10 Tex. App. 298; *Smith v. Tucker*, 25 Tex. 594; *Senterfit v. State*, 41 Tex. 188.

In *Fromme v. Jones*, 13 Iowa 474, it was held that a verdict defective in form may be received by the court when the intention of the jury can be ascertained from the data given in the verdict or referred to in the pleadings, but the court cannot supply omissions to name the amount of the finding by referring to evidence outside of the record. The court may not look to matters *dehors* the record, for the purpose of fixing that which it is the sole province of the jury to determine. *Fries v. Mack*, 33 Ohio St. 52. See also *Spieres v. Parker*, 1 T. R. 141; *McArthur v. Porter*, 1 Pet. (U. S.) 626; *Lee v. Campbell*, 4 Port. (Ala.) 198; *Watson v. Damon*, 54 Cal. 278; *Fryberger v. Carney*, 26 Minn. 84; *Heyward v. Bennett*, 3 Brev. (S. Car.) 113.

Cates v. Nickell, 42 Mo. 169, was an action instituted upon a promissory note; and the cause being submitted to the jury, the following verdict was rendered: "We, the jury, find the issue in favor of the plaintiff." The jury were thereupon discharged, and the court proceeded to ascertain the amount then due upon the note, including the principal and interest, and rendered judgment for the sum. It was held that the verdict as rendered was not sufficient to support a judgment and that the court invaded the province of the jury by its interposition. The judgment was reversed. See also *Burghart v. Brown*, 60 Mo. 24.

In *Bartle v. Plane*, 68 Iowa 227, it was held to have been error for a justice of the peace to render judgment on a verdict which failed to state how much the plaintiff should recover, where all in-

for the plaintiff the lands described in the petition, less a certain number of acres, as set forth in a deed read in evidence, the pleading itself containing no description of the land conveyed by the deed, it would have been necessary for the court to look outside of the verdict, and the pleadings, to the evidence given upon the trial, for the facts upon which to render judgment ;¹ and in another instance, a verdict finding for the plaintiff "the full amount specified in the promissory notes adduced in the case," was held to

debtedness is denied by the defendant. In such case, the jury should have been requested to retire and find how much the plaintiff ought to recover.

On an indictment for theft of certain cattle, a verdict that, "We, the jury, find the defendant guilty of a misdemeanor and assess his punishment at \$100," was held to be entirely insufficient to support a judgment, on the ground that it did not sufficiently appear that the misdemeanor of which the jury found the defendant guilty was that charged in the indictment. *Howell v. State*, 10 Tex. App. 298. And see *Senterfit v. State*, 41 Tex. 188.

1. *Smith v. Tucker*, 25 Tex. 594. And see *Huffaker v. Boring*, 8 Ala. 87; *Crommelin v. Minter*, 9 Ala. 594; *Sturdevant v. Murrell*, 8 Port. (Ala.) 317; *Jenkins v. Noel*, 3 Stew. (Ala.) 75; *Bennet v. Morris*, 9 Port. (Ala.) 171; *Henley v. Mobile Branch Bank*, 16 Ala. 552; *Farrow v. Farrow*, 2 J. J. Marsh. (Ky.) 390; *Fenwick v. Floyd*, 1 Har. & G. (Md.) 172; *Wallace v. Elder*, 5 S. & R. (Pa.) 143; *Tryon v. Carlin*, 5 Watts (Pa.) 371; *Singleton v. Ake*, 3 Humph. (Tenn.) 626; *Jones v. Leath*, 32 Tex. 329; *Clark v. Clark*, 7 Vt. 190; *Clay v. White*, 1 Munf. (Va.) 162; *Gregory v. Jacksons*, 6 Munf. (Va.) 25; *Paul v. Smiley*, 4 Munf. (Va.) 468.

In an action of trespass to try title, a verdict describing the lands as bounded on the west and south by lands which were vacant in 1804, was held to be void for uncertainty. *Sturdevant v. Murrell*, 8 Port. (Ala.) 318. And in *Bennet v. Morris*, 9 Port. (Ala.) 171, a verdict describing land by reference to a boundary commencing at the center of a house occupied by James Wilson in 1817, was declared defective for the same reason. And see *Wallace v. Elder*, 5 S. & R. (Pa.) 143.

In the case of *Singleton v. Ake*, 3 Humph. (Tenn.) 626, which was an action of ejectment, the jury returned a verdict in favor of the defendant for

all the land in the declaration mentioned except fifty acres upon which the defendant formerly resided, but as these fifty acres were described with sufficient particularity in the record, so that the sheriff could have no difficulty in giving possession according to the terms of the judgment, the supreme court declined to interfere on the ground of uncertainty.

A verdict for the plaintiff, in an action of trespass to try title, should specify the lands with sufficient certainty, so that the sheriff, upon judgment being rendered, may enter and make delivery of that portion to which the plaintiff has shown himself entitled else the verdict must be set aside for uncertainty, as the sheriff cannot be informed of what he is to deliver possession. *Crommelin v. Minter*, 9 Ala. 594; *Huffaker v. Boring*, 8 Ala. 87.

A verdict not specifying the land found illegally in a party's occupancy with such certainty as will show where they lie or the number of acres and boundaries, will not be sustained. *Sturdevant v. Murrell*, 8 Port. (Ala.) 317; *Jenkins v. Noel*, 3 Stew. (Ala.) 75; *Fenwick v. Floyd*, 1 Har. & G. (Md.) 172; *Clark v. Clark*, 7 Vt. 190; *Clay v. White*, 1 Munf. (Va.) 162; *Gregory v. Jacksons*, 6 Munf. (Va.) 25.

In an action of trespass to try title, and to ascertain the boundaries, where the jury found that the "old league line" was the true line, but did not find which of the three lines in dispute was the "old league line," the verdict was held void for uncertainty. *Jones v. Leath*, 32 Tex. 329.

A verdict in an action of trespass to try title, describing the premises as lot number 28 in the plat of the town of Pickensville, Pickens county, is sufficiently certain to warrant a judgment. *Henley v. Mobile Branch Bank*, 16 Ala. 552. And see *Farrow v. Farrow*, 2 J. J. Marsh. (Ky.) 390; *Paul v. Smiley*, 4 Munf. (Va.) 468; *Tryon v. Carlin*, 5 Watts (Pa.) 371.

be void for uncertainty, as the court could not render judgment without going outside of the pleadings for the ascertainment of the amount.¹

The maxim, *Id certum est quod certum reddi potest*, is readily applicable to verdicts.² Whenever the amount for which judgment should be rendered can be determined by a simple arithmetical calculation, this may be done by the clerk at the request of the judge, or by the judge himself,³ and a judgment entered accordingly.⁴ Hence, though it is the province of the jury to

1. Mays v. Lewis, 4 Tex. 39. See also New York, etc., R. Co. v. Gallagher, 79 Tex. 685.

2. Hutchinson v. Inyo Co., 61 Cal. 119; Knight v. Fisher, 15 Colo. 176; Beckwith v. Carleton, 14 Ga. 691; Jackson v. Jackson, 40 Ga. 150; Jackson v. Jackson, 47 Ga. 99; Gaff v. Hutchinson, 38 Ind. 341; Stevens v. Campbell, 6 Iowa 538; Hattenback v. Hoskins, 12 Iowa 109; Lincoln v. Lincoln, 12 Gray (Mass.) 45; McCormick v. Hickey, 24 Mo. App. 362; Gibson v. Lewis, 27 Mo. 532; Page v. Cody, 1 Cow. (N. Y.) 115; Fries v. Mack, 33 Ohio St. 52; State Bank v. Bowie, 1 McMull. (S. Car.) 429; Burton v. Anderson, 1 Tex. 93; James v. Wilson, 7 Tex. 232; Parker v. Leman, 10 Tex. 116; Secrest v. Jones, 30 Tex. 596; Griffin v. Chadwick, 44 Tex. 406; Buchanan v. Townsend 80 Tex. 534; Barrett v. Wills, 4 Leigh (Va.) 114; 26 Am. Dec. 315; Grays v. Hines, 4 Munf. (Va.) 437.

The verdict of the jury was for a certain sum, with interest from the date of a certain writ of attachment named in the pleadings, and in the service of which it was claimed that the defendant, as sheriff, committed the trespass of which the plaintiff complains. It was held that as there was but one attachment referred to in the issues made by the pleadings, the date of which was not controverted, that the court might with propriety render judgment upon such a verdict. Hattenback v. Hoskins, 12 Iowa 109.

Where there is no dispute as to the amount due on a note or as to the amount of credits thereon, a verdict of the jury will be construed sufficiently certain which can be made certain by reference to the undisputed sum due on the note. Jackson v. Jackson, 40 Ga. 150.

3. McCormick v. Hickey, 24 Mo. App. 362; McGregor v. Armill, 2 Iowa 30.

4. Knight v. Fisher, 15 Colo. 176; Clapp v. Martin, 33 Ill. App. 438;

Gaff v. Hutchinson, 38 Ind. 341; McGregor v. Armill, 2 Iowa 30; McCormick v. Hickey, 24 Mo. App. 362; Gibson v. Lewis, 27 Mo. 532; Brady v. Clark, 12 Lea (Tenn.) 323; Buchanan v. Townsend, 80 Tex. 534; Bradshaw v. Mayfield, 24 Tex. 481; Barrett v. Wills, 4 Leigh (Va.) 114; 26 Am. Dec. 315; Grays v. Hines, 4 Munf. (Va.) 437.

An action was brought for work, labor, and money loaned at sundry times, the plaintiff admitting certain credits. The defendant alleged the contract for work and labor to be at a figure which would, with the credits allowed by the plaintiff, make a balance in his (the defendant's) favor. On the trial in the district court, the jury found, as a matter of fact, that the plaintiff worked for the defendant thirteen months and that the reasonable value of such services was \$36.50 a month. Taking the verdict of the jury in connection with the facts admitted by the pleadings, a judgment was rendered in favor of the plaintiff for \$124.25. It was insisted that this verdict was not in conformity with the requirements of the code and not sufficient to support a judgment. The Colorado Code, § 200, provides, that when a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counter-claim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury will also find the amount of the recovery. The supreme court, however, resolved that this was a special verdict which the jury in their discretion were authorized to render, and while the verdict should not be commended as a model, still it determines the controversy between the parties, leaving the amount of the recovery a mere matter of arithmetical computation. The verdict was upheld. Knight v. Fisher, 15 Colo. 176.

Where the verdict of a jury did not in terms specify the amount in dollars,

find the exact amount of damages by their verdict,¹ where the finding is for a certain sum with a specified rate of interest from a designated date, judgment may properly be rendered for the principal sum, and the interest calculated in conformity with the terms of the verdict.² A simple expression of opinion is not, it

but simply that the plaintiff should recover a specified amount per month from the institution of the suit to the rendition of the verdict, such a finding was held sufficient, in that it might be made certain. *Secrest v. Jones*, 30 Tex. 596.

But in a suit to recover a slave illegally withheld, and for his hire during that time, a verdict finding the slave for the plaintiff, and finding his hire to be \$150 per year, but not finding any particular sum for hire, will not authorize a judgment against the defendant for \$450 hire for the time during which the defendant had possession. *Bradshaw v. Mayfield*, 24 Tex. 481.

Where, though a verdict is informal and omits to state the result, if it can be ascertained and rendered certain by a simple operation in arithmetic, the maxim, *Id certum est quod certum reddi potest* applies, and the verdict is held to be amply sufficient upon which to found a judgment. *Gibson v. Lewis*, 27 Mo. 532.

A verdict and judgment for the debt claimed in the declaration, with interest from a certain time and subject to the credit of a specified sum, is sufficiently certain. *Barrett v. Wills*, 4 Leigh (Va.) 114; 26 Am. Dec. 315; *Grays v. Hines*, 4 Munf. (Va.) 437.

1. *Meeker v. Gardella*, 1 Wash. 139.

This case goes to the extreme of holding that a verdict for a certain sum, "with legal interest," is too uncertain to support any verdict whatever, unless the words "with legal interest" be disregarded as surplusage.

2. *Beckwith v. Carleton*, 14 Ga. 691; *Mitchell v. Addison*, 20 Ga. 50; *Gaff v. Hutchinson*, 38 Ind. 341; *McGregor v. Armill*, 2 Iowa 30; *Stevens v. Campbell*, 6 Iowa 538; *McLellan Dry Dock Co. v. Farmers', etc., Steamboat Line*, 43 La. Ann. 258; *McCormick v. Hickney*, 24 Mo. App. 362; *Page v. Cody*, 1 Cow. (N. Y.) 115; *Fries v. Mack*, 33 Ohio St. 52; *State Bank v. Bowie*, 1 McMull. (S. Car.) 429; *Burton v. Anderson*, 1 Tex. 93; *Parker v. Leman*, 10 Tex. 116; *Griffin v. Chadwick*, 44 Tex. 406; *Buchanan v. Townsend*, 80 Tex. 534; *Evans v. Reeves* (Tex. Civ.

App. 1894), 26 S. W. Rep. 219; *Barrett v. Wills*, 4 Leigh (Va.) 114; 26 Am. Dec. 315.

The jury returned a verdict for a certain sum with six per cent. interest thereon from a previous date named. As only a simple computation was necessary to fix the exact amount of the verdict so that it might be expressed in one sum, the supreme court was of the opinion that the verdict was sufficient. "It is a maxim of the law," says the court, "that that is sufficiently certain which can be rendered certain." As only a simple arithmetical calculation was necessary in this case, the court might make it and render judgment accordingly. *Gaff v. Hutchinson*, 38 Ind. 341.

In another case, where the jury found the rate of interest and the amount upon which it was to be calculated, and the date from which it was to run, leaving nothing but a mere arithmetical operation to determine the amount of the judgment, such a verdict was held sufficiently certain. *Buchanan v. Townsend*, 80 Tex. 534.

In *Griffin v. Chadwick*, 44 Tex. 406 it is held that where the date can be determined from the pleadings from which the interest, found in the verdict for the plaintiff, shall be computed, a verdict for a "sum certain and interest" is not void for uncertainty.

In the case of *Barrett v. Wills*, 4 Leigh (Va.) 114; 26 Am. Dec. 315, a verdict for the plaintiff, for the debt in the declaration mentioned, with interest from the tenth of September, 1826 subject to a credit of \$53, paid on the 26th of September, 1826, was held to be good, and that the court might render the proper judgment thereon.

In *Georgia*, a verdict on two promissory notes, "We, the jury, find for the plaintiff the sum of eleven hundred and fourteen dollars and four cents, with interest and cost of suit, etc.," was held sufficiently certain. The court contended that the amount could be made certain and that the jury, having found the exact sum of the two notes with interest thereon, meant of course interest from the time the notes respectively

legal contemplation, a verdict,¹ as there must be a definite affirmation or negative of the facts in issue.² Juries may frequently adopt a roundabout way of arriving at a proper conclusion, but if their course can be followed with certainty by the court, their finding will be upheld.³

In criminal cases, where the indictment charges an offense of which there are several grades, the verdict should state, if it finds the defendant guilty, the degree of which the jury mean to convict;⁴ and in prosecutions for larceny, or for the reception of

became due. *Beckwith v. Carleton*, 14 Ga. 691.

The jury, in an action of assumpsit, found a verdict for ten dollars and interest from a certain date. Such a finding clearly warranted a judgment for the principal with interest added. "The calculation of interest," says the court, "was a mere clerical act; in fact, the result of the calculation may be presumed to have been submitted to the jury and approved by them." *Page v. Cody*, 1 Cow. (N. Y.) 115.

Where the demand was for unliquidated damages, a verdict for a certain sum and interest was objected to on the ground that the jury could only give interest by way of damages, and they had not so allowed it. It was held, however, that the jury had found for the plaintiff on the issue, and although they had not assessed a specific sum for his entire damages, they had furnished certain data upon which the court could, with the same facility, ascertain the amount as in the case of a promissory note. *State Bank v. Bowie*, 1 McMull. (S. Car.) 429.

Verdict Ignoring Interest.—But a court cannot give interest on the sum found by a jury, unless some stipulation therefor is in terms made by the verdict, according to, *Hallum v. Dickinson*, 47 Ark. 120; *Bedford v. Jacobs*, 5 Martin N. S. (La.) 448; *Commandeur v. Russell*, 5 Martin N. S. (La.) 457; *Dale v. Downs*, 7 Martin N. S. (La.) 225; *Chain v. Kelso*, 7 Martin N. S. (La.) 264, and *Cochrane v. Murphy*, 4 La. Ann. 6. And see also *Bulloc v. Parthet*, Martin N. S. (La.) 123.

1. *Diehl v. Evans*, 1 S. & R. (Pa.) 366.

2. The object of a verdict is to announce to the court the judgment of the jury as to how far the facts established by the findings conform to those which are alleged and put in issue by the pleadings. As the facts thus declared constitute the basis of the

judgment, it follows that the verdict must either affirm or negative such of the disputed facts as will, in connection with those admitted, if any, support a legal judgment. *Darden v. Mathews*, 22 Tex. 320. And see *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657.

3. *Dougherty v. Ward*, 87 Cal. 81.

4. For instance, on a trial of an indictment for murder, a jury should ascertain by their verdict the precise grade of which the defendant is guilty, or the court may not pass sentence on the verdict. *Robertson v. State*, 42 Ala. 509; *Hall v. State*, 40 Ala. 698; and see *Edgar v. State*, 43 Ala. 312; *Weatherford v. State*, 43 Ala. 319; *Hall v. State*, 31 Fla. 176; *Lovett v. State*, 31 Fla. 164; *Nelson v. State*, 32 Fla. 244.

In *Arkansas*, it has been held that the statute (*Mansfield's Arkansas Digest*, § 2284) providing that "the jury shall in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree," applies only where the indictment is for murder in the first degree; and on indictment for murder in the second degree a verdict of "guilty as charged in the indictment" is sufficient. *Porter v. State*, 57 Ark. 267; *Carpenter v. State*, 58 Ark. 233.

Forgery is divided by an *Alabama* statute into three different grades, and a general verdict in a trial on an indictment simply charging forgery, would not be sufficient, as it would be necessary for the jury to specify the grade of offense of which they desired to convict; but where the indictment charges forgery of a certain degree, a verdict of "guilty as charged in the indictment" is as certain and free from doubt as a more specific finding could be. *Anderson v. State*, 65 Ala. 553. And see *Davis v. State*, 52 Ala. 357.

The *California* Code provides that whenever a crime is distinguished by

stolen property, where the value of the subject-matter of the offense forms a statutory element in the commission of the crime the jury must find the value of such property, in order that it may clearly appear that the prescribed punishment can be legally inflicted.¹

d. AMOUNT—ASSESSMENT OF DAMAGES.—It is a generally recognized rule of practice that a verdict rendered in a suit seeking damages, liquidated or unliquidated, should, if it be for the plain tiff, expressly state the amount to which the jury deem him entitled.² In some jurisdictions this is true, even in actions of debt

it into degrees, the jury, if they convict a defendant, must find the degree of crime of which he is guilty; hence, in the case of *People v. Coch*, 53 Cal. 627, where the defendant was indicted for arson, a verdict of "guilty as charged in the indictment" was held defective for being too general, as arson is divided into degrees by the code; and in *People v. Campbell*, 40 Cal. 129, where the defendant was tried on an indictment for murder, a similar verdict was criticised for the same reason; and in *People v. Gilbert*, 60 Cal. 108, which was a prosecution for the crime of robbery, a verdict, "we, the jury, find the defendant guilty as charged in the information," was declared sufficient, though it was insisted, that as the crime of robbery included as well that of larceny, the jury should have particularly specified for which crime they intended to convict; but it was held that as the charge in the indictment was robbery, a verdict finding the defendant guilty as charged was amply sufficient, as there is but one degree of the crime of robbery. Under the circumstances it is reasonable to presume that if the jury had intended to find guilty of larceny, they would have said, "We, the jury, find the defendant guilty of larceny;" and see also *People v. DeClee*, 60 Cal. 382; *People v. Wing* (Cal. 1890), 24 Pac. Rep. 1026; *People v. Bannister* (Cal. 1893), 34 Pac. Rep. 710; *People v. Cornwell* (Cal. 1894), 35 Pac. Rep. 566; *People v. Lee Yune Chong*, 94 Cal. 379.

When a defendant is charged with grand larceny, a verdict, "guilty as charged," is a sufficient finding of the degree of the crime. *People v. White*, 64 Cal. 211; *People v. Perez*, 87 Cal. 122.

Where, on a trial for murder by poisoning, the verdict of the jury was, "We, the jury, find the defendant guilty and

assess his punishment at confinement in the penitentiary for life," the verdict was held to be fatally defective for non compliance with the provision of the *Texas* code, which requires that if the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree. This statute is mandatory, and the fact that the verdict was committed by poison, which is murder in the first degree *per se*, does not affect the application of the statutory rule. *Johnson v. State*, 30 Tex. App. 419.

1. In *Illinois*, there can be no imprisonment in the penitentiary for the offense of receiving property obtained by robbery, unless the value of the property exceeds \$15, and in such a case to justify sentence of imprisonment in the penitentiary, a verdict must find the value of the property, so that it can be shown to be a case where the punishment of imprisonment in the penitentiary can be legally inflicted. *Tobin v. People*, 104 Ill. 565; *Sawyer v. People* 8 Ill. 53.

Likewise, on trial of an indictment for larceny, where the verdict was "We the jury, find the defendant guilty, and sentence him to the penitentiary for the term of three years," it was held that the value of the goods stolen must be ascertained by the verdict, as the statutes declare that no person convicted of larceny shall be condemned to the penitentiary unless the money or value of the thing stolen shall amount to \$5. *Highland v. People*, 2 Ill. 392.

2. *Kynaston v. Mayor*, 2 Stra. 1052; *Goodwin v. Crowle*, 1 Cowp. 357; *Hardy v. Bern*, 5 T. R. 636; *Hutchinson v. Inyo County*, 61 Cal. 119; *Redmond v. Weismann*, 77 Cal. 423; *Mitchell v. Geisendorff*, 44 Ind. 358; *Brickley v. Weghorn*, 71 Ind. 497; *Wainwright v. Burroughs*, 1 Ind. App. 393; *Cooper v. Poston*, 1 Duv. (Ky.

92; 85 Am. Dec. 610; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600; 20 Am. Dec. 179; Gaither v. Wilmer, 71 Md. 361; Dresser v. Witherle, 9 Me. 111; Strobbridge Lithographing Co. v. Randall, 78 Mich. 195; Poulson v. Collier, 18 Mo. App. 604; Ryors v. Prior, 31 Mo. App. 555; Cates v. Nickell, 42 Mo. 170; Burghart v. Brown, 60 Mo. 24; Rembaugh v. Phipps, 75 Mo. 422; Van Benthuyssen v. DeWitt, 4 Johns. (N. Y.) 213; Van Shaick v. Trotter, 6 Cow. (N. Y.) 599; Ames v. Sloat, Wright (Ohio) 577; Schmertz v. Shreeve, 62 Pa. St. 457; 1 Am. Rep. 439; Whitesides v. Russell, 8 W. & S. (Pa.) 44; Miller v. Hower, 2 Rawle (Pa.) 53; Neville v. Northcutt, 7 Coldw. (Tenn.) 294.

At common law, the rule that the jury must assess the damages was applicable to a special as well as a general verdict, and the failure of the jury to assess damages was ground for *venire facias de novo*. Kynaston v. Mayor, 2 Stra. 1052.

In Miller v. Hower, 2 Rawle (Pa.) 53, in pronouncing a judgment rendered on a verdict assessing no amount as void, Huston, J., observed: "It is useless to talk about judgment for default of plea, or by *nil dicit*, etc. There, a writ of inquiry will ascertain the sum, or it may be done by the officer of the court; but who ever heard of a writ of inquiry of damages, or the sum being ordered to be ascertained by a prothonotary after a jury sworn at the bar, trying the cause and giving a general verdict?"

The Indiana Rev. Stat. of 1881, § 548, provides that in actions for the recovery of money, the jury must assess the amount of the recovery. This provision is not restricted to general verdicts, but is applicable as well to special. Wainwright v. Burroughs, 1 Ind. App. 393.

In an action of *assumpsit*, the jury returned a verdict that the defendants "did assume as alleged," without assessing any damages. For this reason the verdict was held to be too imperfect to afford a foundation for a judgment. Ames v. Sloat, Wright (Ohio) 577.

In Van Shaick v. Trotter, 6 Cow. (N. Y.) 599, which was an action on a promissory note executed by two defendants jointly, one of whom suffered judgment by default, and the other pleaded to the issue, it was held that the jury who tried the issue must assess damages against both at the same time.

In suits on bonds for the performance of covenants, it is compulsory on the plaintiff to assign breaches and have his damages assessed, and when breaches are assigned, the jury at the trial must assess damages for such breaches as the plaintiff shall prove. Van Benthuyssen v. DeWitt, 4 Johns. (N. Y.) 213.

In an action on two promissory notes and on accounts stated, non-assumpsit and set-off were pleaded. The case was tried before a jury who returned a verdict finding for the plaintiff, but not specifying the amount for which they so found. The verdict was duly recorded and the jury separated. It was held that such a verdict was fatally defective. Gaither v. Wilmer, 71 Md. 361.

In a suit on an open account, if the jury find generally for the plaintiff, without ascertaining the sum due, it is error to render judgment thereon for the sum demanded. Taylor v. Hathaway, 29 Ark. 597.

In Neville v. Northcutt, 7 Coldw. (Tenn.) 294, which was an action to recover an account due for goods, wares, and merchandise, upon the return of the jury into court, after having retired to consider their verdict, they were asked by the clerk if they had agreed. The foreman replied that they had and found for the plaintiff. The jury were then asked the amount they had found, and the foreman replied that they had not agreed upon the amount, but the understanding was that the amount of the account should be their verdict. Upon this finding the court pronounced judgment for the amount of the account and costs. The judgment was reversed on appeal by the supreme court.

Action of Ejectment.—If the jury, in an action of ejectment, render a verdict for the plaintiff without assessing any damages, a judgment for the plaintiff, for the possession of the premises and damages, is not sustained by the verdict. Cannon v. Davies, 33 Ark. 56.

Detinue.—In actions of detinue, the jury should not find a verdict in the alternative; that is, the property sued for, or a certain sum in lieu thereof. The proper course is to describe the property and assess its value, so that if the property cannot be had, its value as estimated by the jury may be recovered. In Crozier v. Gano, 1 Bibb (Ky.) 257, the jury found a verdict for certain slaves, naming each separately, if to be had; and if not, then in lieu thereof, certain sums. The court denounced this

brought for a specific sum,¹ though in such cases, reference to the pleadings has generally been allowed to determine the amount

verdict as informal, but seemed to think the intention of the jury was plain, that the sums found were intended as the value of the slaves. Hence, the court overlooked the informality and regarded the true intent of the jury.

Trover.—In trover, a verdict should not be in the alternative. This proceeding demands the value of the property at the time of the conversion, and a verdict finding in favor of the plaintiff for the possession of the property described in the complaint, or its value, if a return cannot be had, is erroneous. However, the portion of the verdict relating to the return of the property may be disregarded as surplusage if it can be separated from that part which is as it should be. *Swan v. Smith*, 13 Nev. 257.

Replevin.—In actions of replevin, where there has been a delivery to the plaintiff under the writ, the property being in his possession at the time of the finding and judgment, it is not necessary that a judgment should be recovered for the possession or delivery, and a finding of the value of the property is wholly unnecessary. *Van Gundy v. Carrigan*, 4 Ind. App. 333.

In actions for the recovery of property susceptible of a division and a distinct valuation, the jury should find the separate value of each article; thus, where an action was brought for the recovery of certain slaves, a judgment rendered on a verdict assessing the value of a woman and her child in the aggregate, was reversed for this reason. *Blakely v. Duncan*, 4 Tex. 184.

Where suit is brought for the recovery of a specific piece of property, in a case where judgment, if the plaintiff prevails, would be rendered in the alternative; namely, for the recovery of the matter in controversy, or its value, it is generally necessary that the verdict should assess the value of the property. *Blakely v. Duncan*, 4 Tex. 184; *Avery v. Avery*, 12 Tex. 54; 62 Am. Dec. 513.

In *Avery v. Avery*, 12 Tex. 54; 62 Am. Dec. 513, while the general rule is recognized, an exception is noted. This case, was also an action for the recovery of a slave, and the jury found a verdict, "We, the jury, find for the plaintiff with \$80 damages and cost of suit." This verdict was objected to on the

ground that the jury should have found the value of the slave sued for. In considering this question, the appellate court said: "In many cases it is essential to the interest of the parties that this should be done. If the property sued for was beyond the reach of the jurisdiction of the court at the time of the verdict and judgment, nothing but compensation for it could be obtained, and the amount of that compensation should be determined by the jury. This would be necessary to the interests of both plaintiff and defendant but where one particular piece of property is sued for and that is sued for in specie, and not in the alternative of damages, if the plaintiff establishes his right to the property, ample and complete justice can only be awarded by judgment for the restitution of the property so claimed. In this case the prayer of the petition was for the specific property; and to secure this object the plaintiff had secured the sequestration of it for the purpose of keeping it within the jurisdiction of the court. Under such circumstances, the necessity of assessing its value is not perceived. The fact that the property sued for was under the control of the court was, doubtless, the reason why the verdict was so found, it being sufficient on which to base a judgment in accordance with the prayer of the petition." The decision of the court in *Blakely v. Duncan*, 4 Tex. 184, is not necessarily disturbed by this case, as in the former instance it did not appear that the slaves were under the control of the court. See also *Van Gundy v. Carrigan*, 4 Ind. App. 333.

Separate Assessment—Each Item.—Where the plaintiff claims damages for so much diminished ability, and another amount for suffering, and recovers a verdict for less than either sum, the defendant cannot complain that the court declined to require an assessment of each item separately. *Bonner v. Green* (Tex. Civ. App. 1894), 24 S. W. Rep. 835.

1. *Drage v. Brand*, 2 Wils. 377; *Goodwin v. Crowle*, 1 Cowp. 357; *Hardy v. Bern*, 5 T. R. 636; *Frazier v. Laughlin*, 6 Ill. 358; *Hinckley v. West* 9 Ill. 136; *Bosseker v. Cramer*, 18 Ind. 44; *Brickley v. Weghorn*, 71 Ind. 497

Fischer v. Holmes, 123 Ind. 525; *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600; 20 Am. Dec. 179; *Strobridge Lithographing Co. v. Randall*, 78 Mich. 195; *Cates v. Nickell*, 42 Mo. 170; *Burghart v. Brown*, 60 Mo. 24; *Poulson v. Collier*, 18 Mo. App. 604; *Schmertz v. Shreeve*, 62 Pa. St. 457; 1 Am. Rep. 439; *Whitesides v. Russell*, 8 W. & S. (Pa.) 44.

A verdict in an action of debt finding no specific sum, is void, and a judgment rendered thereon will be reversed on this ground alone. *Schmertz v. Shreeve*, 62 Pa. St. 457; 1 Am. Rep. 439; *Whitesides v. Russell*, 8 W. & S. (Pa.) 44.

In *Missouri*, there exists a statutory provision to the effect that when a verdict shall be found for the plaintiff in an action for the recovery of money only, the jury shall also assess the amount of the recovery. Hence, in an action on a promissory note, where the execution of the note was denied by the answer, it was the duty of the jury to assess the amount due upon the note. Upon a finding by the jury of the issue in favor of the plaintiff, the court had no right to invade the province of the jury to ascertain the amount due upon the note and render judgment therefor. *Cates v. Nickell*, 42 Mo. 170; *Burghart v. Brown*, 60 Mo. 24; *Poulson v. Collier*, 18 Mo. App. 604.

In *Poulson v. Collier*, 18 Mo. App. 583, the verdict of the jury was in the following language: "We, the jury, find for the plaintiff the amount of the note sued on, under the instructions of the court," whereupon, the counsel for the plaintiff made the calculation and announced to the court that the amount of the note sued on was \$184, and the court changed the verdict as returned by the jury by interlineation, so as to make it read as follows: "We, the jury, find for the plaintiff the sum of \$184, the amount of the note sued on, under the instructions of the court." It was held that the amount of the note was a material fact and the jury alone could find it, courts not being allowed to substitute their findings for those of the juries. *Henley v. Arbuckle*, 13 Mo. 111. And even though the jury assented to the amended verdict, the error was not cured. The verdict in this case was held to be manifestly imperfect without the amount of the note, and not even valid when amended by the court to this extent.

The *California Code of Civil Pro-*

cedure provides that where a defendant establishes a claim for the recovery of money, in an action for the recovery of money, greater than the claim established by the plaintiff the jury must find the amount of the recovery. *California Code Civ. Proc.*, § 626.

In *Electric Imp. Co. v. San Jose*, etc., R. Co. (Cal. 1892), 31 Pac. Rep. 455, the jury returned a verdict for the defendant "for its costs." Such verdict was held not to be within the statute just referred to, because, it being for costs only, there is no actual recovery by either party.

In an action of debt on a bond, the jury found for the plaintiff and assessed his "damages" at \$154. This was held insufficient, as it did not find the amount of the debt, "which," says the court, "is a fact which a party has a right to have found by the jury." *Hinckley v. West*, 9 Ill. 136; *Frazier v. Laughlin*, 6 Ill. 358.

In *Drage v. Brand*, 2 Wils. 377, the jury found that the defendant in the suit owed the debt, but omitted to assess damages for the breach assigned. The verdict was held to be erroneous and the judgment was reversed. See also *Goodwin v. Crowle*, 1 Cowp. 357.

In *Hardy v. Bern*, 5 T. R. 636, error was brought in the exchequer, chamber upon the judgment, because, as the alleged breaches of the bond sued on were denied by the defendant and issue joined thereon, the jury had found the issues for the plaintiffs and had given damages only for the detention of the debt and had not assessed damages for the breaches. Upon the opinion of Lord Kenyon and Mr. Justice Buller that damages must be assessed, the judgment was reversed, and a *venire facias de novo* awarded.

Action on Foreign Judgment.—A verdict in an action of debt, on the decree of a court of a sister state, should find the amount of the debt due. *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600; 20 Am. Dec. 179.

An action was brought on a contract which, if established, would entitle the plaintiff to recover \$63. The jury declared themselves satisfied that such contract had been made, but rendered a verdict for only \$50, although the evidence in the case tended to show that the plaintiff was entitled to \$63, or nothing. It was held, however, that as the jury recognized the existence of the contract, at any rate the defendant could not object to the amount of the

for which judgment should be rendered.¹ A distinction may be noticed under circumstances where the amount is not actually in issue. Here, a simple finding for the plaintiff or defendant is sufficient without specifying any particular sum.² This proposition may be

verdict, for the error, if error there was, was in his favor and not to his prejudice. *Fischer v. Holmes*, 123 Ind. 525.

1. *Smith v. Mohn*, 87 Cal. 489; *Mitchell v. Geisendorff*, 44 Ind. 358; *Brickley v. Weghorn*, 71 Ind. 497; *Wainwright v. Burrows*, 1 Ind. App. 393; *Newton v. Ker*, 14 La. Ann. 715; *James v. Wilson*, 7 Tex. 230; *Avery v. Avery*, 12 Tex. 54; 62 Am. Dec. 513.

The amount claimed in the petition was \$639.75, with interest at the rate of five per cent. per annum from a certain date. The verdict of the jury was for the full amount claimed, and on this verdict a judgment requiring the defendant to pay the full amount of the plaintiff's demand with interest as it appeared in the petition, was upheld, as the precise amount due could be made certain by reference to the pleadings. *Newton v. Ker*, 14 La. Ann. 715.

A verdict for the plaintiff in the sum sued for, where the petition claimed a certain sum of money due as principle and claimed interest in general terms is sufficiently certain to authorize a judgment in favor of the plaintiff. *James v. Wilson*, 7 Tex. 230.

2. *Hudson v. Majoribanks*, 7 Moore 463; *Cotton v. Rutledge*, 33 Ala. 110; *Redmond v. Weismann*, 77 Cal. 423; *Hall v. Emporia First Nat. Bank*, 133 Ill. 234; *Cooper v. Poston*, 1 Duv. (Ky.) 92; 85 Am. Dec. 610; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Joseph v. Mady Clothing Co.* (Mont. 1893), 33 Pac. Rep. 1; *Bulkly v. Marks*, 15 Abb. Pr. (N. Y. C. Pl.) 454; *Buckley v. Bramhall*, 24 How. Pr. (N. Y. C. Pl.) 455; *English v. Goodman* (N. Dak. 1892), 54 N. W. Rep. 540.

In an action brought to recover the penalty of \$500, which is imposed by the *Alabama* statutes upon a judge of probate for issuing a license, contrary to the provision of the article in which that section is embraced, the verdict was simply, "We, the jury, find for the plaintiff." However, in a suit for a sum of money which is fixed by law as a penalty for a certain act, if the plaintiff recovers at all, he must necessarily recover the specific sum which the law prescribes as the penalty. Such a ver-

dict merely finding for the plaintiff and assessing no damages is, nevertheless sufficient to authorize a judgment for the statutory penalty and the costs of the action. *Cotten v. Rutledge*, 3 Ala. 110.

Although the *Kentucky* Code provides that, where by a verdict either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of the recovery, yet in an action on a promissory note where the defense was usury and the issue was upon that plea alone a verdict simply finding "for the plaintiff" is sufficient to support a judgment for the amount of the note and interest *Cooper v. Poston*, 1 Duv. (Ky.) 92; 85 Am. Dec. 610.

The general rule is, that in a verdict for the plaintiff the amount of the recovery should be assessed; but where it was agreed between counsel that the only issue to be tried was whether a certain contract had been entered into or not, and where the jury had been instructed by the court that the only question to be considered was whether the defendant in the case had made such contract, a verdict simply for the plaintiff, without finding the amount of the recovery, is valid. *Redmond v. Weismann*, 77 Cal. 423.

The defendants in *Hall v. Emporia First Nat. Bank*, 133 Ill. 234, had allowed judgment to go against them by default, and the court thereupon assessed damages and rendered final judgment. On motion of the defendants, the court stayed the judgment and allowed the defendants to plead, but refused to set aside the judgment, allowing it to stand as security for the plaintiff until the trial of the issue presented by the pleadings. If the defendants failed to establish their defense, the judgment was to stand. Under such circumstances the verdict of the jury simply finding the issue for the plaintiffs and assessing no damages, was not erroneous in form or substance. The question of damages was not submitted to them and the defendants availed themselves of the leave of the court to plead to the merits, the former judgment still standing as security. The question of damages

clearly illustrated by an action on a promissory note, the execution of which is admitted, the only defense being lack of consideration. In such a case, a verdict generally for the plaintiff sufficiently determines the controversy, and, by reference to the note, judgment may be rendered for the proper amount.¹ Where double or treble damages are recoverable, if the jury find a general verdict for the plaintiff, they should assess single damages, leaving it for the court to pronounce judgment for the multiple of the sum so found, in accordance with law;² and, in the absence of statutes regulating the subject, it has been resolved, in an action of assumpsit, that if the jury are of the opinion that an amount tendered and paid into court by the defendant is insufficient, their proper course is to render a verdict for the entire amount of the plaintiff's demand, leaving it to the court to deduct the amount of the tender and render a judgment for the balance.³ An English case is authority for the statement that when a jury find generally for the plaintiff, but further find that there is no evidence as to the amount of damages, the court should enter a verdict for nominal damages.⁴ It is also maintained that, upon a verdict for nominal damages, a judgment for one cent is not improper.⁵ Where the jury find a general verdict for a certain sum, if concomitant special findings show the

was not in issue. As upon a simple finding for the plaintiff or defendant, the former judgment was to be enforced or annulled.

In an action on two promissory notes, where the amount of the notes and interest was admitted by the counsel for the defendants, it was held to be not absolutely necessary that a special verdict establishing the defendant's liability should contain an assessment of the amount of the recovery. *Bulkly v. Marks*, 15 Abb. Pr. (N. Y. C. Pl.) 454; *Buckley v. Bramhall*, 24 How. Pr. (N. Y. C. Pl.) 455.

1. *California Code of Procedure*, § 626, provides that, when a verdict is found for the plaintiff in an action for the recovery of money, the jury must also find the amount of the recovery. However, where the record showed that there was no issue between the parties as to the execution, terms, or amount of the promissory note, the only issue being whether or not the note had been made without consideration, a verdict finding for the plaintiff without assessing the amount of the recovery would seem to respond to the issue and to be sufficiently certain to found a judgment upon, although it must be admitted that a verdict in such form would be irregular. However, taken together, the record

and verdict showed the exact sum which the jury meant to find for the plaintiff as surely as if the verdict had contained the amount in terms. *Hutchinson v. Inyo County*, 61 Cal. 119.

2. *Dubois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326; *Livingston v. Platner*, 1 Cow. (N. Y.) 175; *King v. Haven*, 25 Wend. (N. Y.) 420; *Newcomb v. Butterfield*, 8 Johns. (N. Y.) 342.

3. *Dresser v. Witherle*, 9 Me. 111.

4. *Tanner v. Bennett*, M. & M. 182.

5. *Davidson v. Devine*, 70 Cal. 519. "One Mill" Damages.—Under the laws of *New York*, all fractions of money less than cents are, in judicial proceedings, rejected; hence, on a verdict for "one mill," no judgment could be rendered. *Brown v. Smith*, 3 Cal. (N. Y.) 81.

In Gold Coin.—Where there is no issue as to whether the plaintiff's demand is payable in gold coin, and the complaint contains no averment on that point, a verdict finding for the plaintiff a certain amount in "gold coin," though irregular, may be sustained by rejecting the words "gold coin" as surplusage. *Watson v. San Francisco, etc., R. Co.*, 50 Cal. 523; *Chamberlin v. Vance*, 51 Cal. 85; *Marquard v. Wheeler*, 52 Cal. 445.

plaintiff to be entitled to a different amount, judgment should be rendered in accordance with the special findings, notwithstanding the fact that the plaintiff may thus recover more than he is allowed by the general verdict.¹

A plaintiff should not be awarded a greater amount of damages than is demanded by him,² but it is immaterial if a verdict exceeds the amount indorsed on the writ, so it corresponds with the amount claimed in the declaration.³

e. REDUCTION OF AMOUNT BY REMITTITUR.—If a verdict, in other respects valid,⁴ is excessive in amount, the court may, in its discretion, instead of unconditionally awarding a new trial, give the successful party the option of reducing the amount of his recovery to the extent of the excess.⁵ The exercise of this authority is generally confined to cases where the damages are so excessive as to induce the belief that the jury have been influenced

1. *Froman v. Rous*, 83 Ind. 94. See *infra*, this title, *Special Findings*.

2. *Wathen v. Byrne* (Ky. 1889), 12 S. W. Rep. 197.

The plaintiff's complaint contained three counts. The first, in substance, that on October 30, 1877, he got upon the rear platform of one of the defendant's cars as a passenger; that the conductor, without asking him for his fare or giving him opportunity to pay it, violently threw him off in front of a car passing upon an adjoining track, and he was run over and injured to his damage \$10,000. The other two counts related to the same accident, alleging that it occurred through defendant's negligence, each closing "to his damage \$10,000." In the prayer for relief, the plaintiff asked damages "to the amount of \$20,000." Upon the trial the court ruled in substance that the plaintiff could only recover on the first count. He obtained a verdict for \$15,000. The defendant claimed that as the said first count only alleged \$10,000 damages, the verdict was unauthorized; the court held, however, that the general prayer for damages at the close of the complaint controlled, but that if, in order to sustain a recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal. *Schultz v. Third Ave. R. Co.*, 89 N. Y. 242.

3. *Williams v. Williams*, 11 Smed. & M. (Miss.) 393.

4. *Dickinson, J.*, delivering the opinion of the court in *Craig v. Cook*, 28 Minn. 232, said: "It may naturally be supposed, that in general, where other issues than merely the amount of damages arise in a case, the same passion

and prejudice which is indicated by the awarding of excessive damages, may have affected the determination of the jury upon other issues also; and if this should be deemed a fact, a new trial should be awarded. But, while it may hence be considered, that the trial court ought not generally to refuse a trial *de novo*, where a verdict is so excessive as to lead to the conviction that the jury has been influenced by passion or prejudice in awarding it, yet, in a particular case, the court might feel satisfied that the verdict of the jury is right, and ought to stand, only that it is excessive in amount; and where it does not appear that the court has exceeded the limits of discretion in such a case, its determination will not be disturbed."

5. *Hurry v. Watson*, 4 T. R. 659, n. *Pacific Express Co. v. Malin*, 132 U. S. 531; *Blunt v. Little*, 3 Mason (U. S.) 102; *Kinsey v. Wallace*, 36 Cal. 462; *Sandstone Co. v. Skoman*, 1 Colo. 323; *Georgia R., etc., Co. v. Crawley*, 87 Ga. 191; *Illinois Cent. R. Co. v. Ebert*, 74 Ill. 399; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62; *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 211; *Collins v. Council Bluffs*, 35 Iowa 432; *Lombard v. Chicago, etc., R. Co.*, 47 Iowa 494; *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80; *Howard v. Grover*, 28 Me. 97; 48 Am. Dec. 478; *Federspiel v. Johnstone*, 87 Mich. 303; *Craig v. Cook*, 28 Minn. 232; *Pratt v. Pioneer Press Co.*, 31 Minn. 251; *Breck v. Smith*, 44 Miss. 690; *Hirt v. Molony*, 2 N. H. 323; *Willard v. Stevens*, 24 N. H. 271; *Belknap v. Boston, etc., R. Co.*, 49 N. H. 358; *Child v. Gronlund*, 41 Fed. Rep. 505; *Diblin v.*

Murphy, 3 Sandf. (N. Y.) 19; Barber v. Rose, 5 Hill (N. Y.) 76; Sears v. Conover, 3 Keyes (N. Y.) 113; Collins v. Albany, etc., R. Co., 12 Barb. (N. Y.) 492; Clapp v. Hudson River R. Co., 19 Barb. (N. Y.) 461; Murray v. Hudson River R. Co., 47 Barb. (N. Y.) 196; McIntyre v. New York Cent. R. Co., 47 Barb. (N. Y.) 515; Butt v. Schrimpf, 31 Tex. 601; Goldstein v. Cook (Tex. Civ. App. 1892), 22 S. W. Rep. 762; McHugh v. Chicago, etc., R. Co., 41 Wis. 75; Corcoran v. Harron, 55 Wis. 120. See NEW TRIAL, vol. 16, p. 593.

The New York Code of Civil Procedure confers the power, upon an appeal from a judgment or order, on the appellate court, to reverse, affirm, or modify the judgment or order appealed from. It is the settled practice of the court, on a motion for a new trial for excessive damages, to refuse to set aside the verdict if the parties will consent to deduct the amount deemed excessive. *Sears v. Conover*, 3 Keyes (N. Y.) 113.

Malicious Prosecution.—In the case of *Blunt v. Little*, 3 Mason (U. S.) 102, the plaintiff recovered \$2,000 in an action for damages for malicious prosecution. Justice Story, delivering the opinion of the appellate court, and considering the question of excessive damages, says: "After full reflection, I am of opinion that it is reasonable that the cause should be submitted to another jury, unless the plaintiff is willing to remit \$500 of his damages."

Action on Warranty.—An action of assumpsit was brought on a contract of warranty given upon the sale of a horse. The jury returned a verdict for the plaintiff assessing the damages at \$18 for breach of the warranty contained in the contract as to the age of the animal, and \$44 for breach of the warranty as to his physical condition. The appellate court held that according to the contract there was no warranty as to the age of the horse and that the verdict for damages on this account was improper. Accordingly, it ordered that if the plaintiff would remit the \$18 assessed for breach of the warranty as to age, he might take judgment for the remainder. *Willard v. Stevens*, 24 N. H. 271.

Assault and Ejection.—The plaintiff sued the defendant railroad in trespass for an assault and ejection from the defendant's cars while lawfully riding therein, causing him damage to his business by the detention, and subjecting him to expense and great mortification.

The verdict was for an amount which the court deemed exorbitant. The supreme court held that if the plaintiff would consent to remit \$200, judgment might be entered on the verdict with costs of the suit. *Belknap v. Boston, etc., R. Co.*, 49 N. H. 358.

Injury to Passenger.—*Collins v. Albany, etc., R. Co.*, 12 Barb. (N. Y.) 492, was an action to recover damages for personal injuries sustained while the plaintiff was a passenger on the defendant's cars. Here, the verdict was excessive, so the supreme court thought, and it was held that the finding could not be allowed to stand unless the personal representative of the plaintiff would consent to have it reduced by such a sum as would obviate this objection.

In *Illinois*, in an action for damages for personal injuries, the jury found for the plaintiff and assessed his damages at \$10,000. On motion by the defendant for a new trial, the plaintiff's attorney remitted \$6,000 of the finding, whereupon the trial court overruled the motion for a new trial and rendered judgment for the balance, and for this amount the verdict was sustained. *Illinois Cent. R. Co. v. Ebert*, 74 Ill. 399.

Corcoran v. Harran, 55 Wis. 120, was a civil action for assault and battery, commenced in a justice's court, where the plaintiff recovered a judgment for \$100. Defendant appealed to the circuit court, and the plaintiff was there awarded \$200 damages. The defendant then moved for a new trial on the ground of excessive damages, when the circuit court permitted the plaintiff to remit \$100 from the amount of the verdict, and thereupon denied the motion and entered judgment in the plaintiff's favor for \$100. The defendant then appealed, contending that the judgment should be reversed, because the plaintiff, on the defendant's motion for a new trial on account of excessive damage, had been allowed to remit as above stated, and then have judgment for the balance. The supreme court declined to disturb the judgment.

Option to Remit—When to Be Exercised.—A period is always set within which the option must be exercised. *Chils v. Gronlund*, 41 Fed. Rep. 145; *Deblin v. Murphy*, 3 Sandf. (N. Y.) 19; *Kinsey v. Wallace*, 36 Cal. 463; *Roberts v. Taylor*, 17 Neb. 184.

Some cases, following the early English law, hold that a remittitur can never be made after entry of judgment.

by passion, prejudice, misapprehension or mistake,¹ but its exercise has been deemed expedient where a remission of a portion of

Chils v. Gronlund, 41 Fed. Rep. 145; Stone v. Matherby, 3 T. B. Mon. (Ky.) 136; Rowan v. People, 18 Ill. 159; Coy v. Hymas, Stra. 1171; Cheveley v. 2 Morris, 2 W. Bl. 1300; Sabin v. Long, 1 Wils. 30; Percival v. Spencer, Yel. 45. Others limit the period to the same term in which judgment has been given. Harris v. Jaffray, 3 Har. & J. (Md.) 543; Herbert v. Hardenbergh, 10 N. J. L. 222. It seems that the more recent English decisions, however, permit a remittitur to be entered both after judgment and the term in which it has been given. Usher v. Dansey, 4 M. & S. 94; Hardy v. Cathcart, 1 Marsh. C. P. 180; Pickwood v. Wright, 1 H. Bl. 642; Corning v. Corning, 6 N. Y. 97. See also 2 Tidd's Pr. 942.

Reversal for Excess, Indicating Proper Amount.—The supreme court of Wisconsin, in the case of Potter v. Chicago, etc., R. Co., 22 Wis. 615, instead of allowing a remittitur, preferred to reverse the judgment and indicate an amount for which they thought it reasonable that a verdict should be upheld. This practice was followed in Goodno v. Oshkosh, 28 Wis. 306, but departed from, it seems, in Corcoran v. Harran, 55 Wis. 120.

Voluntary Remittitur.—The remittitur may be voluntary and without the dictation or suggestion of the court. Illinois Cent. R. Co. v. Ebert, 74 Ill. 399; International, etc., Co. v. Wilkes, 68 Tex. 617; Herbert v. Hardenbergh, 10 N. J. L. 222.

Peremptory Remittitur.—Where it not only appears from the record that the judgment of the inferior court is excessive, but also what it should have been, the appellate tribunal sometimes adopts the practice of peremptory remittitur instead of allowing the plaintiff the option to relinquish.

In Georgia, the supreme court adopted this practice. In Western Union Tel. Co. v. Carroll, 84 Ga. 597. Here the plaintiff sued the Western Union Telegraph Company for the erroneous transmission of a certain message and recovered a verdict for \$25. It appearing by the evidence that the plaintiff had offered to settle with the defendant for \$10, Blandford, J., in delivering the opinion of the court, said: "It is manifest to us that there should have been no greater recovery in this case than

for the sum of \$10, and that the verdict for \$25 was erroneous; but inasmuch as the plaintiff had offered to compromise and settle the case with the defendant at a fair sum, which was due him, viz the sum of \$10, we affirm the judgment of the court below, with the direction that the court cause to be written off from the judgment and verdict all in excess of the sum of \$10." See also Black v. Carrollton R. Co., 10 La. Ann. 33 63 Am. Dec. 586.

In actions of tort as well as contract where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and if he does so, order the verdict to stand for the residue. Hurry v. Watson, 1 T. R. 659 n; Blunt v. Little, 3 Mason (U. S.) 102; Illinois Cent. R. Co. v. Ebert, 74 Ill. 399; Fuller v. Chicago, etc., R. Co., 31 Iowa 211; Collins v. Council Bluffs, 35 Iowa 432; Lombard v. Chicago, etc., R. Co., 47 Iowa 494; Howard v. Grover, 28 Me. 97; 48 Am. Dec. 478; Craig v. Cook, 28 Minn. 232; Pratt v. Pioneer Press Co., 35 Minn. 251; Brecl v. Smith, 44 Miss. 690; Belknap v. Boston, etc., R. Co., 49 N. H. 358; Collin v. Albany, etc., R. Co., 12 Barb. (N. Y.) 492; Clapp v. Hudson River R. Co., 16 Barb. (N. Y.) 461; Murray v. Hudson River R. Co., 47 Barb. (N. Y.) 196; McIntyre v. New York Cent. R. Co., 47 Barb. (N. Y.) 515; Doblin v. Murphy, 3 Sandf. (N. Y.) 19; Corcoran v. Harran, 55 Wis. 120.

Several Items.—Though there are several disputed items included in a verdict, the failure of the court, in ordering a remittitur, to specify to which of the items it applies, is not a reversible error. Ingalls v. Allen, 43 Ill. App. 624.

1. Pickwood v. Wright, 1 H. Bl. 643; Woodruff v. Richardson, 26 Conn. 238; Lewis v. Cooke, 1 Har. & M. (Md.) 159; Jewell v. Gage, 42 Me. 247; Scott v. Choape, 33 Neb. 41; Furry v. Stone, 1 Yeates (Pa.) 186; Guerry v. Kerton, 2 Rich. (S. Car.) 507; Clapp v. Walters, 2 Tex. 130; Robson v. Watt, 11 Tex. 768; Bowe v. Rogers, 50 Wis. 602; Corcoran v. Harran, 55 Wis. 120.

Passion or Prejudice.—In an action of trover, where it appeared to the supreme court that the jury, in their indignation at the defendant's conduct

gave a greater amount of damages than they were by law authorized, departing from the legal measure of damages, it was held that there must be a new trial unless the plaintiff released the amount which was deemed to be in excess. *Guerry v. Kerton*, 2 Rich. (S. Car.) 507.

In *Woodruff v. Richardson*, 20 Conn. 238, which was an action of slander for charging the plaintiff with dishonesty, the jury returned a verdict for an amount so large that, to use the language of the reporter, "the judge at the circuit entirely dissented and returned them to a second consideration." In doing this, he expressed his own views and urged reasons upon the jury against so large an amount of damages; the result was a verdict more nearly commensurate with justice. The supreme court upheld the course of the trial judge in the matter.

In *Ohio*, the court in *Pendleton St. R. Co. v. Rahmann*, 22 Ohio St. 446, maintains that where the statute provides that if damages materially excessive appear to have been given under the influence of passion or prejudice, the verdict shall be vacated, such statute is peremptory in its nature, the presence of passion or prejudice in producing the excess, vitiating the verdict *in toto*, thus excluding the authority of the court to validate any part of it, unless indeed with the consent of both parties, by recourse to this practice of allowing a remittitur.

It has also been held that where the verdict of a jury, in favor of the plaintiff, is so large that the irresistible conclusion is that the jury did not consider the defendant's side of the case at all, the error cannot be cured by a remittitur, no matter for what amount, for to allow this would be in fact to permit the plaintiff to make up his own verdict. *Koeltz v. Bleekman*, 46 Mo. 320.

Misapprehension or Mistake.—In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury and not the opinion of the court is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. *Worster v. Canal Bridge*, 16 Pick. (Mass.) 541; *Ketchum v. Mukwa*, 24 Wis. 303.

Impropriety in Mode of Deliberation.

—Where it was shown that, to a certain extent, the verdict of the jury was regularly found, but that the amount beyond a certain sum was determined by a chance device, it was held that if the plaintiff would remit the portion so erroneously found, that the verdict might be allowed to stand as to the residue. *Fuller v. Chicago*, etc., R. Co., 31 Iowa 211.

Damage in Excess of Demand.—The plaintiff's counsel, upon inspecting the declaration, found that the damages allowed by the verdict were considerably more than the damages called for in the declaration. He therefore prayed the court, while the record was still before them, to allow the plaintiffs to enter a remittitur for the excess and take judgment for the residue, which the court allowed them to do. *Furry v. Stone*, 1 Yeates (Pa.) 186; *Lewis v. Cooke*, 1 Har. & M. (Md.) 159.

In an action of assumpsit, the plaintiff was given a verdict for six hundred and eleven pounds, which was the sum really due him, and entered up judgment for that amount besides costs, while the damages laid in the declaration were only six hundred pounds. The plaintiff was allowed to remit the excess and have a verdict for the residue. *Pickwood v. Wright*, 1 H. Bl. 643.

Where, upon the plaintiff's own showing, he was not entitled to more than \$150, a verdict for \$317.46 must be set aside, unless the plaintiff will consent to remit the excess. *Jewell v. Gage*, 42 Me. 247.

Where the jury find for the full amount of a note on which there appears an admitted credit, the plaintiff may remove this objection to the verdict by remitting the sum by which the verdict exceeds the proper amount. *Robson v. Watts*, 11 Tex. 768.

Where the court has general jurisdiction over a cause, and a verdict is found for more than the sum demanded, a remittitur may be entered as to the excess, and judgment taken for the residue, or the verdict may be set aside and leave then given to amend. *Hirt v. Molony*, 2 N. H. 323.

In *Barber v. Rose*, 5 Hill (N. Y.) 77, Cowen, J., said: "There is no doubt of the plaintiff's right, when the damages found in his favor exceed the amount claimed in his declaration, to remit the excess and take judgment for the sum demanded; and no good reason has been urged against his doing so in any case." See also *Corning v. Corning*, 6 N.

the verdict will operate to cure the effect of an erroneous instruction of the judge,¹ or the improper admission or exclusion of evidence.² A practice, the converse of that of allowing a remittitur has also been recognized, and a verdict manifestly too small has been

Y. 97; *Bowman v. Earle*, 6 Duer (N. Y.) 691; *Dox v. Dey*, 3 Wend. (N. Y.) 356; *Curtiss v. Lawrence*, 17 Johns. (N. Y.) 111.

1. In *Hayden v. Florence Sewing Mach. Co.*, 54 N. Y. 221, the defendant was sued for illegally dispossessing the plaintiff of the possession of certain premises, and destruction of the plaintiff's property which was removed under the defendant's direction. The damages to the plaintiff's property were, by undisputed evidence, proven to be \$4,645. The plaintiff also claimed to have sustained heavy pecuniary losses on account of the breaking up of his business. The court charged the jury that the plaintiff was entitled to recovery for both. The defendant excepted as to the damage to the business, and the plaintiff obtained a verdict for \$8,695. The general term reversed the judgment unless the plaintiff would stipulate to deduct as much as was allowed for damages to his business, and in case he so stipulated, judgment as to the residue was to be affirmed. The plaintiff acquiesced, and judgment for the proven value of his property destroyed was entered. On appeal, it was maintained not only that the general term had the right to order the conditional reversal, but that the erroneous charge of the judge as to the recovery for damages to the plaintiff's business was cured by the remittitur. See also *Jones v. Hughes* (Pa. 1889), 16 Atl. Rep. 849.

2. **Improper Admission of Evidence.**—In an action of trespass on the case to recover damages for personal injuries, the court allowed the plaintiff to prove what amount he had been compelled to pay for labor, which, had he not been injured, he would have done himself. The plaintiff testified that he had paid out for this purpose about \$300, and, it being contended that the admission of such testimony was error, the plaintiff's counsel, when the verdict was rendered, entered a remittitur for that sum. This was held to have cured whatever error there was in the admission of this evidence. *Toledo, etc., R. Co. v. Beals*, 50 Ill. 150.

Improper Exclusion of Evidence.—Where the case did not show the pre-

cise finding of the jury on the question of betterments, the plaintiff's evidence on that point having been erroneously excluded, it was held that the verdict must be set aside unless the tenant would remit the amount found for betterments. *Wendell v. Moulton*, 26 N. H. 41.

In an action of slander, in which evidence of bad reputation was erroneously excluded, the court ruled that the plaintiff might retain his verdict if he elected to have it reduced to one of nominal damages. *Smith v. Williams*, 110 Mass. 511.

On an assumpsit upon an open account for attorney's fees, a depositor of part payment was improperly rejected at the trial, but the appellate court permitted the plaintiff to enter a remittitur for the amount proved by the deposition, with interest up to the rendition of the verdict. *Anderson v. Tarpley*, 6 Smed. & M. (Miss.) 507.

Ignorance of Evidence.—In an action of assumpsit, the defendants introduced uncontradicted testimony to the effect that they paid the plaintiffs for three bales of cotton for which, among other things, the defendants were sued. The jury disregarded this testimony and rendered a verdict, not only for the other sums, but included the value of the cotton as well. The trial court decided that a new trial should be granted unless a remittitur was entered for the value of the said cotton, which was done. The court then overruled the motion for a new trial and rendered a judgment on the verdict after deducting the amount of the remittitur. Upon this judgment, an appeal was prosecuted, the error assigned being that the court below erred in refusing to grant a new trial. The supreme court commended the course of the court below. *Young v. Englehard*, 1 How. (Miss.) 10.

In *Underwood v. Parrott*, 2 Tex. 168, a suit was brought for the proceeds of certain cotton, to which the defendant pleaded set-off of an account embracing numerous articles of merchandise alleged to have been sold and delivered by him to the plaintiff. A verdict having been rendered for the plaintiff, the defendant moved for

allowed to stand upon the defendant's consenting to increase it to a reasonable amount.¹ Some judicatures hold, and it seems with reason, that it is only in cases where the law recognizes some fixed rules and principles to regulate the measure of damages, by which it may be determined how much the verdict is excessive, that the plaintiff may be allowed to remit such an amount as the court may declare excess, and have judgment for the remainder;²

new trial on the ground that the verdict was contrary to law and to the evidence. This motion was overruled by the court, but being of opinion that the verdict was for a sum exceeding that established by the proofs, the plaintiff was permitted to remit the excess and have judgment for the residue. The supreme court held that there was no error in permitting the remittitur to be entered.

In an action brought for the recovery of a slave, the verdict being for the return of the slave or the payment of \$1,200, the plaintiff was allowed to reduce the assessment of the value of the slave to \$900, there being no evidence to prove that the slave was worth more than the latter amount. *Clapp v. Walters*, 2 Tex. 130.

1. Where, in an action of tort to recover damages for the negligence of the defendant's servant, in driving his omnibus against the plaintiff, negligence was proved, and it appeared that the plaintiff's thigh had been broken and considerable expense incurred for the attendance of a surgeon, who also testified that it was doubtful whether the plaintiff would ever entirely recover. The jury brought in a verdict allowing "one farthing" damages. The court ordered a new trial, unless the defendant would consent to increase the verdict to an amount sufficient to cover the surgeon's bill. *Armstrong v. Haley*, 4 Q. B. 917. See also *Collins v. Albany*, etc., R. Co., 12 Barb. (N. Y.) 492; *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461.

2. In *Cromwell v. Wilkinson*, 18 Ind. 369, it was held, that in a case where the damages depended upon calculation, as upon a promissory note, the court might take a remittitur of excess and it would cure the error, but where the damages depended upon judgment, on conflicting evidence or notions of compensation for tort—questions for the jury—that the *nisi prius* court had no power to fix the amount itself and then render judgment upon it.

Again, in *Thomas v. Womack*, 13 Tex. 580, it was maintained that, where the law recognizes some fixed rules and principles to regulate the measure of damages by which it may be determined in how much the verdict is excessive, as in actions on contracts and for torts done to property, the value of which may be ascertained by the evidence, a remittitur of the excess may be received as an answer to a motion for a new trial, on the ground of excessive damages, but where there are no such rules and principles by which to ascertain the excess, and it is uncertain and considerable, a new trial ought to be awarded, for to permit a verdict to be reduced to an amount which the court might think reasonable in such a case would be to substitute the opinion of the judge for that of the jury.

In *Coffin v. Coffin*, 4 Mass. 45; 3 Am. Dec. 189, which was an action to recover damages for slander, the court said: "We were impressed with the belief that the damages were too great, and that a less sum would have been an adequate compensation to the plaintiff, yet whether our impression or the impression of the jury is the more correct, as judges, we are not authorized to determine. The plaintiff's counsel has intimated that he did not wish for larger damages than the court should think reasonable, as the object of his client in the prosecution was to obtain justice for his character, not to dispose of it for money. It is not the province of the court to advise either party, but as the jury have done ample justice to the plaintiff's character, we are satisfied that a liberal remission of a part of the damages would not in any manner operate to the plaintiff's dishonor. But unless there be a remission of a part of the damages, judgment must be entered according to the verdict."

The Chicago & North Western Railway Co. were sued for negligently causing the death of a girl about ten years old. The jury rendered a verdict for \$3,375. The case being carried

to the supreme court, it was suggested by the counsel for the plaintiff that if the damages should be deemed excessive, the court might indicate the amount of the excess and allow it to be remitted, and then affirm the judgment. The court held that it adopted such a practice where a portion of the judgment was illegal and readily severable from the rest and clearly ascertainable by the record, but where such was not the case, it would not substitute its judgment for that of the jury and allow the party to remit. *Potter v. Chicago, etc., R. Co.*, 22 Wis. 615. And see *Park v. Hopkins*, 2 Bailey (S. Car.) 408.

In *Nudd v. Wells*, 11 Wis. 426, which was an action against an express company to recover damages for the non-delivery of a box of machinery. The plaintiff obtained a verdict for \$1,087, and a motion to set aside the verdict and for a new trial was granted, unless the plaintiff would consent to reduce the verdict to \$821, which he did. Judgment was thereupon entered, and the defendant appealed to the supreme court. In delivering the opinion of the court, Paine J., said: "The practice of remitting, where the illegal part is clearly distinguishable from the rest, and may be ascertained by the court without assuming the functions of the jury and substituting its judgment for theirs, is well settled. . . . But it ought not to be carried so far as to allow the court, when the jury has obviously mistaken the law, or the evidence, and rendered a verdict which ought not to stand, to substitute its own judgment for theirs, and, after determining upon the evidence, what amount ought to be allowed, allow the plaintiff to remit the excess, and then refuse a new trial." See also *Corcoran v. Harran*, 15 Wis. 127; *Bigelow v. Doolittle*, 36 Wis. 115.

In *Pendleton St. R. Co. v. Rahmann*, 22 Ohio St. 446, the distinction is made in questions concerning the allowance of a remittitur between actions, the subject of which is a contract, commercial, or other established standard of valuation, where the amount of the verdict, or the facts where known becomes a mere matter of computation, and in actions, the subject of which is without such standard of valuation, where the amount of the verdict is not a matter of computation but of opinion. In the first class of cases, it is maintained that any excess in the verdict, above what the evidence satisfactorily estab-

lishes, may, with the assent of the party in whose favor it is rendered, be eliminated by remittitur and judgment entered for the residue; but in the class of actions in which the opinion of the jury, unaided by any known standard of valuation, determines the magnitude of the recovery, the power of the court over the excessive finding is, in some instances, controlled by statutory conditions. Thus, where the statute provides that if damages materially excessive appear to have been given under the influence of passion or prejudice, the verdict shall be vacated and a new trial granted, the terms of the statute being peremptory in their nature; although the verdict, if purged of any supposed excess, might, in the opinion of the court, be well sustained as to the residue by the facts disclosed, yet the presence and influence of passion or prejudice in producing the excess, vitiates the verdict *in toto*, and excludes the power of the court to validate, or save any part of it without the consent of both parties.

In *Maffett v. Sackett*, 18 N. Y. 522, it was held that it is competent for a court sitting at general term, on appeal from the special term, to allow or reject a claim of either party where its extent has been definitely fixed or can be clearly determined; but where the amount is indefinite and uncertain, it cannot be determined by the court without its assuming the province of the jury. And see *Chouteau v. Suydam*, 21 N. Y. 185; *Cuff v. Dorland*, 57 N. Y. 560.

Notwithstanding the cases in *New York*, holding that, in actions of tort for damages to the person, the general term has, on appeal from an order of the special term, made on motion to set aside a verdict for excessive damages, the right to make a conditional order reversing the judgment and granting a new trial, unless the plaintiff will consent to reduce the damages to a specified sum, and affirming it, if thus purged of the excess, in *Whitehead v. Kennedy*, 69 N. Y. 462, which was an action for attorney's services, the supreme court reversed the order of the general term, reversing a judgment for the plaintiff and ordering a new trial, unless the plaintiff would stipulate to reduce the damages to a certain amount, and, in that event, affirming the judgment for the part deemed not to be excessive. At the same time the supreme court declared that it did not intend to

disturb the authority of those decisions which sanctioned the practice of allowing a remittitur in suits to recover damages for personal injuries, but contended that they must be regarded as applicable only to the class of cases in which such decisions were made.

A justice of the peace rendered a verdict for several dollars more than the proper amount. This judgment was affirmed by the county court, then reversed by the supreme court, and eventually found its way to the court of appeals. The amount seems to have been easily calculable as the suit was on a promissory note, and the court of appeals held that the judgment of the supreme court must be affirmed, unless the plaintiff would stipulate to remit the excess as of the day the judgment was rendered by the justice, in which latter event, the judgment of the supreme court must be reversed, and that of the justice and county court affirmed as modified. *Brownell v. Winnie*, 29 N. Y. 400; 86 Am. Dec. 314.

In *Lambert v. Craig*, 12 Pick. (Mass.) 199, a part of the plaintiff's demand was for wages, and it was proved that he had received, before the commencement of the action, sundry articles of value which should have been deducted from the amount due him on account of wages. Immediately after a verdict for the full amount, the plaintiff offered to remit such sum as should seem reasonable to the court on account of the articles received. On appeal, it was held that as the jury had allowed the plaintiff's whole claim, notwithstanding it had been proven that certain articles had been received which should have been deducted therefrom, which the plaintiff himself admitted by offering to remit, a new trial must be granted. "If the full value had been ascertained," said the court, "the amount might now be remitted and judgment entered for the residue, but unless the parties can agree as to the value, it must be ascertained by a jury and a new trial granted for that purpose."

Recovery of Original Debt After Compromise.—Where a party was sued on an indebtedness which had been compromised for a certain proportion of the original amount, and the jury returned a verdict for the entire amount of the debt, it was held that the excess might be remitted to the extent of the compromise, and the verdict might stand

for the residue. *Pierce v. Wood*, 23 N. H. 519. The terms of this compromise were for a certain percentage of the original indebtedness, so the extent of the excess could be easily ascertained by a mathematical calculation. See also *Sanborn v. Emerson*, 12 N. H. 57; *Pierce v. Wood*, 23 N. H. 519; *Willard v. Stevens*, 24 N. H. 271; *Odlin v. Gove*, 41 N. H. 478; 77 Am. Dec. 773.

Under some circumstances, it is undeniably proper to allow a remittitur, although the amount of the excess is admittedly uncertain. Thus, where the plaintiff recovers the aggregate amount upon a demand consisting of several entire particulars, one of which embraces in part an erroneous claim, it has been held that the plaintiff may agree to remit the whole item and have judgment for those which are not vitiated by the inclusion of error. For example, *Kavanaugh* and wife sued the city of Janesville for injuries to Mrs. Kavanaugh by reason of a defective sidewalk, and a verdict was rendered which included the loss of the wife's services as well as the husband's expenses for nursing and medical attendance. It was established that if a recovery could be had at all for this loss and expense, it must have been in an action by the husband alone. Nevertheless, the verdict was allowed to stand on condition that the plaintiff and his wife would remit the highest amount which, under the evidence, could have been allowed for these items. *Kavanaugh v. Janesville*, 24 Wis. 618.

In an action for injury to the plaintiff's mare from which she died, and which was alleged to have been caused by a defective highway, it was held to be error to admit evidence of the value of the use of the animal during the period which intervened between the injury and her death, including the plaintiff's services in taking care of her. The plaintiff was allowed to testify that he estimated his loss from deprivation of the use of the animal during the interim between the accident and her death, including his services in taking care of the animal at \$36, and the jury brought in a verdict which must be presumed to have included this amount. The supreme court held, that while recovery might be had for the plaintiff's services in taking care of the mare, no recovery could be had for loss of her services between the time of the injury and her death, and hence that the judgment be reversed unless the plaintiff would remit the whole of the \$36, al-

in other jurisdictions, however, the practice is not confined within such limit.¹

f. INTEREST ON AMOUNT OF VERDICT.—Where the party, against whom a verdict in an action on an interest-bearing claim has been recovered, delays the award of judgment by some act of his own, as by motion for a new trial or in arrest of judgment, the prevailing party should be allowed interest on the amount of

though a portion of this amount must have been for what plaintiff had a right to recover; but as no one could say how much, the entire \$36 would have to be relinquished before recovery could be had for the value of the mare, of which the remainder of the verdict presumably consisted. Page *v.* Sumpster, 53 Wis. 652. From the facts of this case, it will be seen that the supreme court, in allowing this remittitur, admitted that the exact amount which should be relinquished could not be ascertained, but the plaintiff was allowed at his option to remit a sum which must include the excess, though it also included an amount to which he was justly entitled. There was manifestly no way of estimating the exact amount to be remitted, but it was thought that to avoid the trouble and expense of a new trial, the plaintiff might prefer to remit the whole of the \$36, which he was accorded permission to do.

Action of Ejectment.—Where the plaintiff, in ejectment, has obtained a verdict for the land claimed in his declaration, the court, after the entry of an order upon the verdict, and the discharge of the jury, cannot alter the verdict by declaring that it will grant a new trial unless the plaintiff abate the verdict as rendered, by taking judgment for a certain part of the land sued for. *Shiflet v. Dowell* (Va. 1894), 19 S. E. Rep. 848.

1. Many of the authorities cited in the foregoing note treat the exercise of this right to allow a remittitur as an invasion of the sacred province of the jury. In dissenting from this view of the question, however, the court, in *Corcoran v. Harran*, 55 Wis. 120, delivers itself as follows: This is a practice well calculated to advance the ends of justice and lessen the expense to litigants and the public, and the allowance of such power is no more an exercise of arbitrary authority by the trial judge than it would be for him to set aside the verdict absolutely, upon the sole ground that it is excessive, and then in

effect direct the jury to bring in a verdict for a smaller sum, or not in excess of the amount named by the court.

In *Dublin v. Murphy*, 3 Sandf. (N. Y.) 19, it was held that the practice of allowing a remittitur is very common in actions upon contract, where the party has recovered more than he is entitled to; but there is some doubt as to whether this practice is permissible in actions of tort; however, upon consideration of the matter, the court seems to find ample sanction, both of reason and authority, for its application to a verdict rendered in an action to recover for personal injuries to the plaintiff, so the verdict which was deemed excessive was ordered to be set aside on payment of the costs, unless the plaintiff, within ten days, would stipulate to reduce it to a sum which the court thought consonant with the right of the case.

Howard v. Grover, 28 Me. 97; 48 Am. Dec. 478, was an action on the case against the defendant for alleged malpractice as a surgeon. The jury returned a verdict for such a large amount that the supreme court maintained that justice required a reduction of the verdict; accordingly, it was determined that unless the plaintiff would agree to remit \$500, the verdict must be set aside and a new trial granted. This, it will be observed, was an action for unliquidated damages, where there was no precise rule by which the court could arrive at the exact amount of the excess, or the exact amount which the plaintiff should be allowed to recover. Nevertheless, the court took it upon itself to say that the verdict was too large. See also cases cited to this effect in foregoing notes.

Works Well in Practice.—The right of the trial court, in the exercise of a sound discretion, when it deems a verdict excessive, and the result of passion or prejudice on the part of the jury, to refuse a new trial upon condition that the prevailing party remit such sum as shall leave the recovery not excessive

the verdict from the date of its rendition.¹ In the absence of legislative enactment, the rule has generally been confined in its

in the judgment of the court, has often been exercised, and whatever criticisms may be made upon the logical consistency of such a rule, it works well in practice. *Pratt v. Pioneer Press Co.*, 35 Minn. 251; *Craig v. Cook*, 28 Minn. 232; *Corcoran v. Harran*, 55 Wis. 120.

1. *Dowell v. Griswold*, 5 Sawy. (U. S.) 23; *Gibson v. Cincinnati Enquirer*, 2 Flip. (U. S.) 88; *Griffith v. Baltimore, etc., R. Co.*, 44 Fed. Rep. 574; *Weed v. Weed*, 25 Conn. 494; *Winthrop v. Curtis*, 4 Me. 297; 14 Am. Dec. 216; *Williams v. Smith*, 2 Cal. (N. Y.) 253; 2 Am. Dec. 209; *Henning v. Vantyne*, 19 Wend. (N. Y.) 101; *Lord v. New York*, 3 Hill (N. Y.) 426; *Bull v. Ketchum*, 2 Den. (N. Y.) 189; *Sproat v. Cutler*, Wright (Ohio) 157; *Buckman v. Davis*, 28 Pa. St. 211; *Irvin v. Hazelton*, 37 Pa. St. 465. See also *INTEREST*, vol. 11, p. 394. And see *Kintner v. State*, 3 Ind. 86; *Johnston v. Atlantic, etc., R. Co.*, 43 N. H. 410.

In *Dowell v. Griswold*, 5 Sawy. (U. S.) 23, it was held that when an action was brought upon an interest-bearing claim, and there was a verdict for the plaintiff and the defendant delayed the giving of judgment by a motion for a new trial or otherwise, the plaintiff was entitled to legal interest from the date of the rendition of the verdict to the time of giving judgment.

The rule of the supreme court of *Connecticut* in this connection, regarding motions for new trials, is, in substance, that where execution is stayed by reason of reserving a case on motion for a new trial, if the judgment be not reversed, interest should be added to the judgment from the time it was stayed. See *Rules of Practice*, Supreme Court of Errors, 18 Conn. 575; *Weed v. Weed*, 25 Conn. 494.

In *Buckman v. Davis*, 28 Pa. St. 211, an award was filed May 17, 1856, and judgment rendered upon it at the December term of the same year and the execution issued for judgment with interest from the date of the filing of the award, the court saying: "The award made pursuant to the submission would, like a verdict, draw interest from the date of filing its entry." The contrary doctrine seems to have been announced by the supreme court in *Kelsey v. Murphy*, 30 Pa. St. 340, but Judge Strong,

delivering the opinion of the court in the subsequent case of *Irvin v. Hazelton*, 37 Pa. St. 465, reviewed the decision of the court in *Kelsey v. Murphy*, 30 Pa. St. 340, and said that it decided nothing more than that a judgment entered, generally operated from the day of its entry, so as to carry interest only from that time; holding in the case before the court, that it was not error in the court to enter judgment with interest from the date of the verdict.

In *Sproat v. Cutler*, Wright (Ohio) 157, interest was allowed upon an award from its date, when the court said: "If it were the verdict of a jury and judgment had been delayed, we should allow interest, if asked."

In *Kintner v. State*, 3 Ind. 86, the court supported a judgment upon an award including interest from the date of the award to the date of the judgment. In this case it appears, in the opinion of the court, "The judgment is objected to because interest was added to the amount of the sum awarded. This objection is untenable. If a judgment had been rendered at the time the award was made, interest would have accrued upon it as a matter of course. The defendants, therefore, are not injured by the addition of such interest, while it would be clearly unjust to the plaintiff to compel him to lose the interest on his debt during the delay caused by the motion of the defendants." While, as is seen, this was the case of an award, and not a verdict, the reasoning would apply with the same force, it would seem, in the latter case.

In *Bowman v. Wilson*, 2 McCrary (U. S.) 394, one of the distributees of a fund paid into court, claimed interest on his portion from the time of the payment into court, including the time when it was held awaiting the settlement of a controversy among several claimants. This was denied him, the court holding that interest was never allowed where, by the order of a court of competent jurisdiction, or by the interposition of the law, or the act of the creditor, payment of the debt has been suspended, during the time of such suspension. This is not in point, but by analogy it might seem to oppose the allowance of interest where the rendition of judgment on a verdict has been

application to interest-bearing claims,¹ though this has not been invariably the case.² At present, statutes in not a few jurisdictions provide for interest on all verdicts for the recovery of money, whatever may have been the nature of the action.³

delayed by the hand of the law, even though its aid were invoked by the defendant, as where a stay was granted upon motion for a new trial. We hardly think such a construction would be given, however, nor would it be warranted.

1. *Blickenstaff v. Perrin*, 27 Ind. 527; *Vredenberg v. Hallett*, 1 Johns. Cas. (N. Y.) 27; *Williams v. Smith*, 2 Cai. (N. Y.) 253; 2 Am. Dec. 209; *Henning v. Van Tyne*, 19 Wend. (N. Y.) 101; *Lord v. New York*, 3 Hill (N. Y.) 426; *Bull v. Ketchum*, 2 Den. (N. Y.) 189; *People v. Gaine*, 1 Johns. (N. Y.) 343. And see *Bonner v. Copley*, 15 La. Ann. 504.

In *People v. Gaine*, 1 Johns. (N. Y.) 343, which was decided before the enactment of any statutes on the subject, the court said: "In all cases where the defendant applies to set aside the verdict and thereby delays the plaintiff, interest is awarded; provided the cause of action be such as to carry interest."

In the case of *Blickenstaff v. Perrin*, 27 Ind. 527, the plaintiff, in an action for slander, recovered a verdict during the April term of the court. A motion in arrest was made and overruled. Judgment was not rendered until the succeeding term, in October, when interest was computed on the verdict from its date to the date of the judgment. The supreme court held that, as the recovery was not upon an interest-bearing claim, and as the statute did not authorize interest on verdicts, that interest in such cases could not be allowed before judgment. The rule on this subject in *Indiana* has been changed by statute. See *Indiana* Statute set forth in note below.

2. One Gibson sued the Cincinnati Enquirer for libel, recovering a verdict for \$3,875 damages, on which verdict judgment was delayed by a motion for a new trial on the part of the defendants. It was held, on overruling the motion for a new trial, that the plaintiff was entitled to judgment for the amount of the verdict and interest from the day it was rendered. *Gibson v. Cincinnati Enquirer*, 2 Flip. (U. S.) 88. Swing, J., delivering the opinion of the court in this case, said: "Upon the

question of the right of the plaintiff to interest upon the verdict, I can see no difference between a verdict in an action for tort and a verdict in actions sounding in contract—the verdict in either case fixes the amount due at the time of its rendition, and that amount the party is entitled to have paid him as of that date, and if payment is delayed him by the act of the defendant, he ought to have interest. Such has been the practice of this court and such seems to be the current of authority." See also *Griffith v. Baltimore*, etc., R. Co., 44 Fed. Rep. 574.

In an action of tort, interest should not be allowed on the verdict from the first day of the term, but from the rendition of the verdict. "It is true," says Swing, J., in *Gibson v. Cincinnati Enquirer*, 2 Flip. (U. S.) 88, "that for many purposes, the term of the court is regarded as but one day, and in all cases sounding in contract, interest in this court is computed to the first day of the term only, so that it is entirely proper that the verdicts and judgments should draw interest from the first day of the term; but in actions of tort such as the present, where the jury were not directed to compute the amount which they should find in favor of the plaintiff as of the first day of the term, the judgment should have been for the amount of the verdict with interest from the day of its rendition."

3. The *California* Code of Civil Procedure, § 1035, provides that the clerk must include in the judgment entered up by him, any interest on the verdict, or decision of the court from the time it was rendered or made. *Alpers v. Schammel*, 75 Cal. 590; *Golden Gate Mill, etc., Co. v. Joshua Hendy Mach. Works*, 82 Cal. 184.

Idaho Code, § 4914, provides that "the clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court from the time it was rendered or made."

Illinois Stat., ch. 74, par. 3, provides that, when judgment is entered upon any award, report, or verdict, interest shall be computed at the rate aforesaid (six per cent. per annum), from the time when

g. ALLOWANCE OF INTEREST BY VERDICT. — Anciently, in *England*, the laws strictly prohibited the taking of interest under any circumstances whatsoever, making no distinction between interest and usury, and holding the practice of requiring either to be reprehensive.¹ With the progress of civilization, however, and the growth of commercial affairs, came the more enlightened view that where there was a contract, express or implied, providing for interest, where its allowance could be presumed from the usage of trade, as upon mercantile instruments, or from the established course of dealing between the parties, interest might be recovered as a matter of right, and not subject to the discretion of the court or jury;² and also, where the defendant had been

made or rendered to the time of rendering judgment upon the same.

In the *Indiana* Rev. Stat. (1881), § 5199, it is provided that "interest on judgments for money hereafter rendered shall be from the date of the return of the verdict or finding of the court, until the same shall be satisfied, at the rate per cent. agreed upon by the parties in the original contract, not exceeding six per cent.; and if there be no contract by the parties, at the rate of \$6 per year on \$100."

In *Maine* Rev. Stat. (1883), ch. 77, § 54, it is provided that "interest shall be allowed on verdicts, and amounts reported by referees to be due, from the time of finding such verdicts, or making such reports, to the time of judgment." *Cary v. Whitney*, 50 Me. 337; *Hervey v. Bangs*, 53 Me. 514.

New York Code Civ. Proc., § 1235, provides that, "Where final judgment is rendered for a sum of money, awarded by a verdict, report, or decision, interest upon the sum awarded, from the time when the verdict was rendered, or the report or decision was made, to the time of entering judgment, must be computed by the clerk, added to the sum awarded, and included in the amount of the judgment." See *Munsell v. Flood*, 46 N. Y. Super. Ct. 134.

Virginia Code, § 3390, provides that if a verdict be rendered, which does not allow interest, the sum thereby found shall bear interest from its date, and judgment shall be entered accordingly. *Fry v. Leslie*, 87 Va. 269. In this case it was held that judgment on a verdict for damages must allow interest from the date of the verdict, when interest is not given by the verdict. See also *Lewis v. Arnold*, 13 Gratt. (Va.) 454. See also codes of other states.

1. Thus, we are told, "it seemeth formerly to have been the general opinion that no action could be maintained on any promise to pay any kind of use for the forbearance of money, because, withall, such contracts are thought to be unlawful and consequently void." *Hawkins P. L. C. R.*, ch. 82, § 6. See also Anonymous Case in *Hard* 420. *Appleton, C. J.*, in *Copen v. Crowell*, 66 Me. 282. See *INTEREST*, vol. 11, p. 379.

2. In *Arnott v. Redfern*, 3 Bing. 353, *Best, C. J.*, states that it appears to him that there are two principles on which interest is given in the English courts; first, where the intent of the parties that interest should be paid can be collected from the terms or nature of the contract; secondly, where the debt has been wrongfully detained from the debtor, and under the second principle, it is immaterial whether the original debt bears interest or not. He further observes, "By our law, interest forms no part of the original debt. It is accorded only by the express terms of the contract, or by implying the engagement to pay interest from the nature of the security or the usage of trade to which the contract relates."

Lord Tenterden, in *Page v. Newman*, 9 B. & C. 378; 17 E. C. L. 399, criticizes this rule which some of the expressions, attributed to the Lord Chief Justice of the Common Pleas in *Arnott v. Redfern*, 3 Bing. 353, would seem to warrant, namely, that interest is due wherever a debt has been wrongfully withheld after the plaintiff has endeavored to obtain payment of it, as this might frequently make it a mooted question at the *nisi prius* whether proper means had been used to obtain payment of the debt, and such as the party ought to have used, which would be productive of great in-

convenience. He continues, "I think that we ought not to depart from the long established rule that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade as in the case of mercantile instruments."

In *Calton v. Bragg*, 15 East 223, Lord Ellenborough, speaking at that time of a period of more than fifty years, said: "During this long course of time, no case has occurred where, upon a mere simple contract of lending, without an agreement for the payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence a contract for interest was to be inferred, has interest been ever given." And in the same case Grose, J., said: "It is the lender's own fault if he do not contract for interest when he advances his money. . . . Why should interest be paid at all without a contract for it? If there be no proof of a contract, it might be given against the intention of the parties at the time of the loan; if they did not then contract for interest, it shows that they did not mean to reserve it."

In *Gordon v. Swan*, 12 East 419, it was held that, though a contract for the sale of goods stipulates a certain day on which payment is to be made, interest does not run upon the sum due from that day. It was contended that interest began to run after the expiration of the period of credit, inasmuch as the giving of a particular day for the payment for the goods sold and delivered, manifested an intention that the debt should be considered liquidated after that period, and made it competent at least for the jury to allow interest. The contract, however, was by the court construed to mean only that the vendee, at all events, should not be called upon for payment until the time given, though still a contract for the sale of goods, and it was held also that the giving of interest should be confined to bills of exchange and such like instruments, and on agreements reserving interest.

In an action for goods bargained and sold, the plaintiff, in support of his demand, introduced a note of the defendant's requesting the plaintiff to furnish to a certain party timber to the value of £30 or thereabouts, for which the plaintiff undertook to be answerable. At

the bottom of the note was written "Credit till Christmas." The verdict was found for the plaintiff which included interest on the sum demanded from the Christmas referred to in the note. The court held the plaintiff to be entitled to interest from the period mentioned in the note. *Mountford v. Willes*, 2 Bos. & P. 337. To this case the reporter subjoins the following note: In a contract for the sale of goods, if a any particular time be limited for the payment of the price, the vendor is entitled to interest on the price from that time.

In *Becher v. Jones*, 11 Rev. Rep. 756, the declaration stated that the plaintiff sold and delivered to the defendant twenty bales of cotton at a certain price, to be paid for at the expiration of four months from such sale and delivery, by giving a bill of exchange to the plaintiff, payable two months after the giving thereof, but that the defendant had not given the bill nor paid for the goods. The question arose whether interest would be allowed for not giving the bill of exchange in payment of the goods sold from the time when the bill, if given, would have become due. Chief Justice Mansfield held the opinion that interest should be allowed in the same manner as if the action had been brought on a bill accepted in payment of the goods.

In *Lee v. Munn*, 8 Taunt. 45, it was held that an auctioneer who had a deposit in his hands for four years could not be compelled to pay interest because the plaintiff had made no demand on him for repayment of the deposit, as there was no contract, either express or implied, no usage, nor was the auctioneer guilty of any wrongful, or willful conduct for which interest might have been given by way of damages.

Lord Mansfield, in *Eddowes v. Hopkins*, 1 Doug. 376, holds, that although by the common law, book debts do not of course carry interest, it may be payable by the usage of the particular branches of trade, or by a special agreement, or, in cases of long delay, under vexatious and oppressive circumstances, if the jury, in their discretion, think proper to allow it.

In an action for money had and received, to recover a sum paid by a third person into the defendant's hands for the plaintiff's use, the plaintiff is not entitled to interest in the absence of any contract, express or implied, to pay interest. *De Barnales v. Fuller*, 2 Campb. 426.

guilty of some act of injustice, fraud or oppression, the plaintiff might recover interest in the discretion of the jury, in this instance not in the form of interest, but of damages.¹ American authorities have always been more liberal in their allowance of this money hire, maintaining that it is but natural justice that he who has the use of another's money should pay interest therefor²—the former diction

Shepherd *v.* Mackreth, 2 H. Bl. 284, was an action brought to recover the amount of the plaintiff's bill, as an attorney, for business done on behalf of the defendant, and a verdict was obtained and judgment entered in the court of the king's bench which, on a writ of error being brought apparently for delay, was affirmed without argument. It was held in this case that interest might be allowed on the affirmance of the judgment. This decision, however, was overruled in Walker *v.* Bayley, 2 Bos. & P. 219, and the court of exchequer chamber, in denying the motion that upon the affirmance of the judgment rendered in an action, the circumstances of which were similar to the case of Shepherd *v.* Mackreth, interest should be allowed, said, that applications of this sort had been frequently made and refused, and that the court in Shepherd *v.* Mackreth did not advert to the circumstance that the action was brought upon an attorney's bill, their attention being directed only to the general question whether interest could be allowed by that court or not. Perhaps, however, the court in Shepherd *v.* Mackreth were induced to allow interest from the fact that the writ of error was prosecuted merely for the sake of delay, which might justify their decision on the principle of allowing interest by way of damages in cases of vexatious delay; which course, it seems, has always been allowable.

1. In Hillhouse *v.* Davis, 1 M. & S. 169, a verdict for interest was allowed on the principle that the defendant had wrongfully withheld the payment of damages found by the jury to be due upon an injury occasioned by the making of the Bristol docks. Le Blanc, Judge, said, in giving judgment in this case: "The jury having given interest, we cannot set the verdict aside without being satisfied that they have done what they are not warranted to do by law, but there is no positive rule of law against their giving interest on a sum ascertained." In this case, it is maintained that, although interest may be

due *ex contractu*, a party may be entitled to damages to the amount of interest, for any unreasonable delay in the payment of what is due under a contract. Arnott *v.* Redfern, 3 Bing. 353; Lee *v.* Munn, 8 Taunt. 45; Eddowes *v.* Hopkins, 1 Doug. 376.

In Eddowes *v.* Hopkins, 1 Doug. 376, Lord Mansfield declared that in cases of long delay, under vexatious and oppressive circumstances, the jury, in their discretion, may allow interest.

Osborn *v.* Hosier, 6 Mod. 167, was an action of debt brought upon a single bill for the payment of 230 pounds on demand. Upon *non est factum* being pleaded, one of the subscribing witnesses was produced and gave full evidence of the enrolling and delivery of the bond, and, on the other side, was produced a person of the same name and surname, with the other subscribing witness, who acknowledged that the hand was very like his, but that it was not his, that he never knew either of the parties nor the other witness, nor could the other witness say that he was the man. Both their reputations being made good in proof, Holt, C. J., ordered that they should write their names, and thereupon left it to the jury who found for the plaintiff. The Chief Justice at the same time ruled that though the bond did not carry interest, yet directed the jury to give interest in damages.

2. Where an executor, before the final settlement of an estate, lent \$100 to a distributee upon the promise of the said distributee to refund it, if it turned out that he was not entitled to it, interest should be allowed the executor on this sum, in the final adjustment of his accounts. It developed that the distributee was not entitled to this sum, and the court held that the executor should be allowed interest on it from the day of the advancements to the day of the settlement. "It is but natural justice," said the court, "that he who has the use of another's money should pay interest for it." Jones *v.* Williams, 2 Call (Va.) 102.

A home defendant, decreed to pay

that "interest follows the principal as the shadow the substance," having attained the dignity of a legal maxim.¹ In the *United States*,

money to the creditor of an absent defendant, will be compelled to pay interest unless he make a legal tender, or bring the money into court. Where the defendant did neither, but kept the money in his own hands, he must pay interest upon it. *Ross v. Austin*, 4 Hen. & M. (Va.) 502.

A certain sum of money was in the hands of Jacob Crevor, the defendant, high sheriff of Cumberland county, as the proceeds of an execution sale made by him. This amount was claimed by the commonwealth as well as by several private individuals. It was agreed between the counsel for the state and the other claimants, that the money should be placed in bank by the sheriff to await the decision of the rights of the claimants. The sum was accordingly deposited, but several days later it was withdrawn by the sheriff, contrary to the agreement, and remained in his possession and use until the decision of the court declared the state to be the rightful owner of the money. The state, in requiring an account from the sheriff, demanded interest from the time the money was taken out of the bank by him, which claim was resisted on the ground that interest should not be paid, because the commonwealth could have suffered no damage, in view of the fact that an agreement had been made to allow the money to remain in bank; the court, in the decision of this question, observed: "The defendant's argument is founded on a fallacy; . . . the commonwealth has suffered damage by the non-payment of the money to which it was entitled, and which was in the hands of the defendant; and the defendant does not pretend that interest would not have been recoverable, if the agreement was out of the question. But the defendant has broken the agreement; and it would be extraordinary indeed, if thereby this case should be strengthened. It is considered as settled that interest shall be recovered against a man who receives the money of another, and holds it against his consent. Now in this case, the defendant has withheld and no doubt made use of the money belonging to the commonwealth, not only against the consent of the attorney general, but in direct violation of his agreement to leave it in bank. He has destroyed

the security which he agreed to give, thereby depriving the commonwealth of all benefit of the agreement, yet insists that he himself is to take advantage of it. This is contrary to all ideas of justice. The commonwealth has the same right to interest as if the agreement had never been made." *Com. v. Crevor*, 3 Binn. (Pa.) 121.

In *Hunter v. Spotswood*, 1 Wash. (Va.) 145, one Herndon, who was sheriff, had received money under the judgment of a county court in the case of an attachment, and was made to pay interest because he had not paid it over and taken security as he had been directed by the county court, but had kept it.

On the trial of *Rapelie v. Emory*, 1 Dall. (Pa.) 349, it was ruled by Shippen, President, that where one man had received money belonging to another, and had retained it without the consent of the owner, it was to be considered in the same light as money lent, and ought to carry interest.

Where a cause had been referred, the report of the referee was set aside, because interest had been allowed on an unsettled account. *Williams v. Craig*, 1 Dall. (Pa.) 313.

1. In *Crawford v. Willing*, 4 Dall. (Pa.) 286, the court held that interest was recoverable on the ascertained balance of an account from the time of the demand of payment. "Whatever may have been the doctrine of the court in former times," said the court, "we have traced, with pleasure, the progress of improvement upon the subject of interest, to the honest and rational rule, that, wherever one man retains the money of another, against his declared will, the legal compensation for the use of the money shall be charged and allowed. From the single case of a promissory note, the instances in which interest is allowed, have been so multiplied year after year that few remain to be added to the legal catalogue. In *Pennsylvania*, the policy is older and perhaps more extensive than it is in *England*. There, even at this day, an action must be brought upon a judgment in order to recover interest upon it; but here an act of assembly, so early as the year 1715, made interest an inseparable incident of the judgment.

the jury are bound to allow interest where the contract, express or implied, stipulates for it, or where sanctioned by usage, either commercial or growing out of the course of dealing between the parties;¹ and it may be allowed in the *United States*, as in *England*, in the name of damages, when the conduct of the defendant deserves rebuke.²

For my own part I am prepared to say that interest ought to follow the debt, as the shadow does the substance. Even in the case of goods sold and delivered, I would think it right to allow interest as soon as the express or implied term of credit had elapsed, and a demand of payment made."

1. Where there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of interest as to the payment of the principal sum. Neither the courts nor the juries ever had arbitrary power to dispense with the provisions of such contract either in whole or in part. *Roberts v. Cocke*, 28 Gratt. (Va.) 207; *Chapman v. Shepherd*, 24 Gratt. (Va.) 377.

Where the amount of the plaintiff's demand is liquidated in writing and a day appointed for the payment, the jury have no discretion to refuse interest on the debt from that day. *Siter v. Robinson*, 2 Bailey (S. Car.) 274.

Arrears of Rent.—The court, in *Bantleon v. Smith*, 2 Binn. (Pa.) 146; 4 Am. Dec. 430, expressly evades a decision of the question whether interest is recoverable on arrears of rent or not. "The old proprietaries of *Pennsylvania*," said the court, "were in the habit of receiving the arrears of their rent without interest. . . . Hence, many persons have supposed that in no instance can interest on rents be recoverable. When this point is brought forward, the court will decide it; at present, they only declare that they consider it as fully open to discussion."

The right to interest on back rent may also be denied on the ground of uncertainty of the amount. *Newton v. Wilson*, 3 Hen. & M. (Va.) 491.

It is maintained, in *Newton v. Wilson*, 3 Hen. & M. (Va.) 470, that interest is not recoverable by way of damages in an action of debt for rent in arrear, where there has been no vexatious or oppressive conduct on the part of the debtor.

In *Graham v. Woodson*, 2 Call (Va.) 249, interest was allowed by the high court of chancery, and the case affirmed

by the supreme court of appeals; but there the court evidently proceeded upon the ground of the unconscientious conduct on the part of the defendant, *Graham*, in endeavoring to defeat the rent altogether.

Distress for Rent.—Where distress is brought for rent in arrear, it must be for the precise sum due. Interest cannot be added to the arrears. Hence, the proprietor of a ground rent in fee, who obtained a judgment for the arrears, upon the sale of the land, is entitled to be paid the whole of the rent in arrear out of the proceeds of such sale in preference to older judgments, but inasmuch as he resorts to the land for payment, no interest upon the arrears is recovered. *Bantleon v. Smith*, 2 Binn. (Pa.) 145; 4 Am. Dec. 430.

In *Lansing v. Rattoone*, 6 Johns. (N. Y.) 43, the court maintained the same position in the following words: "Interest cannot be demanded on the arrears of rent when the party proceeds by distress. It has now become, as Baron Gilbert says, in the nature of an execution rather than a distress, in the general sense of the word; and it would lead to abuse and oppression, if the party was to determine for himself when he was entitled to interest, and to proceed in this way to recover it." See also *Braithwaite v. Cooksey*, 1 H. Bl. 465.

2. Maritime Torts.—Where loss is sustained to the cargo of a vessel by collision or other tort, the jury may allow interest by way of damages added to the value of the property itself at the time of the collision. *The Mary J. Vaughan v. The Steamboat Telegraph*, 2 Ben. (U. S.) 47; *Murray v. The Charming Betsy*, 2 Cranch (U. S.) 64; *Maley v. Shattuck*, 3 Cranch (U. S.) 458; *The Schooner "Lively"*, 1 Gall. (U. S.) 315; *Del Col. v. Arnold*, 3 Dall. (U. S.) 333; *The Anna Maria*, 2 Wheat. (U. S.) 327; *The Amiable Nancy*, 3 Wheat. (U. S.) 546.

Interest Against Executors.—Interest will be allowed against executors on a debt lost by their negligence. Where executors failed to collect a debt due to their testator by bond

under penalty, the debtor being good for the money at the death of the testator and continuing solvent for fourteen years, when the debtor failed, the executors were, under the then existing law in *Virginia*, chargeable with principal and interest thereon up to the time of the failure of said debtor, but not with any interest accruing since said failure. *Chapman v. Shepherd*, 24 Gratt. (Va.) 383. In this last case, the appellants did not deny the liability of the executors for the principal of the bond, but they insisted that they were not chargeable with interest, upon the ground that interest being simply in the nature of damages awarded for the detention of the debt, it could not be known whether the executors, had they sued, would have succeeded in the recovery of any portion of it, and the charge upon the fiduciary, for the amount of the debt lost by his default, is in the nature of damages assessed for the failure to do his duty, and upon general principle that one ought not be compelled to pay damages for delay to pay damages. The court held, however, that the executor himself would not be compelled to pay interest upon the amount with which he was chargeable, but that he was chargeable with interest which he failed to collect as well as with the principal.

In actions of trover, replevin, and trespass, interest on the value of property unlawfully taken or converted is allowed, by way of damages, for the purpose of complete indemnity to the party injured, and, on the same principle, interest on the value of property lost or destroyed by the wrongful or negligent act of another may be included in the damages. *Parrott v. Knickerbocker, etc., Ice Co.*, 46 N. Y. 361.

As to the allowance of interest by way of damages in cases of trover, see *Macon, etc., R. Co. v. Meador*, 67 Ga. 672.

In *Beals v. Guernsey*, 8 Johns. (N. Y.) 446; 5 Am. Dec. 348, which was an action of trespass against a sheriff for illegally taking the plaintiff's personal property, interest was allowed by way of damages. The court said: "The plaintiff ought not to be deprived of his property, for years, without compensation for the loss of the use of it, and the jury had a discretion to allow interest in this case as damages. It has been allowed in actions of trover, and the

same rule applies in trespass, when brought for the recovery of property."

In *Wood v. Robbins*, 11 Mass. 504; 6 Am. Dec. 182, the defendant had fraudulently obtained possession of the plaintiff's money. Putnam, J., after reviewing most of the authorities, said: "There may be cases where interest should not be allowed, as where the defendant was a mere stakeholder, ready to pay the money to the party entitled, but when the defendant has fraudulently obtained possession of the plaintiff's money or wrongfully detained it, he must be charged with interest."

Discretionary with Jury.—In an action for breach of a contract for the delivery of tea of a specified value, the court said that interest was a question generally in the discretion of the jury. *Gilpins v. Consequa, Pet. (C. C.)* 85; *Willings v. Consequa, Pet. (C. C.)* 172.

In *Duryee v. New York*, 96 N. Y. 477, Ruger, C. J., in delivering the opinion of the court, observed: "It is well settled that in an action of tort like this, to recover even unliquidated damages, the allowance of interest, by way of damages, is within the discretion of the jury." See also *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498.

In general, in actions *ex delicto*, it is within the discretion of the jury whether to allow interest by way of damages or not. *Walrath v. Redfield*, 18 N. Y. 457.

Erroneous Charge as to Discretion.—Where the court charged the jury that they might give interest or not as they chose, the judgment should not be reversed even if the charge was erroneous, unless the jury did give interest. *Noe v. Hodges*, 5 Humph. (Tenn.) 103.

Money Received by Mistake.—The testator, Flowers, entered into an agreement with one Jacobs for the sale of certain land, and soon after this, Flowers died and Jacobs paid the purchase-money to his executors. The will, however, which appointed these executors was afterward set aside, having been obtained by undue influence, and Jacobs filed a claim to recover the money that he had thus improperly paid. The question submitted to the court was, whether under these circumstances interest should be allowed. It was held that it was not recoverable where money had been received and paid by mistake, and neither fraud nor surprise was imputed to either party. *Jacobs v. Adams*, 1 Dall. (Pa.) 52.

In actions to recover damages for the non-performance of a contract, the most usual and reasonable standard of compensation which the jury can adopt is interest on the value of the property contracted to be delivered, or the services which should have been performed from the time of the default.¹ The chief difference on the subject of the allowance of interest, between the judicial policies of the states of the Union and *England*, except where the state legislatures have intervened, seems to be the tendency of American courts to more readily imply a promise to pay interest from the terms of the contract itself, or from usage.² In neither country can

Action on Replevin Bond.—In an action of debt on a replevin bond, the measure of damages must depend on the value of the goods where the amount is more than they are worth, but if the value of the goods be more than the rent in arrear for which the original action was brought, then the rent due is the true measure of damages in such case, and no interest is recoverable in either case, as the condition of the bond is only to return the goods. *Hart v. Tobias*, 2 Bay (S. Car.) 408.

1. Interest as a Standard of Damages.—In *Talbot v. Bedford*, Cooke (Tenn.) 447, Overton, J., in delivering the opinion of the court, used the following language: "Whenever agreements will admit of it, we have perceived a laudable disposition in the courts of justice to substitute certainty for uncertainty, in relation to compensation for the non-execution of contracts. Ordinary interest, as such, or in the form of damages, seems to have been wisely adopted as the principle of this substitution. . . . When a man who has contracted to deliver or convey property, or to perform services, fails to do so, the law will presume that the person with whom the contract was made, would have derived a benefit from the performance of such contract, equivalent to the interest of the money which represents its value."

So, upon the contract to allow an overseer 1,200 pounds of cotton on the first day of January for his year's services, interest should be allowed upon the value of the cotton from the time fixed for its delivery. *Ryan v. Baldrick*, 3 McCord (S. Car.) 498. See also *Davis v. Richardson*, 1 Bay (S. Car.) 105; *Atkinson v. Scott*, 1 Bay (S. Car.) 307; *Wigg v. Garden*, 1 Bay (S. Car.) 351.

On the trial of an action, brought against the defendant for the breach of a

contract to deliver a certain number of hogs, the court told the jury that they might give interest by way of damages, or not, as they might think proper, although the plaintiff would not be entitled to interest as interest. In such a case as this, the supreme court held that there was no objection to the rules estimating the damages and fixing the amount of the verdict by the sum the jury thought the plaintiff was entitled to at the time the contract was broken and interest on that amount added together. *Noe v. Hodges*, 5 Humph. (Tenn.) 103.

Contracts for the Payment of Money.—It is an established rule, in the absence of any special damage, that in actions for the breach of a contract for the payment of money, the measure of damages shall be the legal interest on the money for the time it is withheld. *Beatty, J.*, in *Cox v. Smith*, 1 Nev. 171; 90 Am. Dec. 476; *McLane v. Abrams*, 2 Nev. 199.

2. Thus, in *Pease v. Barber*, 3 Cai. (N. Y.) 266, it was held that interest may be recovered on an account for money had and received, against the express decision of the English Common Bench in *Walker v. Constable*, 1 Bos. & P. 307, and *Tappenden v. Randall*, 2 Bos. & P. 467.

In the absence of an express agreement for the payment of interest, on obligations for the payment of a certain sum of money on demand or at a given day, interest on the principal sum from the time it becomes payable is a legal incident of the debt, the right to it being founded on the presumed intention of the parties. *Chapman v. Shepherd*, 24 Gratt. (Va.) 377. Judge Staples, in delivering the opinion of the court in this case, speaking of the defenses which may be made to the recovery of interest on such obligations as have been just mentioned, said: "It is true that the debtor may sometimes,

the jury allow interest on running or open accounts in the absence of an agreement, express or implied, to pay such interest,¹ nor is it

under peculiar circumstances, avoid the payment of interest; but these are matters of defense, the burden of which is upon himself in all cases. They are offered to show that the obligation to pay the interest has been discharged, and not that it did not originally exist. If no valid ground of defense is shown, the judgment is as certainly rendered for the interest as for the principal. In contracts of the character just mentioned, it is apparent, therefore, that interest is not given as damages at the discretion of the court or the jury, but as an incident of the debt which the court has no discretion to refuse.

If it appears to have been the uniform practice of a merchant to charge interest after a certain time, and such practice was known to the debtor, an agreement to pay interest in accordance with such practice is implied. *Reab v. McAlister*, 8 Wend. (N. Y.) 109; *Esterly v. Cole*, 1 Barb. (N. Y.) 235.

Whether this custom of charging interest after a certain interval of credit is known to the debtor, is a question of fact depending either on positive facts, or on circumstances from which knowledge may be inferred, and the existence of such custom and the debtor's knowledge of it, are to be decided by the jury. *Esterly v. Cole*, 1 Barb. (N. Y.) 235.

In *Tennessee*, there is a statute to the effect that all debts evidenced by the usual instruments of writing by which the debtor undertakes to pay a money demand, or liquidated and settled by the sign manual of the debtor, shall bear interest. *Brady v. Clark*, 12 Lea (Tenn.) 323. See also *Hepburn v. Dundas*, 13 Gratt. (Va.) 219; *Virginia Code* (1887), § 3390.

A distinction between written and oral contracts has always been made with regard to interest, it seeming to be implied from the breach of a written promise to pay money on a given day, that the party in default will pay interest, but that same implication does not arise from the breach of an oral contract. *Ryan v. Baldrick*, 3 McCord (S. Car.) 498. See also *Gordon v. Swan*, 2 Campb. 429n.

1. *Calton v. Bragg*, 15 East 223; *South v. Leavy, Hard.* (Ky.) 527; *Trotter v. Grant*, 2 Wend. (N. Y.) 413; *Wood v. Hickok*, 2 Wend. (N. Y.) 501;

Esterly v. Cole, 1 Barb. (N. Y.) 235; *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36; *Holmes v. Rankin*, 17 Barb. (N. Y.) 454; *Van Beuren v. Van Gaasbeck*, 4 Cow. (N. Y.) 496; *Smith v. Velie*, 60 N. Y. 106; *Newell v. Griswold*, 6 Johns. (N. Y.) 45; *Chase v. Union Stone Co.*, 63 How Pr. (N. Y. C. Pl.) 336; *Liottard v. Graves*, 3 Cai. (N. Y.) 226; *Reid v. Rensselaer Glass Factory*, 3 Cow. (N. Y.) 387; *Skirving v. Stobo*, 2 Bay (S. Car.) 233.

In an action of assumpsit for use and occupation of a house, the jury assessed a sum for the annual rent of the house in question, but allowed no interest on the different sums so fixed for the rent, after the expiration of each year. A motion for a new trial was made on the ground that interest was recoverable on each year's rent after it became due. This motion was denied, and on appeal, the judges, after hearing the arguments, refused the motion, observing that this was an unliquidated demand, and no express promise to pay the interest after the end of each year was proved; that it was a matter sounding entirely in damages, which were not ascertained until the finding of the jury, and that too on a *quantum meruit*; and that no interest is recoverable on open or book accounts. *Skirving v. Stobo*, 2 Bay (S. Car.) 233.

Leavy exhibited his bill against *South* for a discovery and rectification of a mistake which had been made in a certain account by crediting the defendant, *South*, twice with the same sum of forty dollars. The defendant failed to appear though served with process and a copy of the bill, and upon the bill alone taken *pro confesso* the court entered a decree for the sum of forty dollars with interest until paid. *South* prosecuted a writ of error, assigning as error that the decree was erroneous as to the interest. The supreme court held the principle to be well settled that interest is not to be allowed on unliquidated accounts for goods sold and delivered, and hence reversed the decree. *South v. Leavy, Hard.* (Ky.) 527.

Where there has been a running account unliquidated between the parties, no balance struck, and nothing in their course of dealing from which an intent or agreement to allow interest can be inferred, it is not a case in which

recoverable on uncertain amounts, or unliquidated demands.¹ In the application of this rule, the *New York* courts seem to have gone a step further than other jurisdictions, holding that, though the

interest can be allowed. *Newell v. Griswold*, 6 Johns. (N. Y.) 45.

In *Smith v. Velie*, 60 N. Y. 106, the case showing that the accounts between the parties were open and unliquidated, it was held that interest should not be allowed upon the balance ultimately found due upon such account.

In *Liotard v. Graves*, 3 Cai. (N. Y.) 234, it was held by all the judges that interest is recoverable upon money paid or advanced from the date of its advancement, but upon an account for goods sold, no interest is recoverable, unless there be evidence of an agreement to pay it, until a liquidation of the account takes place. *Newell v. Griswold*, 6 Johns. (N. Y.) 45, also decides this latter point.

1. "The general rule has been uniformly understood to be, that interest is not recoverable on unliquidated damages or for an uncertain demand." Per Welles, J., in *Holmes v. Rankin*, 17 Barb. (N. Y.) 456. See *Reid v. Rensselaer Glass Factory*, 3 Cow. (N. Y.) 387; *Kane v. Smith*, 12 Johns. (N. Y.) 156.

An action on the case was brought for the breach of a contract as to the quality of certain tea for the delivery of which the contract provided, whereupon it was held to be not agreeable to legal principles to allow interest on unliquidated and contested claims sounding so much in damages. *Gilpins v. Consequa*, Pet. (C. C.) 85; *Willings v. Consequa*, Pet. (C. C.) 172; *Yonqua v. Nixon*, Pet. (C. C.) 224.

Board and Lodging.—Interest is not recoverable upon an unliquidated demand for board and lodging. *Holmes v. Rankin*, 17 Barb. (N. Y.) 454.

Damages in Trespass.—The damages assessed in an action of trespass *quare clausum fregit* do not bear interest until after they have been ascertained by verdict and judgment. Then, the judgment merging the damages will bear interest from the day of its rendition. Where the verdict gave a particular sum as the amount of the damages, and allowed interest from a certain day, it was held that all that was said in reference to interest should have been rejected as surplusage, and judgment rendered for the sum ascertained as damages. *Glidden v. Street*, 68 Ala. 600.

In *Henry v. Risk*, 1 Dall. (Pa.) 265, a question which arose for consideration was, whether interest should be allowed on a certain account for goods, wares, and merchandise, sold by the plaintiff's testator to the defendants, on which the defendants had paid the net amount without any notice that interest would be charged, or any agreement upon either party to pay it. The supreme court held that the current practice of the courts of *England* in such cases disallows the charge of interest, and that the practice in *Pennsylvania* had been regulated by the same principles.

However, in *Crawford v. Willing*, 4 Dall. (Pa.) 286, Smith, J., declared that the authority of this case, laying down the rule that interest was not payable for goods sold and delivered, had been overruled.

In an action for fraud and deceit in the sale of a slave, the declaration charged that the defendant sold the slave to the plaintiff for a fair price, knowing the slave to be in bad health at the time and fraudulently concealing the fact from the plaintiff. The verdict found by the jury was: "We, of the jury, find the defendant guilty of the trespass in the declaration mentioned, and we assess the plaintiff's damages by reason thereof, to \$400, and we allow on the said damages interest from the 21st of September, 1824, till paid." On this verdict judgment was given pursuant to its terms, and the defendant appealed. In regard to the interest allowed, the supreme court held: "This interest, if the action had been founded on contract, might have been given, but being founded wholly and clearly in tort, is unquestionably erroneous." *Brugh v. Shanks*, 5 Leigh (Va.) 598. In this case, the interest was rejected as mere surplusage.

More recently, in *Virginia*, a statute has been enacted, in terms allowing the jury to give interest on damages for tort. *Hepburn v. Dundas*, 13 Gratt. (Va.) 219.

A recovery of interest must depend very much on the circumstances of the case. *Pease v. Barber*, 3 Cai. (N. Y.) 266. But the general rule is, that it is not allowable on an unliquidated, open, or mutual account, until such account is stated by the parties, or at least ren-

amount due the plaintiff for work done or goods sold, or the amount to which the plaintiff may be entitled, is entirely uncertain and unliquidated, yet if the sum can be made certain by mere computation, or even by reference to variable market values, interest may as reasonably be recovered on the amount so obtained as if it had been originally fixed;¹ and in the same state, interest is sometimes allowed on the ground that the debtor is in default for not having taken the requisite steps to ascertain the extent of his indebtedness, although the amount neither has been nor can be readily ascertained.² Where the recovery of interest depends

dered by one party to the other, which is construed a liquidation if assented to, or if not objected to within a reasonable time. The only exceptions are, first, where an express agreement to pay interest has been made and proved; second, where an intent to pay interest can be inferred from the course of dealing between the parties or the particular custom of the trade or place; or, third, where there has been fraudulent conduct or a vexatious detention of the debt. *Borret v. Goodere*, 1 Dick. 428; *Liotard v. Graves*, 3 Cai. (N. Y.) 226; *Anonymous*, 1 Johns. (N. Y.) 315; *Newell v. Griswold*, 6 Johns. (N. Y.) 45; *Holliday v. Marshall*, 7 Johns. (N. Y.) 211; *Kane v. Smith*, 12 Johns. (N. Y.) 156; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 601; *Selleck v. French*, 1 Conn. 32; *Williams v. Craig*, 1 Dall. (U. S.) 313; *McConnico v. Curzen*, 2 Call. (Va.) 358; 1 Am. Dec. 540.

1. In *Van Rensselaer v. Jewett*, 2 N. Y. 135; 51 Am. Dec. 275, a debtor was in default for not delivering property or rendering services in pursuance of his contract, and the question arose as to the allowance of interest from the time of the default. The court held that notwithstanding the payment was not to be made in money, nor was a specified sum to be paid in any other way, and notwithstanding the fact that the damages were unliquidated and there was no agreement for interest, that interest was recoverable. "It was decided in 1806," said the court, "without assigning any reason for the judgment, that interest was not recoverable in a case of this kind (*Van Rensselaer v. Platner*, 1 Johns. (N. Y.) 276). But since that time, the supreme court has deliberately held, on three several occasions, including the present one, that interest is recoverable in such a case." Lush

v. Druse, 4 Wend. (N. Y.) 313; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643.

The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him, and the most reasonable indemnity, though it may be sometimes more, can never be less, than the specified amount of money or the value of the property or services at the time they should have been paid, or rendered with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought in all such cases to recover interest in addition to the debt, by way of damages. This is, nevertheless, true, though the amount of the debt can be ascertained only by an inquiry concerning the value of the property or the services. But when the value can be ascertained, and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if a like sum had been payable in money.

In *McMahon v. New York, etc., R. Co.*, 20 N. Y. 463, the court, in referring to *Van Rensselaer v. Jewett*, 2 N. Y. 135, said that the doctrine there laid down went as far as it was reasonable and proper to go in that direction, and that as long as the courts confine themselves to the principles of that case, they are not without a rule which it is possible to apply, as the rule itself is definite, and the only uncertainty which it introduces is that which necessarily attends the settling of market rates and prices.

2. The case of *McMahon v. New*

not on the terms of the contract, and hence is not recoverable as interest, but rather as damages for the unjust detention of the plaintiff's funds, the defendant may exonerate himself from the imputation of such alleged wrongful detention, by proving that a tender has been made by him of the full amount which was justly due, and declined by the plaintiff.¹ It has also been maintained that the plaintiff, by his own indolence or inactivity, may forfeit his right to this interest by way of damages.²

Rate After Maturity.—Where a promissory note, or other contract for the payment of money, bears interest from a certain date, at a rate not unlawful, but different from the legal rate, it has been made a question, whether after maturity the conventional rate or the legal rate may be recovered. This question has been resolved differently in different jurisdictions, the authorities only agreeing to the extent that, where the intention of the parties can be gathered from the terms of the instrument, such intention, within legal bounds, must be allowed to control,³—the point about which there is conflict arising in the absence of all contract, express or implied, for the payment of interest after maturity. In this contingency, interest is only recoverable in the

York, etc., R. Co., 20 N. Y. 463, illustrates the reasonableness of such a rule. Here, the action was brought to recover for work performed and materials furnished by the plaintiff, under a contract providing that the work should be executed under the direction and constant supervision of the engineer of the company, by whose measurements and calculations the quantity and amount of the work performed should be determined. In this case, the court held that whether the engineer by whom the work was to be measured was to be regarded in law in respect to that duty as the agent of both parties, or of the defendants only, he was in the general employment of the defendants and ready to obey their behests; if they had done their duty by causing him to make an accurate estimate of the work, the amount of the claim would have been so ascertained as to have carried interest. Perhaps they ought not to be considered as in default until they were requested by the contractor to have the estimate made, because it was as much the contractor's duty to request to have it done as it was theirs to direct the engineer to do it. Interest, therefore, if allowed upon this principle, should be computed only from the time of the refusal by the defendants, when called upon, either to cause a final estimate to be made, or to correct one which had been already made.

1. *Delaware Ins. Co. v. Delaunie*, 3 Binn. (Pa.) 295; but, as this case also holds, where the plaintiff insists on too much, and the defendant offers too little, there is then the necessity for a suit, and there being no reason to suppose that the defendant has not made use of the money, he should be chargeable with interest.

2. In *Skipwith v. Clinch*, 2 Call (Va.) 257, the court stated that the plaintiff was not entitled to interest on the rents, although the defendant had been in default for nearly 20 years, because, if it was certain, then the plaintiff might have distrained, and therefore should not have lain by and suffered the rent to accumulate, and if it was uncertain, assuredly interest is not demandable. See also *Cooke v. Wise*, 3 Hen. & M. (Va.) 470.

3. *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Vaughan v. Kennan*, 38 Ark. 114; *Casteel v. Walker*, 40 Ark. 117; 48 Am. Rep. 5; *Seymour v. Continental L. Ins. Co.*, 44 Conn. 300; 26 Am. Rep. 469; *Capen v. Crowell*, 66 Me. 282; *Eaton v. Boissonnault*, 67 Me. 540; 24 Am. Rep. 521; *Paine v. Caswell*, 68 Me. 80; 28 Am. Rep. 21; *Lash v. Lambert*, 15 Minn. 416; 2 Am. Rep. 142; *Pearce v. Hennessy*, 10 R. I. 223; *Sharp v. Lee*, 14 S. Car. 341; *Mobley v. Davega*, 16 S. Car. 73; 42 Am. Rep. 632; *Maner v. Wilson*, 16 S. Car. 470; *Miller v. Hall*, 18 S. Car. 141.

nature of damages,¹ some judicatures maintaining that the standard to be adopted is the one established by law, and others, the one indicated by the preëxisting contract of the parties for interest until maturity. If the agreed rate, though not unlawful, is higher than the legal rate, and the intent of the parties as to the rate to be borne after maturity cannot be gathered from the contract, the weight of authority inclines to the substitution of the legal rate after maturity² (or rather interest, as damages, according to this standard), though a not inconsiderable number of cases hold

1. Swayne, J., in *Holden v. Trust Co.*, 100 U. S. 72; *Fisher v. Bidwell*, 27 Conn. 363; *Hinman, J.*, in *Beckwith v. Hartford, etc.*, R. Co., 29 Conn. 268; 76 Am. Dec. 599; *Hubbard v. Callahan*, 42 Conn. 524; 19 Am. Rep. 564; *First Ecclesiastical Soc. v. Loomis*, 42 Conn. 570; *Shaw v. Rigby*, 84 Ind. 375; 43 Am. Rep. 96; *Kerr v. Haverstick*, 94 Ind. 178; *Ayer v. Tilden*, 15 Gray (Mass.) 178; 77 Am. Dec. 355; *Union Sav. Inst. v. Boston*, 129 Mass. 82; 37 Am. Rep. 305; *Eaton v. Boissonnault*, 67 Me. 540; 24 Am. Rep. 52; *Paine v. Caswell*, 68 Me. 80; 28 Am. Rep. 21; *McLane v. Abrams*, 2 Nev. 199; *Pearce v. Hennessy*, 10 R. I. 223; *Cook v. Fowler, L. R.*, 7 H. L. 27; *Price v. Great Western R. Co.*, 16 M. & W. 244; *Keene v. Keene*, 3 C. B. N. S. 144; *Byles on Bills* (4 Am. ed.), side page, 240. But see remarks of Campbell, C. J., in *Meaders v. Gray*, 60 Miss. 400; 45 Am. Rep. 414.

2. *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. (U. S.) 170; *Holden v. Trust Co.*, 100 (U. S.) 72; *Newton v. Kennerly*, 31 Ark. 626; 25 Am. Rep. 592; *Pettigrew v. Summers*, 32 Ark. 571; *Woodruff v. Webb*, 32 Ark. 613; *Gardner v. Barnett*, 36 Ark. 476; *Vaughan v. Kennan*, 38 Ark. 114; *Casteel v. Walker*, 40 Ark. 117; 48 Am. Rep. 5; *First Ecclesiastical Soc. v. Loomis*, 42 Conn. 570; *Robinson v. Kinney*, 2 Kan. 184; *Searle v. Adams*, 3 Kan. 513; 89 Am. Dec. 539; *Duran v. Ayer*, 67 Me. 145; *Eaton v. Boissonnault*, 67 Me. 540; 24 Am. Rep. 24; *Paine v. Caswell*, 68 Me. 80; 28 Am. Rep. 21; *Macomber v. Dunham*, 8 Wend. (N. Y.) 550; *Ludwick v. Huntzinger*, 5 W. & S. (Pa.) 51; *Pearce v. Hennessy*, 10 R. I. 223; *Langston v. South Carolina R. Co.*, 2 S. Car. 248; *Briggs v. Win-smith*, 10 S. Car. 133; 30 Am. Rep. 46; *Maner v. Wilson*, 16 S. Car. 470; *Mobley v. Davega*, 16 S. Car. 73; 42

Am. Rep. 632; *Miller v. Hall*, 18 S. Car. 141; *Thatcher v. Massey*, 20 S. Car. 542.

The rule applied by the Supreme Court of the *United States*, in such cases, has been to give the conventional rate up to the maturity of the contract, and thereafter, the rate prescribed by law, where the parties themselves have fixed no rate. *Holden v. Freedman's Sav., etc., Co.*, 100 U. S. 72; *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. (U. S.) 170.

"But," says Mr. Justice Swayne, in delivering the opinion of the court, in *Holden v. Freedman's Sav., etc., Co.*, 100 U. S. 72, "where a different rule has been established it governs, of course, in that locality. The question is always one of local law;" accordingly, the same court, in *Ohio v. Frank*, 103 U. S. 697, confirmed the ruling of the supreme court of *Illinois*, holding that bonds bearing interest at the rate of ten per cent. per annum, from date, with no stipulation for interest after maturity, continued to bear the same rate as long as they remained unpaid. See also *Cromwell v. Sac County*, 96 U. S. 51, in which the *Iowa* practice was followed.

In *Holden v. Freedman's Sav., etc., Co.*, 100 U. S. 72, it was also declared. "If payment be not made when the money becomes due, there is a breach of the contract and the creditor is entitled to damages. Where none have been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy enough to say so; in the absence of a stipulation, such an intendment cannot be inferred."

Brewster v. Wakefield, 22 How. (U.

S.) 118, was an action on certain promissory notes, bearing interest, at a stipulated rate until maturity, much in excess of the rate prescribed by law in the absence of contract, though not illegal. These notes were not paid when due and suit was brought. The court held that as the contracts were entirely silent as to interest, if the notes should not be punctually paid, the creditor was entitled to interest after that time only by operation of law and not by any provision in the contract; hence that the court below committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law in the absence of contract.

In *Pearce v. Hennessy*, 10 R. I. 223, the court held that if the parties to a note or other contract for the payment of money intend that it shall carry interest at the stipulated rate until paid, they can easily entitle themselves to have their intention carried into effect by a stipulation that the note or contract shall carry interest at the reserved rate until paid, and in the absence of such stipulation, the agreed rate of interest is to be recovered up to the maturity of the contract, and after that the rate prescribed by law.

The note sued on in *Newton v. Kennerly*, 31 Ark. 620; 25 Am. Rep. 592, bearing interest at the rate of sixteen per cent. per annum from date, omitted the words "until paid." The court held that there was a contract for the rate of interest expressed in the note until its maturity only, and after that it bore no more than the legal rate of interest.

In *Vaughan v. Kennan*, 38 Ark. 114, Justice Eakin said: "This court has repeatedly decided that, in the case of notes bearing contractual interest, when there is no agreement as to interest after maturity, they can only bear interest at the ordinary legal rate after due. It is a matter of intention to be gathered from the direct expressions, or the plain import of the instrument."

In *First Ecclesiastical Soc. v. Loomis*, 42 Conn. 570, the rule was adopted of assessing damages for the retention of money by the defendant beyond the contract time, at the statute rate of interest existing during the time he has elected thus to retain the money. In reaching this conclusion, the court considered the case of *Fisher v. Bidwell*, 27 Conn. 363, in which the question presented was whether, in an action

for the amount of a sum of money loaned for a particular time on a contract for usurious interest, the plaintiff was entitled as damages to interest computed according to the legal rate on such sum, from the time when the credit for the loan expired, to the rendition of the judgment. The court said that in such a case, if the money was not paid when it became due by the terms of the contract, damages would be recoverable by the lender, for the injury to him consequent on its detention after the time when it was agreed to be paid, and such damages would be estimated according to the established legal rate of interest; that rate, though arbitrary, furnishing a general, convenient, and uniform rule for determining the amount of such damages. True, in *Beckwith v. Hartford, etc.*, R. Co., 29 Conn. 268; 76 Am. Dec. 599, damages for the detention of borrowed money beyond the contract period, were assessed at the rate of seven per cent. per annum, when the legal rate was only six per cent., but here the legislature had legalized, in advance, seven per cent. as the rate of interest upon that particular loan at the request of the borrowers; and in *Adams v. Way*, 33 Conn. 419, the damages were assessed at twelve per cent. but upon the ground that this was the statute rate of interest in *Wisconsin*, where the loan was made. In *Hubbard v. Callahan*, 42 Conn. 524; 19 Am. Rep. 564, the plaintiff was allowed to recover fifteen per cent. per annum, but in this case it was recoverable as interest, and strictly in accordance with the terms of the contract, which provided for that rate after maturity.

Duran v. Ayer, 67 Me. 145, was an action instituted on a promissory note bearing twelve per cent. interest, with no agreement for interest after maturity. It was decided that under such circumstances, after the maturity of the note, the plaintiff is entitled to interest only by operation of law, and for this reason he must content himself with the legally established rate.

In *Paine v. Caswell*, 68 Me. 80; 28 Am. Rep. 21, the form of the note sued on was "for value received, we promise to pay John S. Paine, or order, \$500 and interest at ten per cent." Justice Peters, for the court, said: "The question is, for how long a period can the plaintiff require that rate of interest to be paid? Where a note is payable at a certain time with interest exceeding six

that the contract rate only should be regarded.¹ Where the conventional rate is lower than the legal rate, the same rule applies, and in the absence of circumstances tending to show that the parties

per cent., no more than six per cent. is recoverable after maturity, there being no stipulation for interest after that time. In such case, interest after the note is due is allowed only by way of damages." *Eaton v. Boissonnault*, 67 Me. 540; 24 Am. Rep. 52.

The court laid down the rule, in *Langston v. South Carolina R. Co.*, 2 S. Car. 248, that if the debt bears a rate of interest on its face higher or lower than that prescribed by law as the legal rate, where the parties do not contract that it shall be the rate after the debt becomes due, the interest fixed by law attaches on it for the detention of the principal sum. This rule is approved in *Mobley v. Davega*, 16 S. Car. 73; 42 Am. Rep. 632.

In *South Carolina*, under the act of 1866, to entitle one to interest in excess of the legal rate, after the obligation became due, it was necessary that an agreement for such rate should appear in the original contract in writing. *Maner v. Wilson*, 16 S. Car. 470.

The rate of interest which should prevail after the maturity of a contract, is purely a matter of agreement—a question of intention as disclosed by the contract itself—and it is only in the absence of a contract that the legal rate prevails. *Mobley v. Davega*, 16 S. Car. 73; 42 Am. Rep. 632; *Miller v. Hall*, 18 S. Car. 141.

A note for advances payable at a future date, secured by an agricultural lien which provides for interest on the advances at the rate of two and one-half per cent. a month, from the date of each advance, after maturity bears legal interest only. *Thatcher v. Massey*, 20 S. Car. 542.

Note Payable on Demand.—Notwithstanding the fact that, where a note is payable on time with interest exceeding the legal rate, no more than the legal rate is recoverable after maturity, in the absence of an agreement for interest after that time, where a note is payable on demand, interest at the conventional rate is recoverable, for it could not be the intention of the parties that interest at the rate named was to be payable until the note was due and not afterwards, as there was no interval of time after the note was delivered before it became due; it was due *instantly*. *Paine*

v. Caswell, 68 Me. 80; 28 Am. Rep. 21. To the same effect, see *Seymour v. Continental L. Ins. Co.*, 44 Conn. 300; 26 Am. Rep. 469.

Note Payable One Day After Date.—In *Casteel v. Walker*, 40 Ark. 117; 48 Am. Rep. 5, such a note was held to be, so far as the presumed intent of the parties was concerned, practically the same as a note payable on demand, and hence bore the conventional rate after maturity.

1. *Cook v. Fowler*, L. R., 7 H. L. 27; *Morgan v. Jones*, 8 Exch. 620; *Keene v. Keene*, 3 C. B. N. S. 144; *Price v. Great Western R. Co.*, 16 M. & W. 244; *Burgess v. Southbridge Sav. Bank*, 2 Fed. Rep. 501; *Kohler v. Smith*, 2 Cal. 597; *Guy v. Franklin*, 5 Cal. 416; *Corcoran v. Doll*, 32 Cal. 82; *Etnyre v. McDaniel*, 28 Ill. 201; *Phinney v. Baldwin*, 16 Ill. 108; 61 Am. Dec. 62; *Heardt v. Rhodes*, 66 Ill. 351; *Wernwag v. Mothershead*, 3 Blackf. (Ind.) 401; *Bates v. Wernwag*, 4 Blackf. (Ind.) 272; *Kilgore v. Powers*, 5 Blackf. (Ind.) 22; *Billingsly v. Calhoon*, 7 Ind. 184; *Kimmell v. Burns*, 84 Ind. 370; *Shaw v. Rigby*, 84 Ind. 375; 43 Am. Rep. 96; *Hume v. Mazelin*, 84 Ind. 574; *Kerr v. Haverstick*, 94 Ind. 178; *Parvin v. Hoopes*, Morr. (Iowa) 294; *Hand v. Armstrong*, 18 Iowa 324; *Thompson v. Pickel*, 20 Iowa 490; *Gray v. Briscoe*, 6 Bush (Ky.) 687; *Weems v. Ventress*, 14 La. Ann. 267; *Letchford v. Starins*, 16 La. Ann. 252; *Ayer v. Tilden*, 15 Gray (Mass.) 178; 77 Am. Dec. 355; *Brannon v. Hursell*, 112 Mass. 63; *Union Sav. Inst. v. Boston*, 129 Mass. 82; 37 Am. Rep. 305; *Warner v. Juft*, 38 Mich. 662; *Lash v. Lambert*, 15 Minn. 416; 2 Am. Rep. 142; *Pitzer v. Barrett*, 34 Mo. 84; *Broadway Sav. Bank v. Forbes*, 79 Mo. 226; *Meaders v. Gray*, 60 Miss. 400; *Tishimingo Sav. Inst. v. Buchanan*, 60 Miss. 496; *Kellogg v. Lavender*, 15 Neb. 256; 48 Am. Rep. 339; *Cox v. Smith*, 1 Nev. 171; 90 Am. Dec. 476; *McLane v. Abrams*, 2 Nev. 199; *Wilson v. Marsh*, 13 N. J. Eq. 289; *Monnett v. Sturges*, 25 Ohio St. 384; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Hydraulic Co. v. Chatfield*, 38 Ohio St. 575; *Overton v. Bolton*, 9 Heisk. (Tenn.) 762; 24 Am. Rep. 367; *Pridger v. Andrews*, 7 Tex. 461; *Hopkins v. Crittenden*, 10

Tex. 188; Cecil v. Hicks, 29 Gratt. (Va.) 1; 26 Am. Rep. 391; Spencer v. Maxfield, 16 Wis. 178; Pruyn v. Milwaukee, 18 Wis. 367; Spaulding v. Lord, 19 Wis. 533; Wiswell v. Baxter, 20 Wis. 680.

Although the cases are numerous which hold loosely that, in the absence of contract for interest *after* maturity, damages should be allowed according to the standard established by the contract of the parties up to maturity, a close examination of the circumstances surrounding the various transactions, will very generally reveal something from which an *understanding* or *probable intent* may be implied that the contract rate of interest shall prevail as long as the principal is retained. In such cases, the recovery is, more exactly, in pursuance of the implied contract, the courts in their opinions frequently remarking "Surely the parties could not have intended," etc., and allowing recovery consistent with the reasonable and probable intent of the parties, according to the rate expressly agreed upon up to maturity, and yet, *as damages*. Indeed, in some jurisdictions, the practice seems to be founded on a case in which interest was inaccurately allowed as damages, when it should have been recovered as interest. When the above authorities are reviewed in this light, it will be seen that comparatively few adjudications sustain the proposition, pure and simple, that in the *absence of all agreement, express or implied*, for interest *after* maturity, that damages shall be allowed according to the terms of the expired contract. Of course, however, this does not apply to jurisdictions regulated by express legislative enactments on the subject.

In Union Sav. Inst. v. Boston, 129 Mass. 82; 37 Am. Rep. 305, Gray, C. J., in delivering the opinion of the court, said: "When a written agreement is made, as authorized by the statute, to pay a greater rate of interest yearly than six per cent., the intention of the contract and effect of the statute appear to us to be that the creditor shall receive the stipulated rate of interest so long as the debtor has the use of the principal; and that, in an action upon the contract, the creditor shall recover interest at that rate, not merely until the time when the principal is agreed to be paid to him, but until it is actually paid, or his claim for principal and interest judicially established."

In an action for the balance of an account, one of the items of which consisted of a bill of exchange for two hundred pounds bearing ten per cent. interest, which had been dishonored, the case was referred to a master who gave, in the shape of damages, interest at the rate which the bond had borne up to maturity. For the defendant it was insisted that the master had erroneously allowed ten per cent., five per cent. being all the plaintiff was entitled to recover, and it was moved that the case be referred back to the master for reconsideration on this point. However, Chief Justice Cockburn said: "I see no ground for referring this case back to the master as prayed. He has, as he well might, given in the shape of damages the rate of interest the parties themselves had contracted for; I think he has done quite right." Crowder, J., in the same case, said: "I am of the same opinion. The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as the value of the money. Keene v. Keene, 3 C. B. N. S. 144.

In Cook v. Fowler, L. R., 7 H. L. 27, the Lord Chancellor said that according to the well-known principle which has been referred to in many cases: "Any claim in the nature of a claim for interest, after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which the claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest; but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages."

In Morgan v. Jones, 8 Exch. 620, the owner of a vessel mortgaged it as security for a debt, with the proviso for a redemption on payment of the principal and interest at the rate of ten per cent. in six months, but without any provision as to the payment of interest after that time. The principal not being paid then, it was held that the mortgagee was entitled to interest at the same rate until payment.

The case of Spencer v. Maxfield, 16

Wis. 178, held that where the party has given an obligation for the payment of a sum of money by a certain day, with interest at a higher rate than that prescribed by law, in the absence of an agreement on the subject, such high rate of interest will continue, not only until the money is due, but so long as it is held or detained by the debtor, though such obligation is entirely silent as to the rate of interest after its maturity.

The court, in *McLane v. Abrams*, 2 Nev. 199, regards the statutory rate of interest, as damages prescribed by law for the withholding of money, but holds that, for the withholding of money which bears a higher rate of interest by contract, a corresponding damage is allowed. This higher rate continues until payment, although the contract itself does not provide for such higher rate after the maturity of the debt. And in *Kellogg v. Lavender*, 15 Neb. 256; 48 Am. Rep. 339, it is decided that where the rate of interest is fixed in the note, it governs not only until maturity, but until payment, unless otherwise expressed.

In *Union Sav. Inst. v. Boston*, 129 Mass. 82; 37 Am. Rep. 305, it was held that interest after the maturity of a note, and after the breach of a contract to pay, is recoverable not strictly as part of the debt, but rather as damages, ordinarily to be measured according to the intention manifested by the contract and by the standard thereby established. The court cited *Price v. Great Western R. Co.*, 16 M. & W. 244; and the language of Willes, J., in *Keene v. Keene*, 3 C. B. N. S. 144.

In the case of *Kilgore v. Powers*, 5 Blackf. (Ind.) 22, the contract rate after maturity, and without express stipulation for a rate of interest after maturity, was allowed to be recovered, as the court expressed it, "conformably to the terms of the contract;" but whether this refers to an implied contract after maturity, or the expired preexisting contract is not stated. This case was subsequently overruled by *Burns v. Anderson*, 68 Ind. 202, but the rule as set up in this latter case has been in turn repudiated, and the doctrine declared in *Kilgore v. Powers*, recognized and re-established. Thus in *Shaw v. Rigby*, 84 Ind. 375; 43 Am. Rep. 96, the court referred with approval to the above case, and held that where an interest-bearing promissory note contains no provision for any rate of inter-

est after its maturity, in a suit upon such note, interest after maturity will be recoverable as damages, and the proper measure of such damages will be the rate of interest borne by the note before its maturity. The force of this decision as an authority on the rate of interest to be recovered, in the absence of contract, is somewhat lessened on account of the fact that the note on which suit was brought was in form, "One day after date we promise to pay, etc., with ten per cent. interest, value received." Hence, it might be contended that, while there was no express agreement that this rate should be borne after maturity, it was unlikely that it was the intention, or expectation of the parties to the note, that it should be paid at maturity, or that it should bear the agreed rate of interest for one single day, and for all time thereafter the legal rate, which was scarcely more than half the rate contracted to be paid.

However, in *Kimmell v. Burns*, 84 Ind. 370, the note sued on was subject to no such construction, and yet the same conclusion was reached.

And in *Hume v. Mazelin*, 84 Ind. 574, it was held that a note specifying a certain rate of interest before maturity, continued to draw interest at the same rate until paid or merged in a judgment.

In *Meaders v. Gray*, 60 Miss. 400; 45 Am. Rep. 414, Campbell, C. J., in delivering the opinion of the court used the following language: "We are satisfied that to hold that the stipulated rate of interest shall not govern after the maturity of the contract, would be to disregard the plain intent and common understanding of men in their contracts, to pervert the unmistakable meaning of their language, and unjustly to pay defaulting debtors a premium not contemplated by them, for their default. It is probable that no man ever promised a stipulated rate of interest who did not well understand that it was to be borne as long as the debt remained unpaid. When the contracting parties stipulate for a rate of interest different from that prescribed by law, their agreement, if not prohibited by the statute, fixes the incident of the debt which attends it as long as it exists, and to say the rate fixed by statute, to govern in the absence of a conventional rate shall at any time supersede the rate agreed on, is to do violence to the right of parties to make their agree-

to the contract intended to abide by the contract rate until the debt was actually paid,¹ the better doctrine is believed to be that

ment a substitute for the statutory rate." See also *Tishimingo Sav. Institution v. Buchanan*, 60 Miss. 496.

In *Phinney v. Baldwin*, 16 Ill. 108; 61 Am. Dec. 62, an action of assumpsit was brought on the following note: "Thirty days after date, I promise to pay to the order of Harvey Phinney \$200, for value received, with interest from date, at five per cent. per month." This note was dated in *California*, and on the trial the plaintiff introduced the note described in the declaration, and proved that the rate contracted for was not illegal in *California*. The court of appeals, considering the case upon a writ of error, said: "There can be no reasonable doubt as to the true construction of the instrument. It is a promise to pay \$200 in thirty days, and interest thereon at the rate of five per cent. per month. The note continues to bear that rate of interest so long as the principal remains unpaid. The maker undertakes to pay interest at that rate while he withholds payment of the principal; that is the compensation which the payee is to receive for forbearance of the money. We entertain no doubt that this was the real understanding of the parties. It was not their intention that this rate of interest should cease on the maturity of the note, and that it should thereafter only bear interest at the rate of ten per cent. per annum. Such a construction could not be put upon the instrument without doing violence to the intention of the parties. It would, in effect, be making a new contract for them. They evidently contemplated but one rate of interest, and that rate was to continue until payment should be made. The plaintiff was entitled to recover interest on the principal at the rate of sixty per cent. per annum from the date of the note until the rendition of judgment."

In *Spencer v. Maxfield*, 16 Wis. 178, and *Pruyn v. Milwaukee*, 18 Wis. 367, it was held that where a party gives his obligation for the payment of a sum of money by a certain day, with interest at a higher rate than that allowed by law, in the absence of any agreement on the subject, it will be presumed that the parties intended that such higher rate should be paid as long as the money is withheld from one to whom

it is due and payable, but where the contract rate was for interest until the time when the principal sum should become due and payable, no such presumption can arise, unless the parties expressly stipulate that the principal sum shall draw interest at the conventional rate only until the time when it becomes payable, thus negating the idea that it shall bear interest at the contract rate after the period of credit. See also *Spaulding v. Lord*, 19 Wis. 533.

Iowa.—Under the law of *Iowa*, though the legal rate of interest is six per cent., municipal bonds in that state bearing ten per cent. interest before maturity, bear the same rate afterward, and the judgment rendered on such bonds bears interest on the amount due on the bonds at the same rate which the bonds themselves bear. *Cromwell v. Sac County*, 96 U. S. 51; *Hand v. Armstrong*, 18 Iowa 324; *Thompson v. Pickel*, 20 Iowa 490.

Minnesota.—Under the *Minnesota* Stat. (1860), contracts for the payment of money, containing a stipulation for the payment of interest clearly expressed therein, shall bear the same rate of interest after maturity as before, provided the rate agreed to be paid does not exceed twelve per cent. *Lash v. Lambert*, 15 Minn. 416; 2 Am. Rep. 142.

Nevada.—Under legislative enactments in *Nevada*, the courts have held that the same rate of interest, agreed upon by the parties to be paid before the debt becomes due, shall be allowed after its maturity instead of the legal rate. *McLane v. Abrams*, 2 Nev. 199.

Ohio.—In *Ohio*, under the act of May 4th, 1869, parties may stipulate in a note for any rate of interest not exceeding eight per cent. per annum, and such note after maturity will continue to bear the stipulated rate until payment without an express agreement to that effect. *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621. See also *Hydraulic Co. v. Chatfield*, 38 Ohio St. 575.

The court, in *Monnett v. Sturges*, 25 Ohio St. 384, held that a contract to pay a specified rate of interest, is a contract to pay interest at that rate until the principal debt is paid, and not merely for the time the note is to run.

1. Thus, in *Bell v. New York*, 10

the debtor, if he retains the principal after maturity, may be required to pay the rate of interest established by law.¹

Paige (N. Y.) 69, it was held that where a mortgagee has contracted to receive a particular rate of interest, less than the legal rate, during the time of credit agreed upon by the party, if he allows the mortgagee to remain in possession after the mortgage money becomes due and payable, it is reasonable to presume that the understanding of the parties is, that interest shall continue at the same rate until the creditor thinks proper to demand payment.

In *Van Beuren v. Van Gaasbeck*, 4 Cow. (N. Y.) 496, the defendant owed the plaintiff's testator a bond bearing six per cent. interest which had remained unpaid for more than thirty years. This, it would seem, might reasonably be construed into acquiescence on the part of the creditor, or his executor, to allow the retention of the money on the terms of the contract. Another point may also be considered; the bond was dated Feb. 6th, 1786 and conditioned to pay \$712.50 Feb. 6th, 1787, with interest at and after the rate of six per cent. per annum. It is not altogether clear what the words "at and after," which appear in the bond, mean, but from the opinion of the court, it may be inferred that the judicial construction was that six per cent., the rate mentioned, was to prevail as well after as until maturity, for Woodworth, J., in delivering the opinion of the court, observed: "The bond is conditioned for the payment of interest at the rate of six per cent. per annum. The contract of the parties is not confined to the time limited for the payment of the principal, but is general and continues until the contract ceases to operate." The language of the judge, however, is almost as uncertain in meaning as the language of the contract which he seeks to construe.

1. In *Ludwick v. Huntzinger*, 5 W. & S. (Pa.) 51, the stipulated interest on a bond was less than the legal rate, and interest was allowed subsequent to the maturity at the legal rate. The supreme court of *Pennsylvania*, in its opinion, said that until the bond became payable the agreement of the parties regulated the allowance of interest and its rate; but after that the law interposes not only to allow, but to regulate, the rate of interest that could be re-

covered against the defendant for, and on account of, his illegal detention of the debt from the plaintiff.

In *U. S. Bank v. Chapin*, 9 Wend. (N. Y.) 471, it was held that a bank, which is by law limited to six per cent. interest upon all discounts, is entitled to recover at the rate of seven per cent. from the time the debt becomes due; that the clause in the charter limiting the rate of interest to six per cent. referred only to discounts in the ordinary course of business, and the contract with the bank having been broken, the defendant was liable to pay the rate of interest fixed by the *lex loci* from the time the debt became due.

For a case similar to *United States Bank v. Chapin*, see *Kitchen v. Mobile Bank*, 14 Ala. 233.

The case of *Henderson v. Laurens*, 2 Desaus. (S. Car.) 170, was an action brought against an executor to recover a legacy which the testator directed to bear five per cent. interest and be paid at a certain time. The time for its payment having passed, the court decreed that it should be paid with interest at five per cent. up to the time when it was due, and seven per cent., which was the legal rate, thereafter.

Absence of All Contract.—It will be observed that the following cases, maintaining that where the contract rate is lower than the legal rate, the former shall prevail after maturity, do not consider the question in the *absence of all contract* on the subject but regard the agreement as still subsisting. Naturally, as long as the contract itself endures, interest according to its terms may be recovered; but where a party has obtained money for a limited time at a reduced rate of interest, to clothe him with the power to violate his obligation, and to retain indefinitely a benefit to which he is entitled by his contract only until a specified day, would be a subversion of all principles of right and justice. A defaulter would thus be enabled to derive an advantage from his own wrong, and a premium paid delinquent debtors for every violation of their contracts. In this connection see the dictum of Cole, J., in *Spencer v. Maxfield*, 16 Wis. 181.

The conclusion of the court in *Lawrence v. Leake*, etc., *Orphan House*, 2

h. RECEPTION OF VERDICT.—As is indicated by the definition of a verdict, when the decision of the jury on the issues submitted to them is reached, it is to be reported to the court.

(1) *By Whom Received.*—The reception of the verdict is the function of the judge who presided at the trial of the cause, and it has been held that it may not be delegated by him to another; that neither the clerk of the court, nor an attorney, though with the consent of the parties concerned, can lawfully preside at the reception of the result of the jury's deliberations.¹ These asser-

Den. (N. Y.) 577, seems to involve, though perhaps indirectly, this principle. In this case it appeared that a certain sum of money had been lent at a rate less than the legal rate of interest, with no definite agreement as to when the money should be repaid. After the death of the lender and demand of the debt by his representatives, the borrower denied the debt and attempted to conceal evidence of the indebtedness. It was held that this fraudulent conduct on the part of the borrower was a breach of the contract allowing him the benefit of the reduced rate of interest, and that from the time of the denial and attempted concealment, legal interest became due.

The first case to be noticed, in its contradiction of the doctrine laid down in the text, is *Andrews v. Keeler*, 19 Hun (N. Y.) 87. This was an appeal from a judgment in favor of the plaintiff entered upon the report of a referee. An item of the plaintiff's account was a promissory note made by the defendant, dated April 17th, 1867, payable ten days after date with interest at six per cent., and the referee, after deducting some admitted credits, allowed the plaintiff interest on the balance at the rate of seven per cent. from the date of the maturity of the note. The court held that this was error, and that the true rule is, that interest should be computed according to the rate prescribed by the contract until it ceases to operate by being merged in a judgment.

Precisely the same rule was proclaimed in the case of *Miller v. Burroughs*, 4 Johns. Ch. (N. Y.) 436. This was a suit on a bond for which a mortgage was taken as security, the interest was expressed to be at the rate of six per cent. per annum, and the day of payment having passed, the bond and mortgage became forfeited and the question was, whether the plaintiffs

were not entitled to the legal rate, seven per cent., from the time of the forfeiture. The court held that interest must be decreed according to the contract of the parties until the contract ceased to operate by being merged in the decree.

The case of *New York L. Ins., etc., Co. v. Manning*, 3 Sandf. Ch. (N. Y.) 58, has been sometimes cited to sustain the proposition that the contract rate, where it is less than the legal rate, prevails after maturity. This case certainly does not directly determine the point, and as far as analogy is concerned, it would seem rather to support the doctrine in favor of the substitution of the legal rate. The sole question in this case was: Can a mortgagor, whose mortgage secured six per cent. interest and who, after the money became due, regularly paid interest at the rate of seven per cent., afterwards claim to have the excess which he has paid beyond six per cent., applied to extinguish the principal; and it was answered in the negative.

See also *Sullivan v. Fosdick*, 10 Hun (N. Y.) 181, where the court cited the above cases to sustain the proposition that "when a contract calls for interest at less than the legal rate, the same rate of interest continues after the debt becomes due, and until judgment."

1. *Willett v. Porter*, 42 Ind. 250; *Britton v. Fox*, 39 Ind. 369; *McClure v. State*, 77 Ind. 287; *Quinn v. State*, 130 Ind. 340; *Wright v. Boon*, 2 Greene (Iowa) 458; *Hinman v. People*, 13 Hun (N. Y.) 266; *Hiller v. English*, 4 Strobh. (S. Car.) 486; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447. And see *Jones v. State*, 97 Ala. 77.

Receiving the verdict is one, if not the most important of the proceedings during the trial. It must be received by the court before which the trial was had, and if not, the verdict is a nullity and not authority for sentence. *Hinman v. People*, 13 Hun (N. Y.) 266.

tions, however, have not remained uncontradicted, it having been declared that proceedings appertaining to the reception of the verdict, being mere matters of practice, are for the courts to regulate in the exercise of a reasonable discretion.¹

Presence of All of Several Judges.—It seems that where the court is composed of several judges, the absence of one will not impair the validity of a verdict received under such circumstances.² Some adjudications qualify this doctrine by maintaining that, unless it is a mere temporary absence, *animo revertendi*, the court is dismembered, the trial abandoned, and a verdict rendered during such disorganized condition is void.³

In *Willett v. Porter*, 42 Ind. 250, the judge, with the consent of the parties, authorized the clerk to preside at the return of the jury to receive the verdict. It was held that a verdict so received was wholly invalid. See also *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447; *Waller v. State*, 40 Ala. 332.

Save in certain statutory cases, the judge has no right to authorize an attorney, in his absence, to hold court or to perform any of his official duties. In *Britton v. Fox*, 39 Ind. 369, a verdict returned under such circumstances was held invalid, and the fact that the defendant's counsel was present made no difference.

Consent of Parties—Effect of.—Though the consent of the parties can cure many errors, illegalities, and omissions, it cannot authorize or legalize a change in the modes of proceeding which the law has prescribed for the government and direction of its legal tribunals. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447. In this case the court of appeals characterized the practice of the circuit court in authorizing the clerk, with consent of the parties, to receive the verdict, in the absence of the judge, as pernicious, and not sanctioned by any authority, legislative or judicial.

1. *Palmer v. Harper*, *Wright* (Ohio) 383.

In *Alabama*, the supreme court in *Sorrelle v. Craig*, 9 Ala. 534, following, as they say, what they "conceive to be the best established practice," allowed the clerk to receive the verdict, and on Sunday.

In *Brown v. State*, 63 Ala. 97, a verdict, by consent of the parties, was returned to the clerk during a brief recess of the court. The attention of the supreme court was not called to this irregularity, and it seems to have been unnoticed by it. The judgment

was attacked by the appellant, among other assignments of error, upon the ground that the defendant had an absolute right to have the jury polled on the reception of the verdict, and that an agreement by counsel to the effect, that the verdict might be returned during a recess of the court, into the hands of the clerk, could not be construed as a waiver of this right. The judgment was not disturbed.

North Carolina.—The supreme court of *North Carolina*, in *Wright v. Hemphill*, 81 N. Car. 33, sanctions the practice of having the clerk receive the verdict. See also *Willoughby v. Threadgill*, 72 N. Car. 438; *Houston v. Potts*, 64 N. Car. 33; *State v. Austin*, 108 N. Car. 780.

2. *Wathan v. Penebaker*, 3 Bibb (Ky.) 99.

The court of appeals, in *Blend v. People*, 41 N. Y. 604, decided that the conviction of the plaintiff in error should be reversed because one of the justices in session left the bench during the trial, and the county judge appointed another justice of the peace to fill his place, and the trial proceeded before the court thus organized. The learned judge, who delivered the opinion of the court, said: "When Elwood abandoned the trial the court was disorganized, so far as this trial was concerned. This is not the case where a member of the court leaves the bench for a few moments intending to return, and does return, but a total abandonment of the trial, in consequence of which one-third of the court is changed."

3. In the case of *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349, it was held that a court of sessions was not disorganized because one of the justices of sessions left the bench during the trial, went to the witness stand and was examined as a witness in the cause.

(2) *When Received*.—The general rule is that the verdict should be returned before the expiration of the term at which the cause is tried.¹ But in this, as in all questions of practice, there is a great diversity of procedure.² It is also maintained that a verdict cannot be received during an adjournment of the court, for while the court is not in session it is incompetent to transact judicial business.³ But this also is controverted.⁴

Folger, J., assigns as a reason why the irregularity of the justice, in leaving the bench and being examined as a witness, did not disorganize the court, "That the justice did not leave the court room while the trial was progressing; he did not abandon the trial; he left the bench for a space intending soon to return to it and did return." The ruling of the last case cited followed that in *Tuttle v. People*, 36 N. Y. 431; and in *People v. Reagle*, 60 Barb. (N. Y.) 527.

1. *Nabors v. State*, 6 Ala. 200; *Ex p. Juneman*, 28 Tex. App. 486; *Harper v. State*, 43 Tex. 431.

Terms of court are those portions of the year set apart by law for the transaction of judicial business, and within which it should be performed. *Horton v. Miller*, 38 Pa. St. 270.

Prolongation of Term.—In the case of *Gregg v. Cooke, Peck* (Tenn.) 82, the circuit judge had prolonged the term of his court beyond the time appointed by law for its continuance. The proceedings were held to be *coram non judice* and void.

The court, in *Archer v. Ross*, 3 Ill. 303, was holding a term in one county, and during the continuance of such regular term, appointed a special term for the same county, to commence on the day appointed by law for the commencement of a term in another county. A judgment rendered in such special term was held to be void and unauthorized. See also *Davis v. Fish*, 1 Greene (Iowa) 406; 68 Am. Dec. 387; *Grable v. State*, 2 Greene (Iowa) 559.

2. A contrary practice seems to prevail in *Wisconsin*, as evidenced by the decision of the court in *State v. Leahy*, 1 Wis. 258.

In *Kentucky*, it has been decided that a verdict rendered after twelve o'clock on Saturday night at the close of a special term, called a week in advance of the regular term, may be received where there is no conflict with the regular terms required to be held by a judge in any other county. This practice is allowed instead of requiring a delay,

since the same judge presides, the same jurisdiction continues, and the venue is identical the following Monday morning, when judgment may be pronounced on such verdict. *Bales v. Com.* (Ky. 1889), 11 S. W. Rep. 470.

3. *In re Green*, 16 Ill. 234; *Deland v. Richardson*, 4 Den. (N. Y.) 95; *Weeks v. Lyon*, 18 Barb. (N. Y.) 530; *Shamokin Coal, etc., Co. v. Mitman*, 3 Pa. St. 379; *Person v. Neigh*, 52 Pa. St. 199.

During Adjournment—Void.—The case of *Shamokin Coal, etc., Co. v. Mitman*, 3 Pa. St. 379, was given to the jury in the morning and the jury retired to deliberate upon their verdict. The court then adjourned until half past two in the afternoon of the same day; during the interval, and between the adjournment and the time for the re-assembling of the court, the judge took his seat upon the bench and received the verdict of the jury which was then entered on the minutes of the court by the prothonotary, in the absence of both the defendant and his counsel. After the entering of the verdict the judge left the bench, and the court met at the time to which it was adjourned in the morning. On appeal, it was held to be a fatal irregularity, and the judgment was reversed.

In *Nebraska*, under similar circumstances, a verdict was declared invalid. *Longfellow v. State*, 10 Neb. 105.

4. **During Adjournment—Valid**.—The case of *Barrett v. State*, 1 Wis. 175, in considering the question how far an adjournment of the court from day to day during the term suspends its functions during the adjournment, arrived at a different conclusion. In this instance the trial commenced on the 29th day of March and continued until about three o'clock the next afternoon, when the jury retired to consider their verdict. At half past six the same evening the court adjourned until half past eight the following morning, and during that interval, about eleven o'clock at night, March 30th, the judge was informed

(a) **Reception on Sunday.**—The great weight of authority, and especially the more recent decisions, seem to be in favor of allowing the return and reception of a verdict on Sunday,¹ though

that the jury had agreed upon their verdict. He then proceeded to the court room, took his seat upon the bench, and in the presence of the prisoner and bystanders, called the jury to receive their verdict, and then discharged them, and they were never called again to affirm or declare their verdict. This verdict was upheld.

The court, in *McIntyre v. People*, 38 Ill. 514, following *In re Green*, 16 Ill. 234, held that a verdict received during adjournment is not invalid. In this case, however, upon which the court, in *McIntyre v. People*, 38 Ill. 514, justifies its conclusion, the adjournment had merely been announced when the judge was informed that the jury had agreed; and it was held that he properly received their verdict. *In re Green* involves the proposition stated in the note below, namely, that an adjournment is an act, not a declaration; and hence, in this case there had been no actual adjournment in legal contemplation.

Statutes Regulating.—In some of the states, whose practice is regulated by Codes of Procedure, provisions are to be found to the effect that while the jury are absent the court may adjourn from time to time as to other business, but it shall be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. Such a regulation has been construed to authorize the reception of a verdict after the court had adjourned for the day. *Temple v. Com.*, 14 Bush (Ky.) 769; 29 Am. Rep. 442; *Territory v. Milligan* (Okla. 1894), 37 Pac. Rep. 1059.

Act of Adjournment.—An adjournment is an act, not a declaration, and until there has been actual separation and departure the act is incomplete, though proclaimed by the crier of the court. *Person v. Neigh*, 52 Pa. St. 199; *Koontz v. Hammond*, 62 Pa. St. 177; *In re Green*, 16 Ill. 234.

The bill of exceptions, in the case of *Blake v. Bayley*, 16 Gray (Mass) 531, stated the following proceedings: "At the usual hour of adjournment in the afternoon the jury were out; and the judge left the bench without having given any verbal order for the adjournment and before the proclamation

therefor was completed, and without having given any order as to the jury who were out, and passed into the adjacent lobby, leaving the intervening doors open. In a moment or two the judge came back into the court room, while the clerk and the other officers of the court remained in their usual places, and, in the presence of the defendant's counsel, recalled and vacated any adjournment that had been made. The jury then came in and the judge directed the verdict to be taken, the defendant's counsel being present and interposing no objection, and the jury rendered and affirmed their verdict." The defendant afterwards moved that the verdict be set aside and a new trial granted, because the verdict was received by the judge and recorded by the clerk after the court had adjourned and while it was not in session. But the judge overruled the motion, "On the ground that courts have a right to recall and vacate proclamations and adjournments as prematurely and inconsiderately made, for the necessary or reasonable transaction of business, so long as no one is thereby prejudiced; and that, under the above circumstances it was impossible that the defendant was prejudiced; and that there was not in fact a substantial adjournment; and that if there was, the presence of the defendant's counsel was tantamount to an assent and a waiver of error." The supreme court, in overruling the exceptions and affirming the judgment, said: "The defendant's counsel being present in the court room when the verdict was returned, and making no objection thereto, waived the irregularity (if any), and the objection is not open to the defendant."

1. *Sorrelle v. Craig*, 9 Ala. 534; *Hodge v. State*, 29 Fla. 500; *Henderson v. Reynolds*, 84 Ga. 159; *People v. Odell*, 1 Dakota Ter. 197; *Corey v. Silcox*, 5 Ind. 370; *Rosser v. McColly*, 9 Ind. 587; *McCorkle v. State*, 14 Ind. 39; *Joy v. State*, 14 Ind. 139; *Jones v. Johnson*, 61 Ind. 257; *Kankakee, etc., R. Co. v. Horan*, 23 Ill. App. 259; *Baxter v. People*, 8 Ill. 386; *Stone v. Bird*, 16 Kan. 488; *Bales v. Com.* (Ky. 1889), 11 S.W. Rep. 470; *Meece v. Com.*, 78 Ky. 586; *State v. Canty*, 41 La. Ann.

not a few adjudications have held such a practice to be erroneous.¹

587; *Cooper v. Cappel*, 29 La. Ann. 213; *True v. Plumley*, 36 Me. 466; *State v. Wilson* (Mo. 1894), 26 S. W. Rep. 357; *Hoghtaling v. Osborn*, 15 Johns. (N. Y.) 119; *Roberts v. Bower*, 5 Hun (N. Y.) 558; *Webber v. Merrill*, 34 N. H. 202; *Van Riper v. Van Riper*, 4 N. J. L. 156; *State v. Ricketts*, 74 N. Car. 187; *State v. Penley*, 107 N. Car. 808; *Territory v. Milligan* (Okla. 1894), 37 Pac. Rep. 1059; *Com. v. Marrow*, 3 Brews. (Pa.) 402; *Huidekoper v. Cotton*, 3 Watts (Pa.) 56; *Hiller v. English*, 4 Strobh. (S. Car.) 486; *Shearman v. State*, 1 Tex. App. 215; 28 Am. Rep. 402; *Powers v. State*, 23 Tex. App. 42; *Huffman v. State*, 28 Tex. App. 174; *Ex p. Juneman*, 28 Tex. App. 486; *Brown v. State*, 32 Tex. Crim. App. 119. See *DAY*, vol. 5, p. 86.

"While we admit," said the court in *Cory v. Silcox*, 5 Ind. 370, "that many cases are to be found in the books deciding that no judicial act can be done on Sunday, and that verdicts returned on that day are void, we are not satisfied that we would be subserving morality, religion, justice, or the spirit of the common law, by following their example as to verdicts. The reason of the rule, making Sunday *dies non juridicus*, was founded in those principles of religion which require a strict observance of that day, and surely that which tends to its non-observance cannot be regarded as being within the reason of the rule. We apprehend that jurors worn out by the laborious investigation of a lengthy case, and unnecessarily pent up together from twelve to twenty-four hours, would be little inclined, while in that condition, to observe the Sabbath day as they should."

In *Stone v. Bird*, 16 Kan. 488, it was decided that where the trial is completed by the introduction of testimony, the arguments of counsel, and the charge of the court, and the case has passed to the jury for consideration before midnight on Saturday, the fact that they do not arrive at, and return a verdict until some time in the early hours on Sunday morning does not vitiate the entire proceedings and compel a retrial.

Solar Time.—The only standard of time in the computation of a day, or the hours of a day, recognized by the law of *Georgia*, is the meridian of the

sun; hence, a verdict rendered Saturday night at two minutes to twelve by railroad time, and twenty minutes after twelve by sun time, is in reality a Sunday verdict, though the court was held by railroad time. It would be absurd to think that the standard of time fixed by persons in a certain line of business could be substituted, at will, by persons in a certain locality, for the standard recognized by the statutes of the state as well as a general law and usage of the country. *Henderson v. Reynolds*, 84 Ga. 159.

1. *Nabors v. State*, 6 Ala. 200; *Bars v. Irvin*, 49 Ga. 436; *Davis v. Fish*, 1 Greene (Iowa) 406; 68 Am. Dec. 387; *Story v. Elliott*, 8 Cow. (N. Y.) 27; 18 Am. Dec. 423; *Butler v. Kelsey*, 15 Johns. (N. Y.) 177; *Shaw v. M'Combs*, 2 Bay (S. Car.) 232; *Harper v. State*, 43 Tex. 431.

"By all authorities," said the court, in *Davis v. Fish*, 1 Greene (Iowa) 406; 48 Am. Dec. 387, "Sunday is represented to be a *dies non juridicus*. It was made so in the year 517 by a canon of the church, and adopted as the law of the land by the Saxon kings of *England*; and having been confirmed by William the Conqueror and Henry II., was fully established as part of the common law. Decisions in the English books are uniform in pronouncing all the judicial proceedings performed on Sunday as unlawful and void. *Swann v. Broome*, 3 Burr. 1595. And they appear to be sustained by almost equal unanimity by the American courts. . . . Such acts (alluding to the reception of verdicts) are clearly judicial and should come under the prevailing salutary rule that all judicial acts done on Sunday are void, unless expressly authorized by statute."

The court, in *Shaw v. M'Combs*, 2 Bay (S. Car.) 232, decided that a verdict rendered on Sunday is void, declaring that it is a well known rule of common law that the Lord's day, commonly called Sunday, is not a day in law *dies dominicus non est dies juridicus*; consequently, all temporal business transacted on that day is null and void, as it is set apart by our holy religion for the worship of the Almighty, and the necessary preparations for that purpose.

In *Butler v. Kelsey*, 15 Johns. (N.

(3) *Where Received*.—The general rule is that the jury must deliver their verdict in open court.¹ In order to comply more readily with this requirement, however, the judge is allowed to select or change the house or room in which the court is held according to the dictates of necessity or convenience.²

Y.) 177, the jury were impaneled on Saturday, and heard the allegations and evidence before twelve o'clock that night. Still it was decided that they could not assess the damages, or deliver their verdict after that hour on Sunday.

Award.—In *Story v. Elliott*, 8 Cow. (N. Y.) 27; 18 Am. Rep. 423, it was declared that an award made on Sunday and all judicial acts are void. See also *Field v. Park*, 20 Johns. (N. Y.) 140.

1. *Harding v. People*, 10 Cal. 387; *Crotty v. Wyatt*, 3 Ill. App. 388; *Rosser v. McColly*, 9 Ind. 589; *Tuhe v. Eber*, 19 Ind. 126; *State v. Faulk*, 30 La. Ann. 831; *Lawrence v. Stearns*, 11 Pick. (Mass.) 500; *Goodwin v. Appleton*, 22 Me. 453; *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195; *Stubbs v. State*, 49 Miss. 716; *Longfellow v. State*, 10 Neb. 107; *Young v. Seymour*, 4 Neb. 86; *Johnson v. Depuy*, 2 N. J. L. 165; *Labar v. Coplin*, 4 N. Y. 547; *Root v. Sherwood*, 6 Johns. (N. Y.) 68; 5 Am. Dec. 191; *Dornick v. Reichenback*, 10 S. & R. (Pa.) 84; *Barrett v. State*, 1 Wis. 175; 3 Black. Com. 377; 4 Black. Com. 360; 1 Chit. Crim. Law 635; 1 Bishop Crim. Prac., § 1001.

In *Johnson v. Depuy*, 2 N. J. L. 165, it appeared to the supreme court from the return of the justice, that the jury wrote down their verdict and delivered the writing to the justice instead of openly pronouncing their verdict. The appellate tribunal declined to recognize such a practice, declaring that there was no lawful verdict but that which was pronounced by "open voice in open court." See also *Anonymous*, 63 Me. 590.

The Massachusetts practice, in trials on indictments for felonies, requires the pronouncement of the verdict in open court by the foreman. *Com. v. Tobin*, 125 Mass. 203; 28 Am. Dec. 220.

During Adjournment.—The reception of a verdict in the court room, in the presence of the officers of the court, the jury, the parties and the bystanders, at eleven o'clock at night, and during a temporary adjournment, was held a sufficient delivery in open court to sustain the validity of the verdict attacked

on that ground. *Barrett v. State*, 1 Wis. 175. In this case it was held that for all general purposes the court is considered in session from the commencement until the close of the term, and that its authority continues over the parties, jurors, officers, etc., as well during a recess, or adjournment for the night, as during its active labors during the day.

Out of Court.—In *Tuhe v. Eber*, 19 Ind. 126, the verdict was received by the judge out of court, and the jury discharged without the consent of the parties, and without opportunity to call the jury. The supreme court reversed the judgment on that ground. *Rosser v. McColly*, 9 Ind. 587, is to the same effect.

2. **Room of Juror.**—In *King v. Faber*, 51 Pa. St. 387, the court adjourned to the room of a sick juror, and a verdict was there rendered. The supreme court resolved that there was no error in the mode of receiving the verdict, as it was "the best the judge could do under the circumstances."

The circumstances surrounding the reception of the verdict, in *Litchfield Bank v. Church*, 29 Conn. 137, were very similar. In this case the court was adjourned to the hotel on account of the illness of one of the jurors, and the jury were impaneled in the room where he was lying, the verdict being taken there. The propriety of this practice being discussed on appeal, the court said: "We know of no law or practice of our courts which is inconsistent with this proceeding. An unavoidable emergency made it necessary. The court was still holden in Litchfield, the place appointed by law, while no precise place in the town is designated by statute. The house or room may be selected or changed, as necessity or convenience may require."

In *Alabama*, however, it has been held, under *Alabama Code*, § 749, requiring the circuit court to be held each year in the county courthouse, that the verdict must be delivered there, and if received by the judge at his hotel, on account of sickness, it is

(4) *Presence of Parties* — (a) *Civil Causes*. — The parties in a civil cause have a right to be present at the reception of the verdict,¹ but if they do not avail themselves of this privilege, the verdict received in their absence is not thereby rendered ineffectual.² In some instances, it has been held that it is the duty of the judge to have the parties called if they are out of court when the jury appear with their findings;³ in others, that this is a matter with which the court need not concern itself.⁴

(b) *Criminal Cases*. — The practice of requiring the presence of the

void. *Jackson v. State* (Ala. 1894), 15 So. Rep. 351.

Judge at His Chambers. — In *Palmer v. Harper, Wright* (Ohio) 383, the court held that the delivery of a verdict to the judge at his chambers was valid on the ground that the mode of receiving verdicts is a mere matter of practice for the courts to regulate for themselves.

Under the same circumstances, a verdict has been held emphatically invalid. Thus where a verdict was rendered to the judge at his chambers and the jury discharged until ten o'clock the next morning, at which time the court directed the clerk to enter the verdict, the supreme court declared that such a verdict could not be sustained. *State v. Bray*, 67 N. Car. 283.

1. *People v. Albany Mayor's Court*, 1 Wend. (N. Y.) 36.

2. *Stiles v. Ford*, 2 Colo. 128; *Merwin v. Wheeler*, 41 Conn. 14; *Jones v. Bullard*, 52 Ga. 145; *Perry v. Mulligan*, 58 Ga. 479. And see *Broas v. Mersereau*, 18 Wend. (N. Y.) 653.

It is not necessary, in a civil case, that the parties should be present at the rendition of the verdict. It is not even the duty of the court to have them called. *Merwin v. Wheeler*, 41 Conn. 14.

By the common law, the plaintiff was required to be present in court, in person or by attorney, when the verdict of the jury was received, in order to answer to the amercement to which he was liable *pro falso clamore suo*. 3 Black.Com. 376. But this fine or amercement is not at the present day imposed for any cause, and the costs to which he is liable, if he fail in a suit, can be adjudged against him, although he be not present in court at the time the verdict is rendered. It would seem, therefore, that the reason assigned by Blackstone for requiring the plaintiff to attend to receive the verdict no longer exists, and, although he may at-

tend for the purpose of polling the jury, his presence is not necessary. *Stiles v. Ford*, 2 Colo. 128.

It is said, in *Graham v. Tate*, 77 N. Car. 120, that no verdict should be rendered unless the plaintiff be present in person or by attorney; such a practice would be irregular and against the course of the court.

3. Where the plaintiff was not called, on the return of the jury to the bar, before taking the verdict, it was set aside for irregularity, the court holding that the plaintiff should have been called, and his appearance or default entered by the clerk. *Gale v. Hoysradt*, 1 How. Pr. (N. Y.) 72.

4. *Perry v. Mulligan*, 58 Ga. 479; *Merwin v. Wheeler*, 41 Conn. 14; *Strowger v. Sample*, 44 Kan. 298.

It is not necessary, in a civil case, that the judge should send for the defendant or his counsel before receiving the verdict, nor should the court delay or embarrass the business of the court by waiting until a party in a civil case comes into court, before receiving a verdict. If they want to be present they must attend the sessions of the court. *Strowger v. Sample*, 44 Kan. 298.

In a civil cause it is not error to receive the verdict in the absence of the defendant and his counsel. It is their business to be in court when the judge is in court, and if he had them both called, and stopped awhile to see if they would answer, it was only a matter of courtesy and indulgence. *Perry v. Mulligan*, 58 Ga. 479.

In *Georgia*, in a civil case, where a motion was made to set aside a verdict on the ground that it was rendered in the absence of the defendant and his counsel, it was held that the defendant must allege some meritorious defense, for it would be folly, said the court, in *Jones v. Bullard*, 52 Ga. 145, for the court to set aside the judgment, if there is any legal reason why it should not be immediately again rendered.

accused at the reception of the verdict in criminal cases is varied in its extent and application. It seems to be pretty generally admitted that, in trials on indictments for capital offenses, the presence of the defendant is necessary when the jury returns into court with the verdict.¹

From this point, however, the diversity is more marked; some jurisdictions holding that in all prosecutions for crimes of a nature less grave than capital felonies, the presence of the accused is immaterial;² while others maintain, in equally positive terms, that in trials for the commission of all felonies the presence of the defendant cannot be dispensed with.³ In *Alabama*, it is declared

1. *Waller v. State*, 40 Ala. 332; *Slocovitch v. State*, 46 Ala. 227; *Sneed v. State*, 5 Ark. 431; 41 Am. Dec. 102; *Cole v. State*, 10 Ark. 318; *Sweeden v. State*, 19 Ark. 205; *Warren v. State*, 19 Ark. 214; 68 Am. Dec. 214; *Brown v. State*, 24 Ark. 620; *Osborn v. State*, 24 Ark. 629; *Green v. People*, 3 Colo. 68; *People v. Kohler*, 5 Cal. 72; *People v. Ebner*, 23 Cal. 159; *People v. Beauchamp*, 49 Cal. 41; *People v. Jung Qung Sing*, 70 Cal. 469; *State v. Clement*, 42 La. Ann. 583; *State v. Ford*, 30 La. Ann. 311; *State v. Bradley*, 30 La. Ann. 326; *State v. Christian*, 30 La. Ann. 367; *Scaggs v. State*, 8 Smed. & M. (Miss.) 722; *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195; *Stubbs v. State*, 49 Miss. 716; *Finch v. State*, 53 Miss. 363; *State v. Cross*, 27 Mo. 332; *State v. Schoenwald*, 31 Mo. 147; *State v. Smith*, 90 Mo. 37; 59 Am. Rep. 4; *People v. Perkins*, 1 Wend. (N. Y.) 91; *Maurer v. People*, 43 N. Y. 1; *State v. Craton*, 6 Ired. (N. Car.) 164; *State v. Tilletson*, 7 Jones (N. Car.) 114; 75 Am. Dec. 456; *State v. Blackwelder*, Phil. (N. Car.) 38; *State v. Bray*, 67 N. Car. 283; *State v. Bass*, 82 N. Car. 570; *State v. Jenkins*, 84 N. Car. 812; 37 Am. Rep. 643; *State v. Paylor*, 89 N. Car. 539; *State v. Kelley*, 97 N. Car. 404; *Sargent v. State*, 11 Ohio 472; *Dunn v. Com.*, 6 Pa. St. 384; *Prine v. Com.*, 18 Pa. St. 103; *Dougherty v. Com.*, 69 Pa. St. 286; *State v. France*, 1 Overt. (Tenn.) 434; *Andrews v. State*, 2 Sneed (Tenn.) 550; *Clark v. State*, 4 Humph. (Tenn.) 254; *Stewart v. State*, 7 Coldw. (Tenn.) 338; *Hooker v. Com.*, 13 Gratt. (Va.) 763; *Jackson v. Com.*, 19 Gratt. (Va.) 656; *Gage v. State*, 9 Tex. App. 259; *Leschi v. Territory*, 1 Wash. Ter. 23; *Shapoonmash v. U. S.*, 1 Wash. Ter. 188; *Trumble v. Territory*, 3 Wyoming 280.

2. The prisoner, in capital felonies has a right to be, and must be, personally present at all times in the course of his trial, and, as to felonies less than capital, the prisoner has precisely the same right to be present, but it is not essential that he must be, at all events. *State v. Kelley*, 97 N. Car. 404; *State v. Tilletson*, 7 Jones (N. Car.) 114; 75 Am. Dec. 456; *State v. Bass*, 82 N. Car. 570; *State v. Jenkins*, 84 N. Car. 812; 37 Am. Rep. 643; *State v. Paylor*, 89 N. Car. 539.

3. *Waller v. State*, 40 Ala. 332; *Sneed v. State*, 5 Ark. 431; 41 Am. Dec. 102; *Cole v. State*, 10 Ark. 318; *Sweeden v. State*, 19 Ark. 205; *Warren v. State*, 19 Ark. 214; 68 Am. Dec. 214; *Brown v. State*, 24 Ark. 620; *Osborn v. State*, 24 Ark. 629; *Green v. People*, 3 Colo. 68; *People v. Kohler*, 5 Cal. 72; *People v. Ebner*, 23 Cal. 159; *People v. Beauchamp*, 49 Cal. 41; *People v. Jung Qung Sing*, 70 Cal. 469; *State v. Clement*, 42 La. Ann. 583; *State v. Ford*, 30 La. Ann. 311; *State v. Bradley*, 30 La. Ann. 326; *State v. Christian*, 30 La. Ann. 367; *Scaggs v. State*, 8 Smed. & M. (Miss.) 722; *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195; *Stubbs v. State*, 49 Miss. 716; *Finch v. State*, 53 Miss. 363; *State v. Cross*, 27 Mo. 332; *State v. Schoenwald*, 31 Mo. 147; *State v. Smith*, 90 Mo. 37; 59 Am. Rep. 4; *People v. Perkins*, 1 Wend. (N. Y.) 91; *Maurer v. People*, 43 N. Y. 1; *State v. Craton*, 6 Ired. (N. Car.) 164; *State v. Blackwelder*, Phil. (N. Car.) 38; *State v. Bray*, 67 N. Car. 283; *Sargent v. State*, 11 Ohio 472; *Dunn v. Com.*, 6 Pa. St. 384; *Prine v. Com.*, 18 Pa. St. 103; *Dougherty v. Com.*, 69 Pa. St. 286; *State v. France*, 1 Overt. (Tenn.) 434; *Andrews v. State*, 2 Sneed (Tenn.) 550; *Clark v. State*, 4 Humph. (Tenn.) 254; *Stewart v. State*, 7 Coldw. (Tenn.) 338;

that the presence of the accused is requisite in all criminal prosecutions whatsoever, whether for felonies or misdemeanors, and that a verdict rendered in his absence is wholly void and ineffectual.¹ After all, it seems to be more a matter of practice than of principle, which each jurisdiction regulates to its own satisfaction.

Evidence of Presence.—The record should show affirmatively that the prisoner was present when the verdict was received.² It

Hooker v. Com., 13 Gratt. (Va.) 763; *Jackson v. Com.*, 19 Gratt. (Va.) 656; *Gage v. State*, 9 Tex. App. 259; *Leschi v. Territory*, 1 Wash. Ter. 23; *Shapoonmash v. U. S.*, 1 Wash. Ter. 188; *Trumble v. Territory*, 3 Wyoming 280. And see *Martin v. State*, 79 Wis. 165.

In felony cases the verdict must be delivered in open court, and in the presence of the defendant. "This rule," said the court, in *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195, "is founded on two reasons: first, the right of the defendant to be present and to see that the verdict is sanctioned by all the jurors; and secondly, in order that the defendant, if convicted, may be in the power of the court, and subject to its judgment."

The absence of the prisoner during the whole of the trial, and particularly his absence at the rendition of the verdict, is more than an irregularity; it is fatal to the legality of the trial; it is of universal requirement that a person who is tried for felony must be present when the verdict is received. *State v. Ford*, 30 La. Ann. 311.

And this error is not cured by reassembling the jury in the prisoner's presence after they have been discharged, and having them assent to and return the verdict. *Finch v. State*, 53 Miss. 363; *Hines v. State*, 8 Humph. (Tenn.) 602; *Sargent v. State*, 11 Ohio 472; *Mills v. Com.*, 7 Leigh (Va.) 751.

Where a verdict was brought in by the jury in the absence of the prisoners, who were confined in jail, the court, not knowing that they were not present, directed the clerk to receive and read the verdict; and the clerk did read it aloud in the presence of the court and a large number of the bystanders. The court then observed to the jury that they were discharged, and the jury started out of the court room, but had not got out of the bar. It was then discovered that the prisoners were not in court, and the judge immediately stated to the jury that they were not

discharged, and ordered the clerk to hand the papers in the cause back to them, and directed the sheriff to bring the prisoners into court. It was held that in contemplation of law there had been no discharge, and hence that the verdict was not invalid. *Brister v. State*, 26 Ala. 107.

In the State of *Texas*, under its criminal code, it is expressly provided that a verdict in a misdemeanor case may be received and read in the absence of the accused. *Gage v. State*, 9 Tex. App. 259.

Where three persons have been jointly indicted for the same crime, the condemnation and sentence of two of them will not be disturbed because the verdict against two was rendered in the absence of the third. *State v. Bradley*, 30 La. Ann. 326.

The *Arkansas* statutes provide that no indictments for felony shall be tried unless the defendant be personally present during the trial, nor shall a person indicted for an offense less than felony, be tried, unless he be present at the trial, either personally or by his counsel. *Osborn v. State*, 24 Ark. 629.

In Misdemeanor Cases.—It does not seem to be necessary to the validity of a verdict, in trials on indictments for misdemeanors, that the defendant should be personally present at its reception. *Sweeden v. State*, 19 Ark. 205; *Warren v. State*, 19 Ark. 214; 68 Am. Dec. 214; *Osborn v. State*, 24 Ark. 629; *People v. Ebner*, 23 Cal. 159; *State v. Hughes*, 4 Iowa 554; *Stubbs v. State*, 49 Miss. 716; *People v. Petry*, 2 Hilt. (N. Y.) 523; *Son v. People*, 12 Wend. (N. Y.) 344; *People v. Clark*, 1 Park Cr. Rep. (N. Y.) 360; *U. S. v. Leckie*, Sprague (U. S.) 227; *U. S. v. Mayo*, 1 Curt. (U. S.) 433. And see *Reg. v. Templeman*, 1 Salk. 55; *Rex v. Hann*, 3 Burr. 1786.

1. *Slocovitch v. State*, 46 Ala. 227.

2. *Brown v. State*, 24 Ark. 620; *State v. Christian*, 30 La. Ann. 367; *Scaggs v. State*, 8 Smed. & M. (Miss.) 372; *Dyson v. State*, 26 Miss. 383; *Stubbs*

is not necessary that the fact should be stated *in totidem verbis*, but the presence of the defendant may be established by necessary or reasonable construction of the terms of the record.¹

(5) *Waiver of Right to Be Present*.—The greater number of decisions hold that the right to be present at the reception of the verdict may be waived by a party to the suit,² though not

v. State, 49 Miss. 716; *State v. Cross*, 27 Mo. 332; *State v. Schoenwald*, 31 Mo. 147; *Gale v. Hoysradt*, 1 How. Pr. (N. Y.) 72; *Hamilton v. Com.*, 16 Pa. St. 129; 55 Am. Dec. 485; *Dunn v. Com.*, 6 Pa. St. 384; *Dougherty v. Com.*, 69 Pa. St. 286; *Sperry v. Com.*, 9 Leigh (Va.) 623; 33 Am. Dec. 261; *Hooker v. Com.*, 13 Gratt. (Va.) 763. And see *Doebler v. Com.*, 3 S. & R. (Pa.) 237.

The decision of the court, in *Hill v. State*, 17 Wis. 675; 86 Am. Dec. 736, contradicts the principle that the record must affirmatively show the presence of the prisoner when the verdict is returned. The position of the court is grounded on the doctrine that the burden of proof is on the party complaining of the verdict to show error, and it is even contended that where the record discloses the fact of the prisoner's absence from court, it must be presumed to have been a voluntary absence, unless it be proved otherwise. The court concedes the right of the defendant in a criminal case, to be present, but maintains the right to be alienable, and that a verdict rendered during a voluntary absence is valid. See also *Welch v. Stiles*, 47 Iowa 171; *Torque v. Carrillo*, 1 Arizona 336.

The record in the case of *Gould v. Magee*, 3 N. J. L. 475, did not show that the defendant had been called at the time of taking the verdict. The appellate court declined to interfere with the judgment merely on account of this omission.

1. *Sweeden v. State*, 19 Ark. 205; *People v. Jung Qung Sing*, 70 Cal. 469; *State v. Schoenwald*, 31 Mo. 147; *State v. Craton*, 6 Ired. (N. Car.) 164; *Leschi v. Territory*, 1 Wash. Ter. 14; *Trumble v. Territory*, 3 Wyoming 280.

While it is better to state in direct terms that the prisoner was present when the jury pronounced their verdict, it is sufficient if it appear by necessary or reasonable implication. *State v. Craton*, 6 Ired. (N. Car.) 164.

An entry of record in the following form: "Now, again comes as well the parties aforesaid, as also the jurors" sufficiently shows the presence of the de-

fendant. *State v. Schoenwald*, 31 Mo. 147.

Some courts seem to reject the idea that the presence of the prisoner can be shown by reasonable construction of the record, maintaining that it must be a necessary implication.

In *Shapoonmash v. U. S.*, 1 Wash. Ter. 188, the record showed that the prisoner was in court at the commencement of the trial, and although it showed that the court adjourned from one day to the next, nothing was said about the prisoner until the jury rendered their verdict, when it was recited that the "court remanded the prisoner to the custody of the marshal," from which entry the appellate court declined to presume that the defendant was present when the verdict was rendered.

An entry of record that "the court sentence George Dunn, the defendant, to be taken to the jail in Allegheny County from whence you come, and from thence to the place of execution," etc., was held insufficient to establish the presence of the prisoner at the passing of the sentence. *Dunn v. Com.*, 6 Pa. St. 384.

It was said, in *People v. Kohler*, 5 Cal. 72, that in favor of life, the strictest rule which has any sound reason to sustain it, will be observed.

2. *Stiles v. Ford*, 2 Colo. 128; *Robson v. State*, 83 Ga. 166; *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195; *State v. Paylor*, 89 N. Car. 539; *State v. Kelley*, 97 N. Car. 404; *People v. Albany Mayor's Court*, 1 Wend. (N. Y.) 36; *Lynch v. Com.*, 88 Pa. St. 189; 32 Am. Dec. 445; *Fight v. State*, 7 Ohio 181; 28 Am. Dec. 626; *Rose v. State*, 20 Ohio 33; *Wilson v. State*, 2 Ohio St. 319; *Hill v. State*, 17 Wis. 675; 86 Am. Dec. 736.

In *Hill v. State*, 17 Wis. 675; 86 Am. Dec. 736, the court contended that the accused might readily waive his right to be present during the pendency of the trial. "He may waive any trial at all," said the court. "He may plead guilty and thus subject himself to worse results which might follow a trial. And, if he could do this, it would be difficult

by counsel in the absence of his client, where the trial is on an indictment for a felony.¹ There may be a constructive as well as an actual waiver, a voluntary absence of the party operating as such.² On the other hand, however, it has been held, in prosecutions for felony, not only that this is a privilege of which the accused cannot be deprived, but that it is an inalienable and inherent right of which he must avail himself.³

to reconcile, with the rule which allowed it, any reasoning that would prevent him from waiving any mere privilege on the trial that was designed only to aid him in insuring himself from those results."

Express Waiver.—The court, in *People v. Albany Mayor's Court*, 1 Wend. (N. Y.) 36, held that the plaintiff must expressly waive his right to be present before the verdict can be legally received in his absence.

1. *Green v. People*, 3 Colo. 68; *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195; *State v. Paylor*, 89 N. Car. 539; *State v. Kelley*, 97 N. Car. 404; *Prine v. Com.*, 18 Pa. St. 103.

2. *Robson v. State*, 83 Ga. 166; *State v. Perkins*, 40 La. Ann. 210; *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195; *State v. Smith*, 90 Mo. 37; 59 Am. Rep. 4; *State v. Hope*, 100 Mo. 347; *State v. Kelley*, 97 N. Car. 404; *Lynch v. Com.*, 88 Pa. St. 189; 32 Am. Dec. 445; *Wilson v. State*, 2 Ohio St. 319; *Fight v. State*, 7 Ohio 181; 28 Am. Dec. 626; *Rose v. State*, 20 Ohio 33.

Voluntary Absence.—In General.—The accused may waive his right to be present, and if he voluntarily absents himself, when he ought to be in court, he cannot complain of the consequences of his own voluntary act. This voluntary absence of the prisoner is a waiver of his right to be present. *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195.

In *Hill v. State*, 17 Wis. 675; 86 Am. Dec. 736, it was said that if the absence of the defendant be voluntary, the verdict is valid.

Leaving Court Room.—A verdict may be legally rendered, received, and recorded where the accused voluntarily leaves the court room and fails to appear after the sheriff's proclamation to come and hear the verdict about to be rendered. He cannot be permitted to take advantage of his own wrong, and thus defeat the ends of justice. *State v. Perkins*, 40 La. Ann. 210.

Absence On Bail.—It is a right of a prisoner to be present at the time the

verdict is rendered, and if deprived of this right by imprisonment, or in any other improper manner, the verdict shall not be followed by the judgment. Where the accused is absent on bail, he cannot voluntarily absent himself at the time the verdict is rendered, and take advantage of that absence to avoid judgment upon the verdict. *Rose v. State*, 20 Ohio 33; *Wilson v. State*, 2 Ohio St. 319; *Robson v. State*, 83 Ga. 166. And see *Gales v. State*, 64 Miss. 105.

Fugitive From Justice.—If a prisoner on an indictment for felony less than capital, flee the court during the pendency of the prosecution, he will be deemed to have waived the right to be present, and the court may proceed with his trial in his absence. *State v. Kelley*, 97 N. Car. 404.

3. The privilege of being personally present at trials for crimes which amount to felonies, is one that the prisoner cannot waive, and of which he must not be deprived. *Jackson v. Com.*, 19 Gratt. (Va.) 656; *Maurer v. People*, 43 N. Y. 1; *Prine v. Com.*, 18 Pa. St. 103.

In *Andrews v. State*, 2 Sneed (Tenn.) 550, Andrews escaped from custody after the jury had retired to consider their verdict, and was not present when they returned into court and rendered it. It was held that if the prisoner was absent, either in prison or by escape, there was a want of jurisdiction over his person to proceed with the trial, or to receive the verdict.

The law will not regard the reason of the defendant's absence. The rule is the same whether he is absent voluntarily, or against his will, and the verdict in either case is equally invalid. *Sneed v. State*, 5 Ark. 431; 41 Am. Dec. 102.

The accused, in a criminal prosecution for counterfeiting, was absent on bail when the jury returned with their verdict. Being called, he failed to appear, and then the question arose whether the court would receive the verdict in his absence. It was held that the defendant must appear or there

In civil actions, as the presence of the parties at the rendition of the verdict is not material, the liberty to waive such right has never been doubted.¹

(6) *Presence of Counsel*.—It is not essential to the validity of a verdict that the counsel of the parties should be present in court at its return.² Even where the defendant's counsel withdrew from the court room under an arrangement with the judge to send a bailiff for him upon the appearance of the jury with their verdict, the omission to do this was held immaterial.³

2. *POLLING THE JURY*.—This is a practice allowed in most jurisdictions, inaugurated for the purpose of requiring the jurors individually and personally to confirm the verdicts announced in court by their foreman or representative.⁴

In criminal cases it has generally been held that the judge is bound to allow the polling of the jury if properly requested.⁵ In

would be "no propriety in receiving the verdict." *State v. Hurlbut*, 1 Root (Conn.) 90. And see *Clark v. State*, 4 Humph. (Tenn.) 254.

1. *Stiles v. Ford*, 2 Colo. 128.

2. *Torque v. Carrillo*, 1 Arizona 336; *Osborn v. State*, 24 Ark. 629; *Perry v. Mulligan*, 58 Ga. 479; *O'Bannon v. State*, 76 Ga. 29; *Strowger v. Sample*, 44 Kan. 298; *Huffman v. State*, 28 Tex. App. 174; *Martin v. State*, 79 Wis. 165.

3. *Seaton v. Smith*, 45 Kan. 43.

4. *The object of polling the jury* is to ascertain if the verdict, which has just been presented and announced, is their verdict, or in other words, if they still agree to it; not to ask them what their verdict means, nor to question them as to their intention in finding. This ought to be performed by the clerk, who, as he calls over the list of jurors, asks them, one by one, or by the poll, the simple question "Is this your verdict?" This question requires but one answer, and still embraces all the legitimate objects of polling a jury. A party has no right to dictate the manner in which a jury shall be polled, nor to insist on any other question being put to them than the simple one to ascertain whether they agree to the verdict as presented. *Labar v. Koplin*, 4 N. Y. 547.

Answer of Foreman.—When the jury were asked on which count their verdict was founded, the inference was that all concurred in the answer of the foreman, if no one dissented therefrom. *Cross v. Grant*, 62 N. H. 675; 13 Am. St. Rep. 607. See also, in this connection, *Cross v. North Carolina*, 132 U. S. 131.

5. See *CRIMINAL PROCEDURE*, vol. 4, p. 881.

In *Alabama*, the right to poll the jury in all criminal cases, as well in misdemeanors as in felonies, is secured to either party by express enactment of the legislature. *Brown v. State*, 63 Ala. 97. A similar provision is made by the *California* statutes to the effect that in criminal actions a jury, upon the return of the verdict, may be polled by either party before the verdict is recorded. It is silent as to civil cases. *Blum v. Pate*, 20 Cal. 69.

Arkansas.—Upon a verdict being rendered, the jury may be polled at the instance of either party, or the court may of its own accord, direct the polling of the jury, if it doubts that the verdict announced by the foreman has been agreed to by all the jurors. This consists of the clerk or judge asking each juror if it is his verdict, and if one answers in the negative the verdict cannot be received. *Harris v. State*, 31 Ark. 196.

Georgia.—In *Tilton v. State*, 52 Ga. 478, it was declared that in criminal cases, the right to poll the jury is a legal right of the defendant, and does not depend on the discretion of the court. See also *State v. Hughes*, 2 Ala. 102; *People v. Perkins*, 1 Wend. (N. Y.) 91; *Leighton v. People*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 261; *Smith v. State*, 51 Wis. 615; 37 Am. Rep. 845.

Indiana.—In *Joy v. State*, 14 Ind. 139, it was maintained that the defendant has a right to poll the jury at the time of the return of the verdict.

In *Maryland*, it seems to be the practice, in criminal cases, for the clerk, after the verdict has been returned

many instances the same doctrine has been recognized in civil causes,¹ but it is more frequently declared to rest within the discretion of the trial judge in the latter class of actions.²

and recorded, to call the jury to "harken to their verdict as the court hath recorded it." A judgment entered upon the verdict of a jury, discharged and separated without being so called on by the clerk, will be reversed. *Givens v. State*, 76 Md. 485.

In *Massachusetts*, it has never been the right of a party in any case, civil or criminal, to have the jury polled. The affirmance of the verdict by the whole jury in the usual manner, upon it being read to them in form by the clerk, with the opportunity of open dissent thereby afforded each juror, has been deemed sufficient security that the verdict thus affirmed expresses the unanimous decision of the jury. *Costley v. Com.*, 118 Mass. 1; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Ropps v. Barker*, 4 Pick. (Mass.) 238. And see *Lawrence v. Stearns*, 11 Pick. (Mass.) 500.

North Carolina.—Upon rendition of a verdict in a criminal action, either the defendant or the solicitor for the state has a legal right to demand that the jury be polled, and it is error of the court to refuse. *State v. Young*, 77 N. Car. 498.

South Carolina.—In this state, it seems to rest within the discretion of the trial court whether or not the jury shall be polled, for in *State v. Wyse*, 32 S. Car. 45, the court says: "This may be permitted, and will not generally be denied, in a criminal case; but it is a matter which in this state is addressed to the sound discretion of the court." See also *State v. Allen*, 1 McCord (S. Car.) 525; 10 Am. Dec. 687; *State v. Harden*, 1 Bailey (S. Car.) 3.

1. *Crotty v. Wyatt*, 3 Ill. App. 388; *Rigg v. Cook*, 9 Ill. 336; 46 Am. Dec. 462; *Johnson v. Howe*, 7 Ill. 342; *Mitchell v. Parks*, 26 Ind. 354; *Bowen v. Bowen*, 74 Ind. 470; *Hubble v. Patterson*, 1 Mo. 392; *Poulson v. Collier*, 18 Mo. App. 583; *Norvell v. Deval*, 50 Mo. 272; *Fox v. Smith*, 3 Cow. (N. Y.) 23; *Jackson v. Hawks*, 2 Wend. (N. Y.) 619; *Nichols v. Mfg. Co.*, 24 N. H. 437; *Webster v. McKinster*, 1 Pin. (Wis.) 644; *Smith v. State*, 51 Wis. 615; 37 Am. Rep. 845; *Lyle v. Light*, 58 Wis. 248. And see *Hancock v. Winans*, 20 Tex. 320.

Absolute Right—Civil Cases.—Upon

the return of a verdict, either party has a right to demand that the jury be polled; a refusal to allow this is error. *Hubble v. Patterson*, 1 Mo. 392; *Johnson v. Howe*, 7 Ill. 342.

Bell, J., in *Nichols v. Suncook Mfg. Co.*, 24 N. H. 437, citing 3 Bl. Com. 377, says: "At common law, when a verdict is returned, any juror may, in open court, declare his dissent before the verdict is recorded, and either of the parties may require the poll of the jury."

Unless a jury is waived, the polling of the jury is an absolute legal right. *Thornburgh v. Cole*, 27 Kan. 490.

The expression in the case of *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32, "If the court please," would seem to imply that the polling of the jury was in the discretion of the court, but in the case of *Fox v. Smith*, 3 Cow. (N. Y.) 23, and *Jackson v. Hawks*, 2 Wend. (N. Y.) 619, it was decided to be the absolute right of the party to have the jury polled, on their bringing in their verdict, whether it be sealed or oral, unless he has expressly waived that right. *Labar v. Koplin*, 4 N. Y. 547.

The *Indiana Code* provides that when the jury return into court and deliver their verdict, either party may poll them. *Mitchell v. Parks*, 26 Ind. 354; *Bowen v. Bowen*, 74 Ind. 470.

Oklahoma Laws, Art. 12, § 12, provides that, "When the verdict is given, and is such as the court may receive, the court must immediately record it in full upon the minutes, and must read it to the jury, and inquire of them whether it is their verdict." For a construction of this statute, see *Territory v. Milligan* (Okla. 1894), 37 Pac. Rep. 1059.

2. *Blum v. Pate*, 20 Cal. 69; *Whitner v. Hamlin*, 12 Fla. 18; *Smith v. Mitchell*, 6 Ga. 458; *Beale v. Hall*, 22 Ga. 431; *Rutland v. Hathorn*, 36 Ga. 380; *Murphy v. Griggs*, 41 Ga. 465; *Bell v. Hutchings*, 86 Ga. 562; *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32; *Landis v. Dayton*, Wright (Ohio) 659; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447. And see *Byrne v. Grossman*, 65 Pa. St. 310; *Scott v. Scott*, 110 Pa. St. 387.

It is a duty of the court to see to it

The request that the jury be polled must be made before the verdict is recorded and the jury dispersed.¹ In interrogating the jury on this point, no generally established form of question prevails, it being usually the practice to ask the juror simply whether

that each juror agrees to the verdict, and it is within his discretion to adopt such means as the law and usage of the court allow, to ascertain that fact. Among other means is the examination of the jury, when they return their verdict individually, or, as it is called, by the poll. This may be done whenever the court has any ground or reason to believe that the verdict is not unanimous. It may be done at the instance of a juror, or at the instance of a party. It is our judgment that, in civil cases, without saying what would be the rule in criminal cases, it is discretionary with the presiding judge whether the jury shall be polled or not. *Smith v. Mitchell*, 6 Ga. 458.

There is no right in a party to a civil case to poll a jury. It is within the discretion of the judge, and the privilege is sometimes accorded when the verdict is delivered under circumstances of suspicion. *Landis v. Dayton*, *Wright (Ohio)* 659.

In a civil action, neither party has a right to demand the polling of the jury. Before the verdict is recorded it is within the discretion of the court to allow this proceeding. It is never allowed afterwards. *Blum v. Pate*, 20 Cal. 69.

When the jury return their verdict in the court, and their names are called over by the clerk, the court is at liberty to refuse the request of the defendant's counsel to have them polled, unless some legal reason is assigned for making the request. *Murphy v. Griggs*, 41 Ga. 465.

The polling of the jury in a civil case is a matter within the discretion of the trial judge, and he can grant a motion to poll them, either upon the whole verdict, or for any answer to a specific question. *Bell v. Hutchings*, 86 Ga. 562.

In *Byrne v. Grossman*, 65 Pa. St. 310, the court expressly evaded a decision from the question as to whether the court has a right to refuse the request to have the jury polled, although it inclines to the opinion that in civil cases the matter is within the discretion of the court; and in *Scott v. Scott*, 110 Pa. St. 387, the court declined to decide

the "mooted question" as to whether either party in a civil case may demand that the jury be polled.

Douglass, J., in delivering the opinion of the court, in *Whitner v. Hamlin*, 12 Fla. 18, said: "The question presented by the record is not as to the right of the party to poll the jury in all cases, but whether, after the jury has delivered a sealed verdict by the consent of parties, either party may demand as a right that the jury shall be polled. We are of the opinion that no such right exists, and that such applications must be addressed to the sound discretion of the judge, whose duty it is to see that no wrong or injustice is done to parties, and whose direction in such cases is not a matter for review by this court."

The jury may be polled by the court and ought to be if requested by either party. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447.

1. *Blum v. Pate*, 20 Cal. 69; *Malone v. State*, 49 Ga. 211; *Tilton v. State*, 52 Ga. 478; *Macon City Bank v. Kent*, 57 Ga. 283; *Steele v. Etheridge*, 15 Minn. 413; *Weeks v. Hart*, 24 Hun (N. Y.) 181; *Fox v. Smith*, 3 Cow. (N. Y.) 23; *Sargent v. State*, 11 Ohio 472; *State v. Austin*, 6 Wis. 205; *High v. Johnson*, 28 Wis. 72. And see *Scott v. Scott*, 110 Pa. St. 387.

The jury having agreed upon a verdict, and then dispersed by previous consent of counsel, and with leave of court, it is not proper to poll them when the verdict is afterward returned and read. *Macon City Bank v. Kent*, 57 Ga. 283.

The proper time to ask for leave to poll the jury is after the verdict is read, and before the jury has dispersed. *Malone v. State*, 49 Ga. 211; *Tilton v. State*, 52 Ga. 478.

It is too late to ask that the jury be polled after the verdict has been received and recorded. *High v. Johnson*, 28 Wis. 72.

A juror may dissent from a verdict to which he has before agreed, until it is recorded, *Weeks v. Hart*, 24 Hun (N. Y.) 181; and he may do this whether the jury is polled or not, and if he does so dissent there can be no

the verdict rendered is his.¹ Cautions, exhortations, or reminders of official oath and duty are not usual, and should not be allowed.²

The dissent of a juror must be decided and unequivocal, or the verdict as rendered will be received and recorded.³ But where a

valid verdict. *Scott v. Scott*, 110 Pa. St. 387.

Where, upon the polling of the jury, one of them replied that he had agreed to the verdict rendered as a matter of accommodation, though it was against his conscience, the unsuccessful party should object to the reception of the verdict at the time, before the verdict has been received and recorded; and an omission to do this will be deemed a waiver of all right to object to this irregularity. *Farrell v. Hennesy*, 21 Wis. 632; *State v. Austin*, 6 Wis. 205.

1. *Harris v. State*, 31 Ark. 196; *Black v. Thornton*, 31 Ga. 641; *Bowen v. Bowen*, 74 Ind. 470; *Labar v. Koplin*, 4 N. Y. 547; *Leighton v. People*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 261.

Form of Question.—When the jurors were asked "Do you find for the plaintiffs or defendant?" exception was taken to the form of the question, it being contended that the better practice would be, following the reading of the verdict, "What say you, Mr. Juror, is that, or is it not, your verdict?" it was held that the question as put was the substantial equivalent of this form, and that the verdict would not be disturbed on this ground. *Black v. Thornton*, 31 Ga. 641.

In polling the jury the inquiry should be restricted to the question "Is this your verdict?" *Bowen v. Bowen*, 74 Ind. 470.

A party will not be allowed to question a juror, upon the poll of the jury, as to the misconduct of the jury during trial. *Bassham v. State*, 38 Tex. 622. And see *Anderson v. Green*, 46 Ga. 361.

Reply of Juror.—The exact words used by the juror, in replying to the question to ascertain his concurrence in the verdict, are immaterial. It is sufficient if they indicate clearly the assent of the individual mind to the verdict. *Com. v. Buccieri*, 153 Pa. St. 535.

2. The jury returned with their verdict declaring the prisoner guilty of the crime of murder as charged in the indictment, when the defendant's counsel requested that jury be polled. This

request was granted, but when he asked the court to inform the jury that the answer given to the question should be the "conscientious individual opinion of each man," the court declined to comply, and it was held that all that could be required, under the existing practice, was that each juror should be separately asked whether the verdict rendered by the foreman was his verdict. *Leighton v. People*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 261. See also *Labar v. Koplin*, 4 N. Y. 547.

3. *Webster v. McKinster*, 1 Pin. (Wis.) 644; *Farrell v. Hennesy*, 21 Wis. 632; *State v. Austin*, 6 Wis. 205; *Gose v. State*, 6 Tex. App. 121.

Where, upon the polling of the jury, eleven assented to the verdict, and one, in reply to the question of the clerk "Is this your verdict?" said, "It is as far as it goes," the defendant objected to the reception of the verdict. The trial court overruled the objection, and upon appeal it was held that there was nothing in the answer of the juror that ought to invalidate the verdict. *Ran-kin v. Harper*, 23 Mo. 579.

Where the jury were polled at the request of the plaintiff, and eleven of them, when their names were respectively called, in answer to the interrogatory, whether the verdict returned was theirs, promptly answered in the affirmative, but the remaining juror answered that the verdict "was not his, but that he had consented to it," and then when the question was repeated answered "Yes," it was held that this was a sufficient assent to the verdict. *Mitchell v. Parks*, 26 Ind. 354.

Upon the return of the verdict, the jury, being polled, replied variously. Some answered simply that they found for the defendant; some four or five added either that they were not satisfied, or not fully satisfied, but all finally added that they found for the defendant. It was held that the court pursued the proper course in receiving and recording the verdict. *Black v. Thornton*, 31 Ga. 641.

Where a juror answered in response to the inquiry, "Is this your verdict?"

juror answered that he could not say whether he had found for the plaintiff or the defendant, the court properly rejected the verdict.¹ If the verdict is disaffirmed by one or more members of the jury, the entire number should be sent back for further deliberation,² when they may, if all subsequently agree, render a verdict similar in all respects to the former finding.³

If the verdict is received and recorded without objection by the unsuccessful party, he will be deemed to have waived all right to require the polling of the jury,⁴ though in a jurisdiction

that "it was, but that he consented to it under protest," it was held that the court committed no error in receiving and recording the verdict. *Wyley v. Bull*, 41 Kan. 206.

Where the record stated that a juror, upon being polled after affirming the verdict, had twice attempted to address the court, but had not been allowed to speak, it was held that this was no reason for disturbing the verdict, as it did not appear that the juror wished to dissent from, or attack the verdict. *Hughes v. Detroit, etc., R. Co.*, 78 Mich. 399.

Although a juror may have agreed upon, and signed, a verdict as a matter of accommodation, or from other motive, yet, if he expresses dissatisfaction with it when he comes into court, or when a poll is taken, states that he cannot conscientiously assent to it, the court should respect his scruples, and refuse to receive a verdict not freely and unanimously concurred in; and, though a juror replied in the affirmative in answer to the question as to whether the verdict announced by the foreman was still his, if it was under circumstances which showed clearly that he entertained doubts of the defendant's guilt, and was opposed to finding him guilty, the verdict should not be received. *State v. Austin*, 6 Wis. 205.

Where a juror stated, in answer to the question as to whether he concurred in the verdict returned, that he had agreed to it merely for the sake of an agreement, and not because he thought it was correct, it was held not to be a proper verdict, and that it should not have been received. *Rothbauer v. State*, 22 Wis. 468. And see *Weeks v. Hart*, 24 Hun (N. Y.) 181.

Where, in polling the jury, one member, in response to a question "Is this your verdict?" replied, "Under the evidence, it is not my verdict," the coun-

sel was not allowed to interrogate the juror as to the reason for his answer. Such a reply is final and conclusive. *Poulson v. Collier*, 18 Mo. App. 583.

Where the jury had been polled at the request of the counsel of the unsuccessful party, and in his presence, and the verdict entered without objection, this is positive proof that all the jury assented to the verdict, and, as such, cannot be overcome except by evidence of actual fraud practiced on the court and the counsel of the unsuccessful party by the opposing party, or some one in his behalf, or by the clerk in procuring the verdict, to be delivered and entered when it had not been agreed to by the jury. *Green v. Bliss*, 12 How. Pr. (N. Y. Supreme Ct.) 428.

1. *Black v. Thornton*, 31 Ga. 641.

2. *Brown v. State*, 63 Ala. 97; *Black v. Thornton*, 31 Ga. 641; *Morgan v. Bell*, 41 Kan. 345; *Bunn v. Hoyt*, 3 Johns. (N. Y.) 255; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; 20 Am. Dec. 616; *Hancock v. Winans*, 20 Tex. 320.

Where a jury sealed up the verdict and separated, they might be sent back to reconsider, if one of them disagrees to the verdict when polled; and the same verdict subsequently brought in is good. *Bunn v. Hoyt*, 3 Johns. (N. Y.) 255; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; 20 Am. Dec. 616.

Where, upon the return of a sealed verdict, the jury are polled and found to disagree, it is not error, in the absence of objection of either party, to send them out for further deliberation. *Morgan v. Bell*, 41 Kan. 345.

When some of the jurors answer in the negative, they may be sent out to reconsider their verdict. *Brown v. State*, 63 Ala. 97.

3. *Bunn v. Hoyt*, 3 Johns. (N. Y.) 255; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; 20 Am. Dec. 616.

4. **Waiver of Right.**—It seems that if

regarding this practice as not only a privilege, but a right, the verdict received in the absence of a party's counsel, without fault on his part, whereby this right was lost, was held to be invalid.¹

j. CONSTRUCTION OF VERDICT.—Verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt of their import, from immateriality of the issue found, or their manifest tendency to work injustice.² From the standpoint of the

no request be made to poll the jury, the right will be deemed to have been waived. *Raymond v. Bell*, 18 Conn. 81.

Where the jury return their verdict to the clerk, during a brief recess of court, by agreement of counsel, it was held that this must be construed as a waiver of a right to poll the jury. *Brown v. State*, 63 Ala. 97.

A stipulation that the jury might, when they had agreed on their verdict, if the court should not be then in session, sign and seal the same and deliver it to the officer in charge, and disperse, was construed to be a waiver of the right to poll the jury, if the parties should not be in court. *Koon v. Phoenix Mut. L. Ins. Co.*, 104 U. S. 106.

In *Texas*, an agreement that the jury should seal up their verdict and separate, operates as a waiver of all right to have the jury polled, except for the purpose of ascertaining whether the verdict as returned was unanimously agreed to when it was sealed up. *Hancock v. Winans*, 20 Tex. 320.

In a proper case for a sealed verdict, the right of parties to poll the jury is not affected by an agreement that the jury may seal their verdict. *Steele v. Etheridge*, 15 Minn. 413. And see *Rigg v. Bias*, 44 Kan. 148.

Directing Verdict.—Where a court directs a verdict, as there is no fact to be found by the jury, neither party is entitled to have it polled. *Donoghue v. Indiana*, etc., R. Co., 87 Mich. 13; *Bond v. State*, 68 Miss. 648.

1. *Smith v. State*, 51 Wis. 615; 37 Am. Rep. 845.

2. 1 *Graham and Wat'n New Trials* 160; *Burnett v. Maxey*, 9 Port. (Ala.) 410; *People v. McCarthy*, 48 Cal. 557; *Huntington v. Ripley*, 1 Root (Conn.) 321; *State v. Merwin*, 34 Conn. 113; *Simmons v. Rarden*, 9 Ga. 543; *Mitchell v. Addison*, 20 Ga. 50; *Small v. Hicks*, 81 Ga. 691; *Bond v. People*, 39 Ill. 26; *Lvons v. People*, 68 Ill. 271; *Rose v. State*, 82 Ind. 344; *Chambers v. Butcher*, 82 Ind. 508; *Kansas City*,

etc., *R. Co. v. Phillibert*, 25 Kan. 582; *Miller v. Shackelford*, 4 Dana (Ky.) 271; *Singleton v. Singleton*, 8 Dana (Ky.) 315; *Timmons v. State*, 56 Miss. 786; *Schoonover v. State*, 17 Ohio St. 294; *Reed v. Gentry*, 7 Oregon 497; *Kelton v. Bevins, Cooke* (Tenn.) 90; 5 Am. Dec. 670; *Carr v. Stevenson*, 5 Humph. (Tenn.) 559; *Lindsay v. State*, 1 Tex. App. 327; *Bland v. State*, 4 Tex. App. 15; *Williams v. State*, 5 Tex. App. 226; *Vincent v. State*, 10 Tex. App. 330; *Mays v. Lewis*, 4 Tex. 38; *Bennett v. State*, 30 Tex. 521; *Elkins v. Parkhurst*, 17 Vt. 105.

Regard Paid to Intent.—In the consideration of a verdict, the first object is to ascertain what the jury intended to find; and this is to be done by construing the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to pleadings. *Miller v. Shackelford*, 4 Dana (Ky.) 271; *Mays v. Lewis*, 4 Tex. 38.

Clerical Error.—Where the intention of the jury is clear, it becomes the duty of the court to disregard a mere clerical error. *Jeansch v. Lewis*, 1 S. Dak. 609.

The language of the jury should not be confined to the technical import of the words used, but should be understood in the sense in which the jury probably intended them. *Mays v. Lewis*, 4 Tex. 38.

Upon an indictment for larceny of various articles, aggregating in value \$30, the jury returned a verdict in the following language: "We, the jury, find the prisoner guilty to the amount of thirteen dollars." This verdict was held to be a perfect finding of the crime charged, and that the qualifying words did not vary its meaning or effect, the whole being equivalent to finding the defendant guilty and assessing the value of the things stolen at \$13. *Timmons v. State*, 56 Miss. 786. And upon trial of an indictment for the same offense, under a statute defining the crime, it has been decided that a general verdict

of "guilty" implies a finding that the value of the property stolen is at least as much as is required to constitute the statutory offense. *Schoonover v. State*, 17 Ohio St. 294.

Upon a grand juror's complaint before a justice of the peace, charging the defendant with placing nuisances on a certain highway, the complaint containing two counts, one with regard to a building, and the other with regard to stone and timber placed on the highway, the justice made a general finding of guilty, and imposed a fine of seven dollars. By law, the lowest penalty that could be imposed for such an offense was five dollars. The defendant appealed to the superior court, and there moved that the case be erased from the docket, on the ground that the complaint charged two offenses, and that the fine showed that the justice found the defendant guilty of but one, and that he must have been acquitted of the other; and as it did not appear on which count he was found guilty and on which acquitted, he could not be compelled to answer to either. It was held, however, that it could not be inferred, from this state of the record, that the justice had acquitted on one count, but that a more reasonable inference was that but one offense was proved under both counts, and that the justice found the defendant guilty on both. *State v. Merwin*, 34 Conn. 113.

Obvious Construction.—It is not necessary that the construction adopted is the most obvious one, if it be fair and reasonable, and essential to support the judgment, particularly if the fact is one of minor importance. *Kansas City, etc., R. Co. v. Phillibert*, 25 Kan. 582.

Ut Res Magis Valeat, Quam Pereat.—Where the language of a verdict is ambiguous, it is the duty of the court to give it such construction as will make it effective. *Carr v. Stevenson*, 5 Humph. (Tenn.) 559. And see *State v. Bowen*, 16 Kan. 475.

Nothing can be presumed which the record is required to show; hence, where the entry in a misdemeanor case recited a verdict found by a jury of good and lawful men, to wit, A, B, it was held that no presumption could be indulged in aid of the entry or verdict, as the law required that the record should show, when one accused of crime was tried by a jury, that the jury was a lawful one, and such an entry as the one in question, imported a jury

composed of but one man. *Marks v. State*, 10 Tex. App. 334.

Matter in Issue.—A verdict which does not clearly find the matter in issue, cannot be helped by intentment. *Jewett v. Davis*, 6 N. H. 518.

Where an indictment charged the defendant with feloniously aiding and assisting in the escape of a prisoner confined in jail for a felony, and the jury found a verdict: "We, the jury, on our oaths, do find the defendant guilty of negligently permitting the escape of the convict named in the indictment, but not guilty of feloniously aiding or assisting him to escape," it was held that the verdict of the jury acquitted the accused of the offense of which he was charged in the indictment, and found him guilty of an offense for which he was not indicted, and hence, no judgment could be legally rendered against him. *Westbrook v. State*, 52 Miss. 777.

On the trial of an indictment containing two counts, the first charging the murder committed by the defendant purposely, with premeditated malice, and the second charging the killing to have been done purposely and with premeditated malice in the perpetration of burglary, an acquittal as to the first count and a conviction of the second, did not acquit the defendant on the whole indictment. *Bissot v. State*, 53 Ind. 408.

Several Issues.—An action of assumpsit was brought for goods sold and delivered, and the defendant interposed the pleas of non assumpsit and Statute of Limitations. The verdict of the jury was: "The jury find the issue for the plaintiff and assess his damages at," etc. The judgment was attacked on appeal, on the ground that there were two issues of fact, and the finding of the jury was on one only, not designating which. The supreme court held that the fair and rational construction was, that the jury negated the defenses interposed by the defendants, and found the matters in issue between the parties to be in favor of the plaintiff. *Tippen v. Petty*, 7 Port. (Ala.) 441. And see *Porter v. Rummery*, 10 Mass. 66; *Jenks v. Halet*, 1 Cai. (N. Y.) 60.

A verdict in terms, "We, the jury, find for the plaintiff," must be understood as a finding by the jury upon the issues joined between the parties, and even though there were several distinct issues made by the pleadings, such a verdict would be regarded as a sub-

jury's intention, their verdict should be regarded, and when this can be ascertained, if consistent with legal principles, such effect should be allowed to their findings as will most nearly conform to their intent.¹ If this intention would be discovered, the verdict must not be read as an abstraction, as it is but a step in the cause, to be construed and applied reasonably in the light of all

stantial finding upon all the issues. *Fries v. Mack*, 33 Ohio St. 52; *Calvin v. State*, 12 Ohio St. 60.

Burden of Proof.—As every proper intendment is to be made to sustain a verdict, it is the duty of the excepting party to show that error intervened at the trial. *Elkins v. Parkhurst*, 17 Vt. 105. See also *State v. Dixon*, 3 Iowa 416; *Elswick v. Newsom*, 9 Dana (Ky.) 260.

The presumption is, that the verdict of a jury is as broad as the issues upon which they are required to find, *Reed v. Gentry*, 7 Oregon 497; that it is consistent with the instructions given by the court, *Vincent v. State*, 10 Tex. App. 330; and that it conforms to the evidence, *Burnett v. Maxey*, 9 Port. (Ala.) 410.

The same reasonable intendment, in favor of the validity of a verdict, exists in respect to other judicial proceedings. *Rose v. State*, 82 Ind. 344; *Bennett v. State*, 30 Tex. 521.

Findings by Judge.—Where the facts have been submitted to the court without the intervention of the jury, it must be inferred, in the absence of any showing upon the record to the contrary, that the evidence introduced was sufficient to warrant the finding. *Eason v. Fisher*, 1 Ark. 90.

In an action of assumpsit the jury found a verdict, "We, the jury, find for the plaintiff and fix judgment at \$500." It was apparent that this verdict was not formal, and in the form of action which they were trying, they should have assessed the damages. On appeal, the supreme court held that the jury no doubt intended to do this, and that the verdict must be given such construction. *Halifax Fire Ins. Co. v. Vanduzor*, 49 Ill. 489.

In *Smith v. Mohn*, 87 Cal. 489, it was objected that the court found only the amount due to the plaintiff upon the contract sued on and not that the sum named was due from the defendant; but as the plaintiff and defendant were the only parties who signed the contract, it must follow as a necessary inference,

in view of their findings, that if anything was due the plaintiff it was due from the defendant. It was held, therefore, that this finding was sufficient.

A verdict, "We, the jurors, find for the plaintiff \$1,000," is informal, but sufficient, as it designates with reasonable clearness the amount named as the amount of the recovery assessed by them in the plaintiff's favor. *Ryors v. Prior*, 31 Mo. App. 555.

In *Rembaugh v. Phipps*, 75 Mo. 422, a verdict, "We, the jury, find a judgment for the plaintiff for the sum of \$90," is informal, but it appears clearly enough that it is intended to be a verdict in favor of the plaintiff for \$90 damages.

1. *McGuff v. State*, 88 Ala. 147; 16 Am. St. Rep. 25; *Handley v. Lawley*, 90 Ala. 527; *Taylor v. Talman*, 2 Root (Conn.) 291; *Russell v. Marks*, 32 Fla. 456; *Harvey v. Head*, 68 Ga. 247; *Bernard v. State*, 76 Ga. 613; *Small v. Hicks*, 81 Ga. 691; *Woodward v. Davis*, 127 Ind. 172; *Hroneck v. People* (Ind. 1890), 24 N. E. Rep. 861; *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512; *Bledsoe v. Com.* (Ky. 1889), 11 S. W. Rep. 84; *Hays v. Com.* (Ky. 1890), 14 S. W. Rep. 833; *Chace v. Fall River*, 2 Allen (Mass.) 533; *Taylor v. Short*, 38 Mo. App. 21; *Schwaabs v. Woodburne*, 56 Mo. 176; *Hoyle v. Farquharson*, 80 Mo. 378; *State v. Jones*, 106 Mo. 302; *Bishop v. St. Paul City R. Co.*, 48 Minn. 26; *Kearney v. Metropolitan El. R. Co.* (Super. Ct.), 13 N. Y. Supp. 608; *Benner v. Kilpatrick*, 54 N. Y. Super. Ct. 532; *Goodenow v. Travis*, 3 Johns. (N. Y.) 427; *Cook v. State*, 24 N. J. L. 843; *Kelsey v. Chicago, etc., R. Co.*, 1 S. Dak. 80; *Jeansch v. Lewis*, 1 S. Dak. 609; *Moore v. State*, 7 Tex. App. 14; *Harris v. State*, 8 Tex. App. 91; *Plumley v. State*, 8 Tex. App. 529; *Vincent v. State*, 10 Tex. App. 330; *Cole v. State*, 32 Tex. Crim. App. 423; *Manwell v. Manwell*, 14 Vt. 14; *Ohlweiler v. Lohmann*, 82 Wis. 198. And see *Hunter v. Burlington, etc., R. Co.*, 84 Iowa 605; *Fike v. Davis*, 5 Ind. App. 1; *Lauter v. Simpson*, 2 Ind. App.

293; *Mechanics*, etc., *Bank v. Livingston* (City Ct.), 23 N. Y. Supp. 814.

Where it is obvious that the jury did not intend to find a general verdict, it is error to treat their finding as such. *Dray v. Crich*, 3 Oregon 300.

The verdict of a sheriff's jury, under complaint of A B and others, for damages to land by reason of the laying out of a highway, which stated as follows: "We find that the said complainants have sustained damages by means of said laying out of said street or way over or adjoining their land, and the continuance thereof, and we find and allow damages to each of them respectively as follows, to wit, to A B, nothing," should not be set aside as repugnant or against law, but should be accepted as a verdict that he has sustained no damages for which he is entitled to compensation. *Chace v. Fall River*, 2 Allen (Mass.) 533.

Where distinct parcels of property are levied on under one levy, and all claimed by the same claimant, the whole being tried under one issue, if a verdict is rendered finding certain particular parcels of the property subject to the levy, the legal intentment of such a verdict would be that the balance was not subject. *Moses v. Mfg. Co.*, 68 Ga. 241.

A general verdict for the plaintiff, in an action instituted for the dissolution of a partnership, the appointment of a receiver, and the distribution of the profits, does not authorize a judgment for all the relief asked by the petition, where the only question submitted to the jury was as to the existence of the partnership. *Clark v. Gallaher*, 2 Tex. Civ. App. 541.

Several Defendants.—In *Porter v. Cotney*, 3 Ala. 314, two persons were joined as defendants, who pleaded the general issue, and thereupon a verdict was returned as follows: "We, the jury, find the issue in favor of the defendant." It was held that the reasonable intentment was, that "defendant" was unintentionally used for "defendants," and that the verdict as rendered was decisive of the case. See also *Steed v. Barnhill*, 71 Ala. 157.

Where two defendants were tried on an indictment for a felonious assault with malicious intent, a verdict that each defendant was guilty of an assault without the intent as alleged in the indictment, operated as a conviction of a simple assault. *Com. v. McGrath*, 115 Mass. 150.

Several Plaintiffs.—In a suit instituted by several plaintiffs, the jury, in the caption of their verdict, mentioned the plaintiffs by name, but in the body used the word "plaintiff." This was held to be immaterial. *Hartford County v. Wise*, 71 Md. 43.

Reconventional Demands.—The plaintiff sued to recover from the defendant the sum of \$320 for building a cotton gin house on the plantation of the defendant. The defense was that the gin house was so defectively constructed that it collapsed a short time after its erection, and that the material used in its construction, which had been furnished by the defendant, was thereby destroyed and rendered valueless. The defendant therefore reconvened and claimed damages to the amount of \$500 for the loss of the material. There was a trial by jury, and a verdict was rendered in favor of the defendant for \$175 damages, and from a judgment thereupon rendered, the plaintiff appealed on the ground that the jury responded only to the reconventional demand, and not to the plaintiff's claim. It was held, however, that when the reconventional demand grew out of the plaintiff's cause of action, that a verdict for one party was necessarily a verdict against the other, and hence the judgment was affirmed. *Kelly v. Caldwell*, 4 La. 40; *Delee v. Hatcher*, 19 La. Ann. 98.

In *Theriot v. Henderson*, 6 La. Ann. 222, it was held that in a suit where the defendant sets up a reconventional demand, the verdict of the jury in favor of the plaintiff covers the reconventional demand, and that if the defendant desired a special finding of the jury upon his reconventional demand, he should have asked for it before the verdict was recorded.

Counterclaim.—A finding by the jury for the full amount of the defendant's counterclaim is, by necessary implication, a finding adversely to that extent, on the cause of action stated in the plaintiff's petition. *Taylor v. Short*, 38 Mo. App. 21; *Schaabs v. Woodburne Sarven Wheel Co.*, 56 Mo. 176; *Hoyle v. Farquharson*, 80 Mo. 378.

But where it is impossible to tell from a verdict whether the jury passed on the plaintiff's claim, or only on one set up by defendant, a judgment rendered thereon cannot stand. *Walston v. Walston* (Tex. 1894), 24 S. W. Rep. 951.

the proceedings.¹ When a verdict is found for the plaintiff or defendant, the presumption always arises that the jury have found all the facts necessary to support it;² and where several issues are submitted and a general verdict rendered, the legal inference is, that all the issues have been found in favor of the prevailing party;³ a presumption, however, which may be rebutted by

1. *Baker v. Thompson*, 89 Ga. 486; *Hattenback v. Hoskins*, 12 Iowa 109; *State v. West*, 45 La. Ann. 928; *Wilson v. McCrillies*, 50 Mich. 347; *Muller v. St. Louis Hospital Assoc.*, 73 Mo. 242; *Hoback v. Com.*, 28 Gratt. (Va.) 922; *Mack v. Bensley*, 74 Wis. 112.

A verdict which is not explicit in its terms, but the intention of which is apparent from the pleas and evidence, may be construed with reference thereto by the court. *Harvey v. Head*, 68 Ga. 247.

Where the information, charge, and evidence all related to an offense of aggravated assault, a verdict of guilty is not defective because it does not state the character of the offense. *Cooper v. State* (Tex. 1893), 20 S. W. Rep. 979. And see *Burgess v. State* (Tex. 1893), 24 S. W. Rep. 286.

In *Bond v. People*, 39 Ill. 26, it was declared that a general verdict of guilty, in a criminal case, must be understood to refer to the offense charged in the indictment, and hence it is unnecessary to specify the offense, either by description, reference to the indictment, or otherwise.

The verdict, said the court, in *Atlantic, etc., R. Co. v. Purifoy*, 95 N. Car. 302, must be taken and interpreted in connection with the issue, and when, by necessary implication, it disposes of the matters in controversy, it will not be set aside, though not so full as might be desirable.

2. *Welch v. Fourier*, 6 Ala. 516; *Hickman v. Southerland*, 4 Bibb (Ky.) 104; *State v. Craig*, 89 N. Car. 475; 45 Am. Rep. 698; *Wolf v. Goodhue F. Ins. Co.*, 43 Barb. (N. Y.) 400; *Bybee v. Burbank*, 2 Oregon 295; *Richardson v. Royalton, etc., Turnpike Co.*, 6 Vt. 496; *Fitzer v. McCannan*, 14 Wis. 63.

3. *Rhoads v. Metropolis*, 36 Ill. App. 123; *Worford v. Isbel*, 1 Bibb (Ky.) 247; *Sheldon v. Edwards*, 35 N. Y. 279; *White v. Simonds*, 33 Vt. 178; 78 Am. Dec. 620.

Where a general verdict has been found, it may be presumed that a material question of fact, not specially

found but about which there was evidence, was determined in favor of the prevailing party. *Allard v. Hamilton*, 58 N. H. 416.

Where the general issue and special pleas are pleaded, and a verdict is found for the plaintiff on the general issue, which clearly could not have been so found if any of the special pleas had been supported, the verdict is in effect a verdict for the plaintiff on all pleas. *Carroll v. Graham*, 8 R. I. 242; *Burdick v. Burdick*, 15 R. I. 165.

Verdict by Consent.—Upon a verdict by consent, it is to be assumed that everything that could legally have been found for the party in whose favor the verdict was taken, has been so found. *Hill v. Pine River Bank*, 45 N. H. 300.

General Verdict of Guilty—Several Counts.—Where, on an indictment containing several counts, a general verdict of guilty was rendered, it was held to be equivalent to a verdict of guilty, as the defendant stood charged in the indictment on each and every count thereof. *Lovell v. State*, 45 Ind. 550.

A general verdict that the defendant is "guilty in manner and form as he stands charged in the indictment," where the indictment contains two counts charging distinct misdemeanors, will authorize a sentence on each count. *Eldredge v. State*, 37 Ohio St. 191.

Where there are several counts in the information, and a general verdict is rendered, the jury will be presumed to have found the prisoner guilty upon all the counts, and the court will impose a sentence in accordance with the facts proved upon the trial. *State v. Tuller*, 34 Conn. 280. See also *State v. Bean*, 21 Mo. 269.

This is not the case, however, where, upon the trial of an indictment containing several counts, the jury is directed to confine its investigation to one count only. Here a general verdict of guilty will be construed as an acquittal on all the counts withdrawn from their consideration. *State v. Thompson*, 95 N. Car. 596.

Several Counts—Same Offense—Different Forms.—Where a verdict found the

showing that on one or more of the issues no evidence was offered.¹ It has been held that if an indictment contains two separate counts for offenses which may be properly joined therein, the one of a higher grade and the other of a lower grade, if of the same nature, connected with and growing out of the same transaction, though the punishment for each grade may be different, and the jury find a general verdict of guilty, the legal intendment of such a verdict is to find the defendant guilty of the highest grade charged.²

In criminal prosecutions, where intent constitutes an element of the offense charged, if the jury, though finding the defendant guilty, negative the question of intent, the verdict cannot operate as a conviction.³ A verdict of guilty upon one of several counts

prisoners "guilty as charged in the indictment," the indictment containing two counts, it was declared that this was in effect a finding of guilty on both counts, which charged the same offense in different forms, and that there was no error, therefore, in entering a judgment on this verdict. *Moody v. State*, 1 W. Va. 337.

Several Counts—Conviction on One.—

Where, upon an indictment containing three counts, no presumption arises that the three counts charge the same offense, the defendant may be convicted on one, and acquitted on the others, without rendering the verdict liable to objection on the ground of repugnancy. *Com. v. Lowrey*, 159 Mass. 62.

Issue as to Gold Coin.—In an action to recover money, the complaint claimed, and the answer denied, that it was payable in gold coin. The verdict found for the plaintiffs generally. It was held that such a verdict included a finding on all the allegations of the complaint material to the plaintiffs' recovery, but that it did not determine the issue whether the money sued for was, or was not, payable in gold coin. *Merritt v. Wilcox*, 52 Cal. 238.

1. *Rhoads v. Metropolis*, 36 Ill. App. 123.

Where the plaintiff declares in two counts, and the attention of the jury is directed by the judge to one only, a general verdict found by them, is presumed to be on that count. *Jones v. Cooke*, 3 Dev. (N. Car.) 112.

2. In *Dean v. State*, 43 Ga. 218, which was the trial of an indictment containing several counts, upon which a general verdict of guilty was rendered, it was maintained that there was a presumption of law that the jury in-

tended to find the prisoner guilty of the highest offense charged in the indictment. *Estes v. State*, 55 Ga. 131; *Adams v. State*, 52 Ga. 565; *Yarborough v. State*, 86 Ga. 396; *State v. Crenshaw*, 45 La. Ann. 496; *Conkey v. People*, 1 Abb. (N. Y.) App. Dec. 418; *Harmon v. Com.*, 12 S. & R. (Pa.) 191; *Whart. Cr. L.*, p. 1037, § 3048. And see *State v. Carter* (S. Car. 1893), 18 S. E. Rep. 517.

In *O'Connor v. State*, 9 Fla. 215, the verdict, on an indictment for murder containing only one count, was simply "guilty." It was held that although the jury under this count might have found the prisoner guilty of manslaughter, yet having found him guilty generally, it must be taken as referring to the offense in the indictment.

3. Thus, where the defendant was tried upon an indictment for false pretenses, and the jury found a verdict in the following language: "Guilty of obtaining food and money under false pretenses, but whether there was any intent to defraud, the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy." As the latter part of this finding negated the intent to defraud, without which the former portion could not have been found, it was held that the conviction must be quashed. *Reg. v. Gray*, 17 Cox Crim. Cas. 299.

State v. Wolfrum (Wis. 1894), 60 N. W. Rep. 799, was an action to recover the forfeiture, prescribed by Laws of 1889, ch. 381, § 1, to be incurred by a dishonest property owner who should "intentionally make a false statement" of his possessions in order to avoid payment of taxes. A verdict was rendered finding the defendant "guilty, not

of an indictment, without any finding as to the other counts, is equivalent to a verdict of acquittal on the counts ignored;¹ and where a new trial is had, and the jury are silent as to the counts upon which the finding was made at the former trial, this is an acquittal upon all counts, and operates to discharge the accused.² It is not usually necessary for a verdict in a civil case to name the party against whom it is found, as a verdict in favor of one party is construed to be a verdict against the other.³

k. SURPLUSAGE.—When a jury find not only the issues submitted to them, but embrace in their verdict the determination of matters not involved in the controversy, this redundant matter is denominated surplusage.⁴ Under these circumstances, the maxim

criminally, but negligently.” This was held to be in effect a verdict of acquittal for the defendant.

1. *Nabors v. State*, 6 Ala. 200; *Bell v. State*, 48 Ala. 684; 17 Am. Rep. 40; *Johnson v. State*, 27 Fla. 245; *Hathcock v. State*, 88 Ga. 91; *Chambers v. People*, 5 Ill. 351; *Keedy v. People*, 84 Ill. 569; *Thomas v. People*, 113 Ill. 531; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186; *Hayworth v. State*, 14 Ind. 590; *State v. Calvin*, 42 La. Ann. 978; *State v. Grimes*, 29 Mo. App. 470; *State v. Cofer*, 68 Mo. 120; *Morris v. State*, 8 Smed. & M. (Miss.) 762; *State v. Taylor*, 84 N. Car. 773; *Morehead v. State*, 34 Ohio St. 212; *Girts v. Com.*, 22 Pa. St. 351; *People v. Chalmers*, 5 Utah 201; *Kirk v. Com.*, 9 Leigh (Va.) 627; *State v. Hill*, 30 Wis. 416.

Where an indictment contains three counts, two of them charging a conspiracy to obtain goods by false pretenses, and the other for obtaining goods by false pretenses, a verdict finding the defendant guilty of the conspiracy to obtain goods by false pretenses, saying nothing as to the third count, is equivalent to a finding of not guilty as to that count, *Thomas v. People*, 113 Ill. 531; and when an indictment, in distinct counts, charges rape, and an attempt to commit a rape upon the same person, referring to the same act, a verdict of guilty as to either count amounts to an acquittal of the crime charged in the other. *State v. Cofer*, 68 Mo. 120.

Upon the trial of an indictment for murder in the first degree, a verdict of guilty of murder in the second degree, without expressly acquitting the defendant of murder in the first degree, is good, and such verdict is equivalent to an acquittal of the higher degree of the crime charged. *Morehead v. State*, 34 Ohio St. 212.

Likewise, a verdict which declares the defendant guilty of common assault, under an indictment for felonious assault, without a specific statement that he is not guilty of felonious assault, is in effect an acquittal of the higher offense charged. *State v. Grimes*, 29 Mo. App. 470.

2. *State v. Gannon*, 11 Mo. App. 502.

3. *New York, etc., R. Co. v. Gallagher*, 79 Tex. 685.

In trespass against several defendants, a general verdict for the plaintiff, without specifying against which of the defendants, will be understood as applying to them all. *Caine v. Watson*, 1 Morr. (Iowa) 52.

Criminal Cases—Misnomer of Defendant.—In the case of *People v. Ah Ye*, 31 Cal. 451, the defendant was indicted by the name of John Doe, a Chinaman, and when arraigned gave his name as Ah Ye and pleaded not guilty, and upon the trial, the jury rendered a verdict in the following form: “The jury, in the case of the people of the State of California *v. Ty Chin*, a Chinaman, do find the said Ty Chin, a Chinaman, guilty.” Upon appeal, the supreme court held that the only solution of the matter was to hold it to be a finding of the jury that Ah Ye was not guilty of the crime for which he was indicted and, tried, and that upon the verdict judgment should have been entered in his favor. See also *Territory v. Do*, 1 Arizona 507.

Where, upon the trial of an indictment charging Joseph McBride with a certain offense, and the verdict of the jury pronounced James McBride guilty, it was held that such a verdict would not support a judgment against the real defendant. *State v. McBride*, 19 Mo. 239.

4. *Coke's Litt.* 227. See also *Lassiter v. Thompson*, 85 Ala. 223; *Pierce*

utile per inutile non vitiatur is applicable,¹ and such portion of the verdict as lies beyond the legitimate province of the jury may be disregarded or rejected.² Accordingly, it has been held that the language of a jury accompanying their verdict, attempting to

v. Schoden, 62 Cal. 283; *Hudson v. Hawkins*, 79 Ga. 274; *State v. Bradley*, 6 La. Ann. 556; *Poulson v. Collier*, 18 Mo. App. 583; *Goodenow v. Travis*, 3 Johns. (N. Y.) 427; *Duane v. Simmons*, 4 Yeates (Va.) 441; *Burton v. Bondies*, 2 Tex. 203; *Garrard v. Henry*, 6 Rand. (Va.) 114. And see subsequent notes under this subdivision.

1. The maxim *utile per inutile non vitiatur* applies as strongly to verdicts as to any other part of judicial proceedings. Thus, a finding of facts by the jury, not necessarily involved, will not vitiate the verdict when insufficient to decide the issue. *Tuley v. Mauzey*, 4 B. Mon. (Ky.) 5.

Lord Coke laid down the rule that if a jury give a verdict on the whole issue and more, that which is more is surplusage and should not arrest judgment, for *utile per inutile non vitiatur*. Coke's Litt. 277.

If the jury, in rendering a verdict, decide the whole issue and then add other immaterial things, the verdict is not thereby vitiated. The immaterial things so added may be regarded as surplusage and rejected. *State v. Bradley*, 6 La. Ann. 556. To the same effect, see *Gover v. Turner*, 28 Md. 600; *Wallis v. Bazet*, 34 La. Ann. 131.

In *Windham v. Williams*, 27 Miss. 313, it is declared that "if more is found by the jury than is necessary, it may be disregarded as surplusage, but it does not vitiate that which is necessary and well found."

Money Obtained by Fraud.—In an action to recover money alleged to have been obtained by fraud, the jury returned the following verdict: "We, the jury, find for the plaintiff and assess his damages at \$275. The jury, in their verdict, decline to impute improper motives to the defendants in the matter in controversy." It was held that this last sentence did not vitiate the verdict, it being merely surplusage. *Dunlop v. Hayden*, 29 Ind. 303.

It has been held that if a verdict in dower, where the husband did not die seised, finds among other things the value of the land, this will be construed as surplusage and will not vitiate the

rest. *Leineweaver v. Stoeper*, 17 S. & R. (Pa.) 297; *Benner v. Evans*, 3 P. & W. (Pa.) 454; *Shirtz v. Shirtz*, 5 Watts (Pa.) 255.

2. *Stearns v. Barrett*, 1 Mason (U. S.) 153; *U. S. v. One Case Stereoscopic Slides*, 1 Sprague (U. S.) 467; *McRae v. Colclough*, 2 Ala. 74; *Toulmin v. Lesesne*, 2 Ala. 359; *Watson v. San Francisco, etc., R. Co.*, 50 Cal. 523; *Worthington v. Brewster*, 30 Ga. 112; *Lively v. Ball*, 2 B. Mon. (Ky.) 53; *Tuley v. Mauzey*, 4 B. Mon. (Ky.) 5; *Riggs v. Maltby*, 2 Metc. (Ky.) 88; *Hobart v. Haggett*, 12 Me. 67; *Odlin v. Grove*, 41 N. H. 478; 77 Am. Dec. 773; *Bemus v. Beekman*, 3 Wend. (N. Y.) 667; *Sanders v. New York, El. R. Co.*, 16 Daly (N. Y.) 261; *Fisher v. Kean*, 1 Watts (Pa.) 259; *Miner v. Booz* (Pa. Com. Pl.), 6 Kulp. 373; *Cavene v. McMichael*, 8 S. & R. (Pa.) 441; *Martin v. Ohio River R. Co.*, 37 W. Va. 349.

So far as the verdict goes beyond the allegations of the pleadings, it is inoperative and void. *U. S. v. One Case Stereoscopic Slides*, 1 Sprague (U. S.) 467.

Sanders v. New York El. R. Co. (C. Pl.), 10 N. Y. Supp. 112, was an action instituted to recover for alleged injury to adjacent property resulting from the operation of the elevated railway. The finding of fact, in addition to its reference to smoke, steam, gas, and cinders of which there was ample proof, stated that grease, oil, and water, of which there was no evidence, were allowed to drop from passing trains and fall in front of the plaintiff's premises. It was held, upon an inspection of the whole case, that this apparent error could not have had any influence on the result, and it was also said to be obvious that the judgment was intended to rest upon the findings on the issues actually discussed at the trial. The conclusion was that, under the circumstances, the obnoxious clause might be disregarded as surplusage.

But see the case of *Pappenheim v. Metropolitan El. R. Co.* (Super. Ct.), 7 N. Y. Supp. 679; this case, however, is not regarded as controlling. There the inadvertent finding was wholly irreconcilable with, and antagonistic to,

the judgment, and was, moreover, made as a separate and distinct finding. That decision was put upon the ground that, where two findings of fact are inconsistent, the appellant is entitled, in the support of his exceptions, to have that taken as true which is the more favorable to himself.

In a *scire facias*, upon a municipal lien for grading and paving a street, the jury, under the instructions of the court, found a verdict for the city for the amount of its claim and also, under instructions, found certain facts, not amounting to a special verdict, by which it appeared that the defendant had a set off, as against the contractor, in excess of the amount of the claim of the city, and on this verdict judgment was rendered generally. It was held that the city could not complain, as the judgment was for its claim in full, and the remainder of the verdict was surplusage. *Pittsburg v. McKnight*, 91 Pa. St. 202. Compare *Pittsburg v. Harrison*, 91 Pa. St. 206.

In *State v. McCombs*, 13 Iowa 426, it is held that the words, "as charged in the indictment" after the words "we, the jury, find the defendant guilty," are mere surplusage, and do not affect the rights of the defendant. *Evans v. State*, 58 Ark. 47.

In a suit against a surety, where the question was whether or not he had been discharged from liability, a verdict for the plaintiff sufficiently determined the issue. "It is impossible to mistake the meaning of the jury," said the court, "and whatever else is in the verdict is mere surplusage and amounts to nothing." *Worthan v. Brewster*, 30 Ga. 112.

The appearance of a name appended to a verdict, which is not found in the list of jurors sent up in the record as those who tried the case, does not invalidate the verdict. It is mere surplusage. *Burton v. Bondies*, 2 Tex. 204.

Issues Not Presented.—In *Ashton v. Touhey*, 131 Mass. 26, the jury found upon an issue not presented to them by the pleadings. It was held that that part of their verdict might be rejected as surplusage, "for," said the court, "it is not only competent for the court, but it is its duty to put into correct form the finding of the jury."

In the case of *North & South St. R. Co. v. Creighton*, 86 Ga. 499, the verdict of the jury was in these words: "We, the jury, find for the plaintiff \$800, less the amount of freight, with

interest." It was held that the words "less the amount of freight" might be disregarded as surplusage, as there was no "freight" involved in the issue on trial.

Where in an action on a promissory note, the issues for the jury were as to presentation, demand, refusal to pay, and notice, and the jury returned a verdict finding for the plaintiff; assessing his damages at a certain sum, it was held that so much of the verdict as related to the assessment of damages, was surplusage which should have been rejected and judgment rendered in favor of the plaintiff for the amount of the note, which was a different and larger amount than that assessed by the jury as damages. *Pierce v. Schaden*, 62 Cal. 283.

"In Gold Coin."—Where there was no issue as to whether the plaintiff's demand was payable in gold coin, a verdict finding for the plaintiff in gold coin is improper, but the words "gold coin" may be treated as surplusage and disregarded in the entry of the verdict and the judgment. *Marquard v. Wheeler*, 52 Cal. 445.

To the same effect, see *Watson v. San Francisco, etc., R. Co.*, 50 Cal. 523, and *Chamberlin v. Vance*, 51 Cal. 85.

But where a note is by its terms payable "in gold coin," a verdict finding for the plaintiff the amount of the note in gold coin is proper. *Irvin v. Garner*, 50 Tex. 48.

Extraneous Fact—Void Pro Tanto.—A verdict which goes beyond the issues raised by the pleadings and passes upon an extraneous fact not embraced therein, is *pro tanto* void, and the surplus matter may be disregarded in entering the judgment. *Marquard v. Wheeler*, 52 Cal. 445.

Stating Legal Consequence of Judgment.—Where a purchaser of goods left them with the vendor, and afterwards recovered a verdict for their value, the force of the verdict is not destroyed by an additional direction that they be delivered to the defendant. This merely states the legal consequence of the judgment, and may be rejected as surplusage. *Rawson v. McElvaine*, 49 Mich. 104.

Conditional Set-off.—Where the jury returned a verdict for the plaintiff for \$51.60, subject to an offset of \$26.80 if the said offset had not already been paid, and if it had been paid then for \$51.60 without offset, it is proper to render a

explain their reasons for so finding,¹ or a mere expression of opinion at the time of the delivery of the verdict,² is surplusage, which does not in the least impair the effect of the really substantial portion remaining after the rejection of that which is irrelevant. It has also been maintained that where the jury have erroneously allowed interest on an amount of damages assessed, a resort to the same practice will enable the court to sustain the verdict, and pronounce judgment for the amount indicated, ignoring the finding for interest.³ Again, if the jury transcend the limits of their jurisdiction by a direction as to the payment of costs, the part relating to costs is surplusage, void, and of no effect.⁴ The rule in respect to the rejection of surplusage does not

judgment for \$51.60 and reject the balance as surplusage. *Hawkins v. House*, 65 N. Car. 614.

The title of a case prefixed by the jury to their verdict may, it seems, be regarded as surplusage if it is erroneous. In *People v. Ah Kim*, 34 Cal. 189, the defendant was arraigned under the name of Ah Keet. Upon being arraigned he stated his name to be Ah Kim; which name was substituted and the further proceedings were had in the substituted name. The jury, however, in rendering their verdict, prefixed the original title to the case, "People v. Ah Keet" and said: "We, the jury, find the defendant guilty as charged in the indictment." It was held that the mistake of the jury, in prefixing the original title of the case to their verdict, was of no consequence, as the judgment was properly entitled and pronounced against the defendant in his proper name. The case of Ah Kim was the one tried and submitted to them and there was no necessity for prefixing a title to the verdict, and the error was obviated by regarding such title as surplusage.

Inaccuracy from Surplusage.—If the finding of a jury, as affirmed and recorded, does not state with technical accuracy their finding upon the real issues tried, and the court can see how it should be corrected, it will reject what is surplusage and make it conform to the real issues tried. *Ashton v. Touhey*, 131 Mass. 26.

Fixing Punishment.—Where, upon the trial of an indictment for larceny, the jury declared the defendant guilty, and proceeded to fix his punishment, it was held that that part of the verdict which alluded to the punishment might be considered as surplusage and rejected, and the sentence construed as the act

of the court. *Cropper v. U. S.*, 1 Morr. (Iowa) 259. See also, as to the rejection of surplusage, *Longacre v. State*, 2 How. (Miss.) 637; *Massey v. Duren*, 7 S. Car. 310; *Wells v. Garland*, 2 Va. Cas. 471.

1. The supreme court of *Maryland*, in upholding a verdict where the jury had departed from the proper form by assigning reasons for their finding, said: "It is true the verdict is not in the usual form, the jury having assigned a reason upon which they based it, but as we have said, we do not regard this departure from the usual form as material. Where the intention of the jury is manifest, the court will disregard matters of form." *Gover v. Turner*, 28 Md. 600; *Browne v. Browne*, 22 Md. 115. See also *Gregory v. Frothingham*, 1 Nev. 253.

2. An expression of opinion by the jury at the time of the delivery of their verdict, forming no part of their verdict, will not vitiate it. Such remarks are mere surplusage and cannot affect the plain finding of the verdict on the issue joined. The maxim *utile per inutile non vitiatur* is applicable. *Wallis v. Bazet*, 34 La. Ann. 131.

3. *Glidden v. Street*, 68 Ala. 600.

4. *Lincoln v. Hapgood*, 11 Mass. 358; *Hancock v. Buckley*, 18 Mo. App. 459; *State v. Knight*, 46 Mo. 83; *Tucker v. Cochran*, 47 N. H. 54; *Parkinson v. McQuaid*, 54 Wis. 473. And see *Ford v. Taggart*, 4 Tex. 492; *Hall v. York*, 16 Tex. 18.

"For the Defendants, They to Pay Costs."—In the case of *State v. Knight*, 46 Mo. 83, the jury returned the following verdict: "We, the jury, find for the defendants, they to pay the costs of the suit." Regarding this verdict, the appellate court said: "The jury found for the defendants; the verdict was good

apply where the redundant findings are substantially variant from those which are responsive to the issues,¹ or where the surplus clearly shows that the jury reasoned incorrectly, or that they came to their conclusion from false premises.²

(1) *Recommendation to Mercy*.—It not infrequently happens that a jury, in rendering a verdict of guilty upon the trial of an indictment for a capital offense, moved by compassion, or impressed with the belief that circumstances exist palliating the atrocity of the crime committed, add to their verdict a recommendation of the prisoner to the mercy of the court. In the absence of a statute prescribing the effect of a verdict of "guilty with mitigating circumstances,"³ it has generally been held that such invocation of judicial clemency is merely an addition to, and not

and complete; the matter of costs was not in issue, and was not submitted to them. That part of their verdict, therefore, was merely void, and should have been disregarded as surplusage."

"**Each Party to Pay His Own Costs.**"—In an action for a trespass upon real estate, and for taking and removing a fence therefrom, to which was pleaded a general denial and that the *locus in quo* was owned in fee by the defendant, the jury found a verdict for the defendant that he was not guilty of the trespass complained of, and added that they "established the line as made by A B & C, and that each party pay his own costs of suit." This verdict was properly treated as a mere general verdict for the defendant, the remainder being disregarded. *Parkinson v. McQuaid*, 54 Wis. 473.

"**Dividing Costs.**"—In *Hancock v. Buckley*, 18 Mo. App. 459, the verdict of the jury was for the plaintiff, but dividing the costs between the parties. It was held that this latter part of the verdict, being wholly outside of the issues submitted to the jury, should be treated by the court as surplusage.

Where the jury do not find for either party, their verdict consisting solely of a direction as to costs, it was held to be void. *Ford v. Taggart*, 4 Tex. 492; *Hall v. York*, 16 Tex. 18.

"**Awarding Costs—Correction.**"—Where the jury go out of their province and award costs, it seems that they may be allowed to correct their verdict in that regard. *Foote v. Woodworth* (Vt. 1894), 28 Atl. Rep. 1034.

1. *Washington, J.*, in *Patterson v. U. S.*, 2 Wheat. (U. S.) 221.

Moses, C. J., in delivering the opinion of the court in *Massey v. Duren*, 7 S.

Car. 310, said: "In the case at the bar, the verdict, without the words which 'cumber' it, was certain as to the intention of the jury, and valid as their expression on the very issues on which they were to pass. To set it aside, because of additional words, which do not really qualify the judgment of the jury on the material issues involved, and thus permit a second trial, would be without any sufficient cause."

In *Charleston v. Weikman*, 2 Spears (S. Car.) 371, Wardlaw, J., in delivering the opinion of the court, said: "It is only where a verdict, before certain and valid, . . . has been cumbered by the addition of useless matter, not qualifying the previous meaning, that the addition can be rejected as surplusage." See also *Pappenheim v. Metropolitan El. R. Co.* (Super. Ct.), 7 N. Y. Supp. 679.

2. *Gregory v. Frothingham*, 1 Nev. 253.

3. In *Florida*, there is a statute by virtue of which a majority of the jury, when rendering a verdict of guilty of murder in the first degree, may agree upon a recommendation of the prisoner to the mercy of the court, which will change the penalty, which without such recommendation is death, to imprisonment for life. *Hicks v. State*, 25 Fla. 535.

In *Georgia*, the rule seems to be, that on the trial of an indictment for crimes punishable with death, if the jury expressly recommend, upon the rendition of a verdict of guilty, that the penalty shall be commuted to imprisonment for life, it is the duty of the court to pronounce judgment in conformity with this recommendation. *Stallings v. State*, 47 Ga. 572; *Johnson v. State*, 48 Ga. 116; *West v. State*, 49

a qualification of, the verdict, which the court is at perfect liberty to reject or disregard as surplusage.¹

1. AMENDMENT OF VERDICT—(1) *By the Jury*.—Where defects of substance or of form appear in the verdict upon its rendition, the jury may be allowed to alter or correct it at their own request, or the court may require the proper amendments to be made.² To this effect the court may point out the errors which the verdict contains and make such explanations as it may deem

Ga. 451; *Wair v. State*, 51 Ga. 303; *Brantley v. State*, 87 Ga. 149; *Pool v. State*, 87 Ga. 526. And see *Stephens v. State*, 51 Ga. 236; *Thomas v. State*, 89 Ga. 479.

1. *People v. Lee*, 17 Cal. 76; *Roby v. State*, 61 Ga. 45; *State v. Potter*, 15 Kan. 303; *State v. Bradley*, 6 La. Ann. 556; *State v. O'Brien*, 22 La. Ann. 27; *Penn v. State*, 62 Miss. 450; *State v. Vasquez*, 16 Nev. 42; *State v. Bennett* (S. Car. 1894), 18 S. E. Rep. 886. And see *Lewis v. State*, 3 Head (Tenn.) 127.

Technically and strictly, the jury have nothing to do with the question of punishment, but only with the question of guilt, and they go outside the strict boundaries of their duty when they attempt to influence the term of the punishment. Where the verdict as returned was one finding the defendant guilty of murder in the second degree, and with a recommendation that his punishment should be the least amount allowed by law, the court declined to receive the verdict in that form and handed them one without these words, which was duly signed and recorded. It was held that no error had been committed affecting the substantial rights of the defendant. *State v. Potter*, 15 Kan. 303.

To the same effect, it is declared, in *State v. Vasquez*, 16 Nev. 42, to be the sole duty of the jury to declare by their verdict whether the defendant is guilty or not guilty, and that the trial court should disregard the request of the jury for an instruction as to their rights and duties in recommending the defendant to the mercy of the court.

In *Penn v. State*, 62 Miss. 450, the jury trying an indictment for murder, returned a verdict in these words: "We, the jury, find the defendant guilty as charged in the indictment, and plead the mercy of the court." The jury was polled, each juror was asked: "Is this your verdict?" and he responded: "It is." The verdict was held to be good and the words, "plead

the mercy of the court," mere surplusage.

And in *State v. Bradley*, 6 La. Ann. 556, the jury found the prisoner guilty, but recommended him to the clemency of the court, on the ground that he was not prepared for trial, adding, however, that they did not mean to censure the court. It was held that it was the duty of the trial judge to disregard all this as surplusage, as it was not responsive to the issue, and altogether beyond the jurisdiction of the jury. See also *State v. O'Brien*, 22 La. Ann. 27, where, to a verdict of guilty of murder, the jury added a recommendation of the prisoner to the mercy of the court, it was held that this addition was not a qualification of the verdict, but might be rejected as surplusage.

In *People v. Lee*, 17 Cal. 76, the defendant was found guilty of murder in the first degree, but recommended to the mercy of the court. The verdict was recorded without the recommendation, as that was no part of the verdict, being addressed solely to the court. *Roby v. State*, 61 Ga. 45.

The rule formerly prevailed in *Tennessee*, by which the opinion of the jury finding mitigating circumstances was made obligatory upon the court. In *Lewis v. State*, 3 Head (Tenn.) 127, a provision of a more recent enactment is cited, leaving the question of mitigating circumstances in the sound discretion of the court, upon an unbiased and discriminating survey of the whole case, to give effect to the recommendation or to refuse to do so as the ends of public justice may seem to dictate. See also *Nelson v. State*, 10 Humph. (Tenn.) 532; *Lancaster v. State*, 91 Tenn. 267.

2. *Defects of Substance*.—*St. Clair v. Caldwell*, 72 Ala. 527; *Tarleton v. Briscoe*, 1 A. K. Marsh. (Ky.) 67; *Ward v. Bailey*, 23 Me. 316; *Wright v. Hemphill*, 81 N. Car. 33; *State v. Bishop*, 73 N. Car. 44; *Mark v. Hud-*

son River Bridge Co., 56 How. Pr. (N. Y. Supreme Ct.) 109; *State v. Baldwin*, 14 S. Car. 135.

"Defendant" to "Plaintiff."—Where the verdict was in favor of the defendant for a certain sum, which was the sum sued for by the plaintiff, and this evident mistake was immediately discovered and the attention of the jury called to it, it was proper for them to retire and amend the verdict by making it in favor of the plaintiff. *Blalock v. Waldrup*, 84 Ga. 145.

But where the verdict is rendered for one party in obedience to the instructions of the judge, it cannot be amended on motion so as to transform it into a verdict for the other party. *Brush v. Kohn*, 9 Bosw. (N. Y.) 589.

"Nominal" to "Substantial" Damages.—In an action against a mill owner, to recover damages caused by his maintaining his dam at too great a height, whereby the water was set back, the jury rendered a verdict with nominal damages for the plaintiff, and directed that the defendant should reduce his dam to a certain level. The latter portion of the verdict, in reference to the reduction of the dam, was ordered to be erased by the judge, but several jurors dissented from the verdict thus amended, whereupon the jury were directed to retire for further deliberation. Consequently, the jury rendered a verdict with substantial damages for the plaintiff. It was held that the defendant had no ground for exception. *Brown v. Dean*, 123 Mass. 255.

Formal Defects.—*Truebody v. Jacobson*, 2 Cal. 269; *People v. Jenkins*, 56 Cal. 7; *Cook v. State*, 26 Ga. 593; *Cook v. Scott*, 6 Ill. 333; *M'Gregg v. State*, 4 Blackf. (Ind.) 101; *State v. Waterman*, 1 Nev. 543.

Thus, in *Cook v. Scott*, 6 Ill. 333, it was observed that the court may, in the exercise of a sound discretion, permit the verdict of the jury to be put into proper form before they are discharged.

On Motion of Prosecuting Attorney.—Where the verdict against the defendant in an indictment was informal, the jury were allowed to amend it upon motion of the prosecuting attorney, with the consent of, and in the presence of, the court, so as to give it the form of a general verdict of guilty. *M'Gregg v. State*, 4 Blackf. (Ind.) 101.

At Request of Jury.—*Hamilton v. Barton*, 20 Iowa 505; *Broussard v. Nolan*, 4 La. Ann. 55; *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32; *Sledd v. Com.*, 19

Gratt. (Va.) 822. See also *Tarlton v. Briscoe*, 1 A. K. Marsh. (Ky.) 67.

In the case of *Sledd v. Com.*, 19 *Gratt. (Va.)* 813, upon the rendition of the verdict, the defendant, for certain reasons then expressed, moved the court to set aside the verdict. One of the jurors, after hearing the discussion upon the motion to set aside, said that he desired to amend the verdict. Thereupon the court inquired of the jury whether they desired to amend their verdict and each of the jurors answered that he did. The jury were then allowed to amend their verdict, which proceeding was subsequently approved by the supreme court.

In *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32, the court said: "The law is well settled, that before a verdict is recorded the jury may vary from the first offer of their verdict, and the verdict which is recorded shall stand; and there are many cases in the books, of a jury changing their verdict immediately after they have pronounced it in open court."

By Direction of Court.—*Truebody v. Jacobson*, 2 Cal. 269; *Cook v. State*, 26 Ga. 593; *State v. Waterman*, 1 Nev. 543; *Heller v. State*, 23 Ohio St. 582; *Herbst Importing Co. v. Burnham*, 81 Wis. 408.

It is the duty of the court to look after the form and substance of the verdict so as to prevent a doubtful or insufficient finding from passing through the records of the court; for that purpose the court can, at any time while the jury are before it and under its control, see that it is amended in form so as to meet the requirements of the law. *People v. Jenkins*, 56 Cal. 4.

Specification as to Count.—When a verdict defective in form is brought in by a jury, it is not error for the court to direct the jury to retire again to say under which count they find the prisoner guilty. *People v. Graves*, 5 Park. Cr. Rep. (N. Y.) 134.

Specification as to Degree of Crime.—On the trial of several defendants jointly indicted for murder, the jury came in with the verdict "Guilty in the manner and form as they stand indicted." The court sent them back with instructions to find the degree. They returned a verdict in proper form and assented to it when polled. This was held not to be error. *Nicely's Appeal* (Pa. 1889), 18 Atl. Rep. 737.

Correction of Form.—When a jury brought into court a verdict in eject-

necessary,¹ and with proper discretion allow evidence to be heard.² Thereupon, the court should have the correction made in its presence,³ or should direct the jury to retire to their room for further deliberation.⁴

ment in the plaintiff's favor generally, and for damages, and before the verdict was entered in the record, the court charged them to bring in a verdict in the form required by law, and directed that a proper form be prepared, which being done, the jury retired and brought in their verdict in legal form, signed by their foreman, upon which judgment is entered, there is no fault in the proceedings. The jury may vary or amend a verdict before their discharge and before it is recorded, and the form of verdict prepared under direction of the court agreed to by the jury is sufficient. *Coffee v. Groover*, 20 Fla. 64.

1. *Truebody v. Jacobson*, 2 Cal. 269; *People v. Jenkins*, 56 Cal. 7; *Coffee v. Groover*, 20 Fla. 64; *Ft. Wayne v. Duryee* (Ind. App. 1894), 37 N. E. Rep. 299; *State v. Bishop*, 73 N. Car. 44; *Mark v. Hudson River Bridge Co.*, 56 How. Pr. (N. Y. Supreme Ct.) 109; *People v. Graves*, 5 Park. Cr. Rep. (N. Y.) 134; *State v. Baldwin*, 14 S. Car. 135; *Trent v. State*, 31 Tex. Crim. App. 251; *Doran v. Ryan*, 81 Wis. 63.

Where the defendant was indicted for the larceny of a leather trunk, the jury returned a verdict of "guilty of the larceny of a fifty dollar note," as evidence to the effect that the trunk contained a fifty dollar note when stolen had been introduced. The court informed the jury that the prisoner was not indicted for stealing the bill but the trunk, whereupon the jury retired and brought in a verdict of guilty of the larceny of the trunk as charged in bill of indictment. It was held that, as the verdict as first rendered was not received or recorded, and the jury had not been discharged, it was admissible for them to correct the inadvertence so as to make the verdict responsive to the indictment. *State v. Bishop*, 73 N. Car. 44.

Re-reading Instructions to Jury.—After the cause had been argued and submitted, and the jury had retired to consider their verdict, they returned into court, and, by their foreman, handed to the court an informal verdict, which was entered upon the minutes of the court. The court, however, seeing that the jury had mistaken an instruction which had

been given to them, as to the form of their verdict, again read to them the instruction and directed them to retire and reconsider their verdict. They did so, and soon after returned into court with a verdict, legal in form, which was read and recorded, and the jury, upon being polled, assented to it, and were discharged. *People v. Jenkins*, 56 Cal. 4.

Explanation of Legal Terms.—If a jury have, through a misconception of the meaning of legal terms, returned a verdict the reverse of which they intended, and such verdict has been affirmed, the papers may be again delivered to the jury by the presiding judge before they have dispersed or left their seats, and the judge may explain to them the meaning of those terms and the verdict may be corrected accordingly. *Ward v. Bailey*, 23 Me. 316.

2. In *Burk v. Com.*, 5 J. J. Marsh. (Ky.) 675, it was held that before a verdict is received by the court and recorded, the judge has a right to call in a witness who has been examined and cause his reexamination upon the point on which the jury are not satisfied, or on which they are about to predicate an erroneous verdict.

3. *Stewart v. Taylor*, 68 Cal. 5; *M'Gregg v. State*, 4 Blackf. (Ind.) 101; *Burk v. Com.*, 5 J. J. Marsh. (Ky.) 675.

4. *Hughes v. State*, 12 Ala. 458; *St. Clair v. Caldwell*, 72 Ala. 527; *Straugham v. State*, 16 Ark. 37; *Truebody v. Jacobson*, 2 Cal. 269; *People v. Marquis*, 15 Cal. 38; *People v. Jenkins*, 56 Cal. 7; *Stewart v. Taylor*, 68 Cal. 5; *Patrick Red Sandstone Co. v. Skoman*, 1 Colo. App. 323; *Blalock v. Waldrup*, 84 Ga. 145; *Mangham v. State*, 87 Ga. 549; *Baker v. Thompson*, 89 Ga. 486; *Ft. Wayne v. Duryee* (Ind. App. 1894), 37 N. E. Rep. 299; *Johnson v. Rider*, 84 Iowa 50; *Ford v. State*, 12 Md. 514; *Brown v. Dean*, 123 Mass. 255; *Kearney v. Clutton* (Mich. 1894), 59 N. W. Rep. 419; *State v. Arrington*, 3 Murph. (N. Car.) 571; *Willoughby v. Threadgill*, 72 N. Car. 438; *State v. Bishop*, 73 N. Car. 44; *Wright v. Hemphill*, 81 N. Car. 33; *Robeson v. Lewis*, 73 N. Car. 107; *Warner v. New York Cent. R. Co.*, 52 N. Y. 437; 11 Am. Rep. 724; *People v. Graves*, 5

(a) **Period Within Which the Jury May Amend.**—It seems to be generally regarded as the correct rule that no amendments or alterations can be made by the jury after the verdict has been recorded and the jury have been discharged.¹

Park. Cr. Rep. (N. Y.) 134; Blackley v. Shelden, 7 Johns. (N. Y.) 32; Heller v. State, 23 Ohio St. 582; Beates v. Retallick, 23 Pa. St. 288; Sanders v. Bagwell, 37 S. Car. 145; Alston v. State, 41 Tex. 39; Trent v. State, 31 Tex. Crim. App. 251.

In a criminal case, however, it has been held that the court has no right to send the jury back to their consultation room, if the verdict in effect acquits the prisoner. Where, upon the trial of an indictment for felony and horse stealing, the jury returned, for their verdict, that the prisoner was not guilty of the felony and horse stealing, "but guilty of a trespass," the court directed them to reconsider their verdict, and say "guilty or not guilty, and no more." The jury retired and returned a verdict of "guilty." On appeal, the supreme court ordered the verdict first rendered to be recovered and the defendant discharged. *State v. Arrington*, 3 Murph. (N. Car.) 571.

Calculation of Interest.—It is no error, after a jury have come into court and delivered their verdict, the form of which showed they intended to add interest thereto, for the court to send them back to their room to calculate the interest. *Mark v. Hudson River Bridge Co.*, 56 How. Pr. (N. Y. Supreme Ct.) 109.

In *Strobridge Lithographing Co. v. Randall*, 78 Mich. 195, the foreman of the jury announced to the court that the jury found for the plaintiff in a given sum. At the request of the plaintiff's counsel the court inquired if the verdict included interest, and one of the jurors answered that it did, and stated the amount of the principal. The court felt satisfied, notwithstanding the statement of the juror, that the verdict was not intended to include interest, and sent the jury out again to consider the matter. This was held not to be an improper mode of procedure.

Completion of Verdict.—In an action against B, C, and D, the jury having returned a verdict "we find for the plaintiff the sum of \$3,110.74 against B," the circuit judge recommended the case to the jury, charging them to find the complete verdict. It was held that

there was no error in the action of the circuit judge. *State v. Baldwin*, 14 S. Car. 135.

Where trespass to try title was brought for three acres of land, and the jury found for the plaintiff as to one acre, for the defendant as to a second, but as to the third, said they were not agreed, and on being sent back to consider as to the third acre, returned a verdict for the plaintiff for all three without noticing the first verdict, judgment was given for the plaintiff. *Dyer*, 204b, 205a; Bacon's Abr., "Verdict" (H.).

1. *Saunders v. Freeman*, 2 Dyer 209; 2 Hale P. C. 299-309; *Rex v. Simons*, Say. 34; *St. Clair v. Caldwell*, 72 Ala. 527; *Straughan v. State*, 16 Ark. 37; *Paige v. O'Neill*, 12 Cal. 494; *Coffee v. Groover*, 20 Fla. 64; *Little v. Alison*, 8 Ga. 201; 3 Am. Dec. 393; *Baker v. Thompson*, 89 Ga. 486; *Crotty v. Wyatt*, 3 Ill. App. 388; *Cook v. Scott*, 6 Ill. 333; *Martin v. Morelock*, 32 Ill. 485; *Williams v. People*, 44 Ill. 478; *Ft. Wayne v. Duryee* (Ind. App. 1894), 37 N. E. Rep. 209; *Bishop v. Mugler*, 33 Kan. 145; *Broussard v. Nolan*, 4 La. Ann. 56; *Goodwin v. Appleton*, 22 Me. 453; *Ward v. Bailey*, 23 Me. 316; *Edelen v. Thompson*, 2 Har. & G. (Md.) 31; *Ford v. State*, 12 Md. 514; *Fox v. Smith*, 3 Cow. (N. Y.) 23; *Root v. Sherwood*, 6 Johns. (N. Y.) 68; 5 Am. Dec. 191; *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32; *State v. Arrington*, 3 Murph. (N. Car.) 571; *State v. Bishop*, 73 N. Car. 44; *Robeson v. Lewis*, 73 N. Car. 107; *Sutliff v. Gilbert*, 8 Ohio 405; *Sargent v. State*, 11 Ohio 472; *Wolfran v. Eyster*, 7 Watts (Pa.) 38; *Scott v. Scott*, 110 Pa. St. 387; *Com. v. Nicely*, 130 Pa. St. 261; *State v. Yancy*, 1 Treadw. (S. Car.) 237; *State v. Dawkins*, 32 S. Car. 17; *Mills v. Com.*, 7 Leigh (Va.) 751; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447; *Sledd v. Com.*, 19 Gratt. (Va.) 822; *Allen v. State*, 85 Wis. 359; *Weeks v. Hart*, 15 Am. Law Rev. 423. And see *Williams v. People*, 44 Ill. 478; *Leftwich v. Day*, 32 Minn. 512.

In 2 Hale 299, it is stated that "if the jurors by mistake or partiality, give

their verdict in court, yet they may rectify it before it is recorded, or by advice of the court go together again and consider better of it, and alter what they have delivered. But if the verdict is recorded they cannot retract nor alter it."

Co. Litt. 227 b says: "After the verdict is recorded the jury cannot vary from it, but before it be recorded they may vary from the first offer of their verdict, and that verdict which is recorded shall stand."

Where the jury, after returning a verdict of guilty, have been dismissed, there is no authority for reimpianelling them and allowing them, on further instructions, to render a new verdict, though the only change is in recommending the defendants to mercy, and the judgment pronounced on such verdict will be set aside. *State v. Dawkins*, 32 S. Car. 17.

The rule, however, as stated in the text, seems to have been slightly trenched upon in the case of *Prussel v. Knowles*, 4 How. (Miss.) 90, which was an action of trespass against several defendants, in which the jury rendered a verdict finding all of the defendants guilty, all but one of the jurors immediately leaving the court room. The juror who yet remained having his attention called to the matter, stated that it had not been the design of the jury to find all the defendants guilty, as by the terms of the verdict had been done. The other members of the panel were brought before the court, and they readily gave the same explanation. The court then allowed the jury to amend their verdict in conformity with their intent. This amendment seems to have been allowed on the ground that there is a rule of law permitting jurors to explain their verdict in order to show what they really intended to find.

Discharge of Jury.—It is not in all cases the mere entry of the verdict on the record which finally terminates the connection of the jury with the cause and supersedes their power to amend; or, as it is expressed by Folger, J., in *Warner v. New York Cent. R. Co.*, 52 N. Y. 437; 11 Am. Rep. 724, "the fact that the verdict has been announced, and has been as announced entered in the minutes of the clerk, is not that recording which makes the announcement and the clerical act the fixed and unalterable verdict of the jury. The true rule is laid down in the opinion in *Walters v. Junkins*, 16 S. & R. (Pa.) 414;

16 Am. Dec. 585, that after the verdict has been received and entered upon the minutes, and the jury has been dismissed, they have not the power to re-assemble and alter their verdict." And see *Sergeant v. State*, 11 Ohio 472; *State v. Dawkins*, 32 S. Car. 17.

In *Ward v. Bailey*, 23 Me. 316, the jury had rendered a verdict, and it had been received and entered on the docket, but the jury had not separated or left their seats. On questioning the foreman, it appeared that the jury had misconceived the meaning of the terms used in their verdict; whereupon, they were permitted to correct the mistake, and the minutes of the clerk were altered accordingly. On review, this was held to be no error.

In *Walters v. Junkins*, 16 S. & R. (Pa.) 414; 16 Am. Dec. 585, referred to above, the jury returned the verdict: "We find for the plaintiff six cents damages." The court then asked them if they found the defendant to pay all costs or only the legal costs. The foreman replied "six cents damages and six cents costs;" and this verdict was recorded. The next cause on the docket was immediately taken up, though the jury, or most of it, which had rendered the verdict just set forth, still remained in the box. On an interview between the foreman and the plaintiff's attorney, it was intimated that the jury had intended their verdict to be entered with full costs against the defendant. This being made known to the court, the jury were instructed to retire and certify what was their verdict, and how they had agreed it should be. They did so, and in a few minutes returned, and said their finding had been six cents damages and full costs; whereupon the counsel for the defendant objected to the entry being altered, but the court allowed the minutes to be corrected according to the subsequent finding of the jury. The jury had not been formally told they were discharged, although the court had gone a few minutes in another cause. The judgment pronounced on this verdict was reversed. *Rogers, J.*, delivering the opinion of the court, said: "The law allows the jury all reasonable opportunity before their verdict is put on record, and they are discharged, to discover and declare the truth according to the judgment. The court may also, of their own accord, send the jury back to reconsider their verdict if it appears to be a mistaken

(2) *By the Court.*—The court not only has the power, but it is its duty, to amend or modify a verdict, so as to put it in proper legal form, or to make it express the actual intent of the jury,¹

one, and before it is received and recorded." After citing some adjudications on the subject, the learned judge concluded: "Although these cases do not expressly determine the point, the inference is irresistible that where the verdict is received and recorded and the jury dismissed, as in this case, they have not the power to alter their verdict."

In *Patrick Red Sandstone Co. v. Skoman*,^{*1} Colo. App. 323, the jury, having found the verdict for a larger amount than that claimed by the plaintiff, were allowed, after having been discharged, to amend their finding by reducing it to the amount claimed by the plaintiff. This being assigned an error on appeal, the supreme court held that inasmuch as the plaintiff could have reduced the amount of recovery to the amount claimed by *remittitur*, the error of allowing the jury to amend after their discharge, if error it was, could not have prejudiced the defendant, and hence, the appellate court declined to consider the objection.

Dispersion of Jury by Consent of Parties.—The dispersion of the jury by consent of the parties to the cause, does not deprive the jury of their right of amendment. In *Maclin v. Bloom*, 54 Miss. 368, it was assigned for error that no legal verdict was rendered by reason of the fact that the jury having been given leave, by consent of parties, to return their verdict to the clerk during the recess of the court, brought in to the clerk a verdict for the plaintiff without specifying any amount, and were thereupon suffered by the clerk to separate. Next morning, the defect having been discovered, they were re-assembled and sent back to their consultation room from which they soon returned with a proper verdict. This was held to be no error. See also *Jones v. Smith*, 64 Ga. 711.

New Hampshire.—The doctrine as laid down in *Dearborn v. Newhall*, 63 N. H. 301, is in direct conflict with the statement in the text as to the time within which the jury may be allowed to amend. *Doe, C. J.*, delivering the opinion of the court in this case, said: "In some jurisdictions a recorded ver-

dict cannot be amended by the jury after their separation; but in this state a different practice prevails. The error in this case could be corrected, whether the verdict had, or had not been recorded, and whether the jury had, or had not separated."

1. *Hawks v. Crofton*, 2 Burr. 698; *Spencer v. Goter*, 1 H. Bl. 78; *Petrie v. Hannay*, 3 T. R. 659; *Russell v. Wheeler, Hempst.* (U. S.) 3; *Laber v. Cooper*, 7 Wall. (U. S.) 570; *Lincoln v. Iron Co.*, 103 U. S. 412; *Koon v. Phoenix Mut. L. Ins. Co.*, 104 U. S. 106; *Snyder v. U. S.*, 112 U. S. 216; *Hopkins v. Orr*, 124 U. S. 510; *Patterson v. Cook*, 8 Port. (Ala.) 66; *St. Clair v. Caldwell*, 72 Ala. 527; *Neal v. Peevey*, 39 Ark. 337; *Corbett v. Gilbert*, 24 Ga. 454; *Shelton v. O'Brien*, 76 Ga. 820; *Osgood v. McConnell*, 32 Ill. 74; *Crittenden v. Evans*, 48 Ill. 52; *Boynton v. Phelps*, 52 Ill. 210; *Harrison v. Jaques*, 29 Ind. 208; *Gordon v. Higley, Morr.* (Iowa) 19; *Armstrong v. Pierson*, 15 Iowa 476; *Edwards v. McCaddon*, 20 Iowa 520; *Craig v. Taylor*, 10 B. Mon. (Ky.) 55; *Blair v. Com.* (Ky. 1892), 20 S. W. Rep. 434; *Little v. Larrabee*, 2 Me. 37; 11 Am. Dec. 43; *Hobart v. Haggett*, 12 Me. 67; 28 Am. Dec. 159; *Sawyer v. Hopkins*, 22 Me. 268; *Porter v. Rummery*, 10 Mass. 69; *Ashton v. Touhey*, 131 Mass. 26; *Sleight v. Henning*, 12 Mich. 371; *Coit v. Waples*, 1 Minn. 134; *Crich v. Williamsburg City F. Ins. Co.*, 45 Minn. 445; *Montgomery v. Tillotson*, 1 How. (Miss.) 215; *State v. McBride*, 19 Mo. 239; *Fay v. Richmond*, 18 Mo. App. 355; *Humphreys v. Woodstown*, 48 N. J. L. 588; *Brush v. Kohn*, 9 Bosw. (N. Y.) 592; *Lee v. McLaughlin*, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 151; *Burhans v. Tibbits*, 7 How. Pr. (N. Y. Supreme Ct.) 21; *Hay v. Ousterout*, 3 Ohio 384; *Irven's Appeal*, 33 Pa. St. 237; *Keen v. Hopkins*, 48 Pa. St. 445; *Barclay v. Kerr*, 110 Pa. St. 130; *Jackson v. Tozer*, 154 Pa. St. 223; *Roulain v. M'Dowell*, 1 Bay (S. Car.) 490; *Buchanan v. Townsend*, 80 Tex. 534; *Foster v. Caldwell*, 18 Vt. 176; *Wallace v. Hilliard*, 7 Wis. 627.

"When the intention of the jury is manifest," said Lord Mansfield, in

provided this does not necessitate a substantial alteration of the facts found.¹

Hawks v. Crofton, 2 Burr. 698, "the court will set right matters of form."

Amount.—Where the jury returns a verdict assessing the damages at a certain amount "with interest," the addition of words by the court, naming the amount, including interest, cannot be complained of. *Clapp v. Martin*, 33 Ill. App. 438.

Assumpsit.—Where, in assumpsit, the verdict of the jury was returned as follows: "We, the jurors, find for the plaintiff \$450," which was, by the court's direction and by the notes and in the presence of the jury, put in form so as to read: "We, the jurors, find for the plaintiff and assess the damages at \$450," it was held that there was no error in putting the verdict in form. *Osgood v. McConnell*, 32 Ill. 74. And see *Lincoln v. Iron Co.*, 103 U. S. 412.

Misnomer.—In an action against L. L. R., on a note signed by him as president of L. L. R. I. and S. Co., a description of the defendant in the verdict as L. L. R. I. and S. Co., is a formal error which the court may amend. *Fay v. Richmond*, 18 Mo. App. 355.

In *Readfield v. Shaver*, 50 Me. 36; 79 Am. Dec. 592, the clerk, in preparing a blank verdict for the jury, made a mistake in the name of one of the parties, which error escaped the notice of the jury. Upon the return of the verdict it was amended by the court, so as to conform to the writ and other papers in the case, the jury affirming the verdict as amended. This was held to be the proper course, under the circumstances, sustained by reason and authority.

Intention—How Ascertained.—A verdict defective in form may be reformed by the court when the intention of the jury can be ascertained from data given in the verdict, or referred to in the pleadings; but the court cannot supply an omission to name the amount of the finding by reference to evidence outside the record. *Fromme v. Jones*, 13 Iowa 474; *Edwards v. McCaddom*, 20 Iowa 520. And see *Peabody v. Hewett*, 52 Me. 34; 83 Am. Dec. 486; *Burhans v. Tibbits*, 7 How Pr. (N. Y. Supreme Ct.) 21.

1. *St. Clair v. Caldwell*, 72 Ala. 527; *Stewart v. Taylor*, 68 Cal. 5; *Farmers Loan, etc., Co. v. Chandler* (Ga. 1893), 18 S. E. Rep. 540; *Cane v. Watson*, *Morr.* (Iowa) 70; *Gaither v. Wilmer*,

71 Md. 361; *Little v. Larrabee*, 2 Me. 37; 11 Am. Dec. 43; *Sharpleigh v. Wentworth*, 13 Met. (Mass.) 358; *Roberts v. Rockbottom Co.*, 7 Met. (Mass.) 46; *Coit v. Waples*, 1 Minn. 134; *State v. McBride*, 19 Mo. 239; *Acton v. Dooley*, 16 Mo. App. 448; *Poulson v. Collier*, 18 Mo. App. 583; *Brush v. Kohn*, 9 Bosw. (N. Y.) 589; *Herzberg v. Murray*, 40 N. Y. Super. Ct. 271; *Guenther v. People*, 24 N. Y. 100; *Humphreys v. Woodstown*, 48 N. J. L. 588; *Wallace v. Hilliard*, 7 Wis. 627; *Allen v. State*, 85 Wis. 359.

In *Gordon v. Higley*, *Morr.* (Iowa) 20, it was said that the court might direct a change in the language of a jury, so as to make their verdict correspond to the usual forms, provided such change did not alter the evident meaning of the verdict. "And," observed the court, "this may be done without the consent of the jury, or even should they positively object, and is, therefore, perfectly proper after their separation."

Replevin.—Thus, it has been held in *Wisconsin* that a verdict in replevin upon the general issue and plea of property, which simply finds a defendant not guilty, and fails to find the value of the property or title, is substantially defective and, therefore, is not amendable. *Wallace v. Hilliard*, 7 Wis. 627.

In *Poulson v. Collier*, 18 Mo. App. 583, which was an action on a promissory note, the jury returned a verdict for the plaintiff, "for the amount of the note sued on" without in terms specifying any sum. This was regarded as a substantial defect, which was beyond the power of the court to repair; and their amendment of the verdict by inserting the amount was denounced as an invasion of the province of the jury. Though it is pretty generally conceded that the authority of the court to amend is confined to matters of form, the decisions on the subject are not uniform, on account of the diversity of opinion as to what constitutes matter of form and what of substance. In the case of *Poulson v. Collier*, though the action was upon a promissory note, the verdict was held to be fatally defective because of the omission to name the amount; and to this effect, see also *Gaither v. Wilmer*, 71 Md. 361. On

(a) **Consent of Jury.**—The authority of the court to make this formal correction is not dependent upon the consent of the jury;¹

the other hand, it has been held that where the plaintiff is entitled to recover a sum certain, known and conceded, if entitled to recover anything, the court may amend a verdict in his favor by inserting such amount, where the jury have failed to do so. *Hodgkins v. Mead*, 119 N. Y. 166; *Schweitzer v. Connor*, 57 Wis. 177. See also *Clark v. Lude*, 63 Hun (N. Y.) 366.

In an action on a note, where the only issue was upon its execution, a verdict that the jury "find for the plaintiff the amount of the note and interest," is sufficient to justify the court in ordering the clerk to assess the amount in rendering judgment therefore, as the form of the verdict sufficiently expresses the intention of the jury. *McGregor v. Armill*, 2 Iowa 30.

In an action of debt against a clergyman, for the recovery of the statutory penalty prescribed for marrying a minor, the jury returned a verdict against the defendant, declaring him "guilty in manner and form as he stands indicted." The jury were returned to their room for further deliberation, and returned with a proper verdict, which was upheld by the supreme court. *Beates v. Retallick*, 23 Pa. St. 288.

Amending the Record—Matters of Substance.—A distinction has been made between the amendment of the verdict itself and the record of the verdict. This distinction is recognized by Mr. Bishop, in the first volume of his *Criminal Procedure*, section 1013, where it is observed that though the functions of the judge and jury are distinct, and the former can have no power to alter the substance of anything which the latter, acting within their proper sphere, have found, yet the record of the verdict is distinguishable from the thing recorded, and may be amended under the same rules and with the same effect as any other part of the record. In this regard, see *Parks v. Turner*, 12 How. (U. S.) 39; *Crary v. Carradine*, 4 Ark. 216; *Peabody v. Hewett*, 52 Me. 34; 83 Am. Dec. 486; *Clark v. Lamb*, 8 Pick. (Mass.) 415; 19 Am. Dec. 332; *Crich v. Williamsburgh City F. Ins. Co.*, 45 Minn. 444; *Frederick v. Circuit Judge*, 52 Mich. 529; *Acton v. Dooley*, 16 Mo. App. 448; *Burhans v. Tibbits*, 7 How. Pr. (N. Y. Supreme Ct.) 21; *Hodg-*

kins v. Mead, 119 N. Y. 166; *Rew v. Barker*, 2 Cow. (N. Y.) 408; 24 Am. Dec. 515; *Clark v. Lude*, 63 Hun (N. Y.) 363; *Fischer v. Reilly* (Com. Pl.), 3 N. Y. Supp. 757; *Lippe v. Metropolitan El. R. Co.* (Super Ct.), 10 N. Y. Supp. 519; *Osborne v. Morris*, 21 Oregon 367; *Keen v. Hopkins*, 48 Pa. St. 445.

Misentry of Verdict.—Where it is evident that a verdict has been entered on the record different from that rendered by the jury, it may be corrected by the court. *Atty Gen'l v. White*, Bunb. 283; *Cogan v. Ebdon*, 1 Burr. 383; *Com. v. Lang*, 10 Gray (Mass.) 11; *Jackson v. Dickenson*, 15 Johns. (N. Y.) 309; 8 Am. Dec. 236; *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am. Rep. 544; *Den v. Norman*, 2 Dev. (N. Car.) 496; *Grim v. Reinbold*, 2 Pa. Dist. Ct. Rep. 612. *Compare Parker v. Lake Shore, etc., R. Co.*, 93 Mich. 607.

Entering Verdict on one of Several Counts.—The rule seems to be well established that a general verdict of a jury may be restricted so as to apply to one count, where, by the minutes of the judge, it appears that the evidence in the case applies to that count only. *Ferguson v. Mahon*, 11 Ad. & El. 179; *Williams v. Strahan*, 1 B. & P. 309; *Eddowes v. Hopkins*, 1 Doug. 376; *Matheson v. Grant*, 2 How. (U. S.) 281; *Barnard v. Whiting*, 7 Mass. 358; *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Den v. Norman*, 2 Dev. (N. Car.) 496; *Cooper v. Bissell*, 15 Johns. (N. Y.) 319; *Brush v. Kohn*, 9 Bosw. (N. Y.) 593; *Sayre v. Jewett*, 12 Wend. (N. Y.) 135; *Norris v. Durham*, 9 Cow. (N. Y.) 151; *Paul v. Harden*, 9 S. & R. (Pa.) 23.

1. When a verdict is returned defective in form, the court may correct it, with or without the consent of the jury. *Ewing v. Sandford*, 21 Ala. 157; *St. Clair v. Caldwell*, 72 Ala. 527; *Hobart v. Haggett*, 12 Me. 67; 28 Am. Dec. 159.

In *Hay v. Ousterout*, 3 Ohio 384, the court amended the verdict in conformity with the intention of the jury, as manifested by its terms, without any consultation with the jury themselves. This was held not to be improper.

At Request of Jury.—Where the jury come into open court and request the judge to correct a clerical mistake in

it has even been held that, though the jury object, the judicial power of amendment is not affected.¹

(b) **From What Amended.**—In amending the verdict, the court may be assisted by the record of the proceedings,² by explanations or affidavits of the jurors,³ by the judge's notes,⁴ and any other clear and satisfactory evidence.⁵

(c) **Period Within Which the Court May Amend.**—Without distinguishing between the amendment of the verdict itself, and the amendment of the verdict after it has been merged in the record,⁶ it may be stated generally that no fixed time is prescribed within which amendments must be made by the court, a reasonable promptitude being all that is required.⁷ The prevailing rule

the form of a verdict submitted to them, and thereafter agree upon and return such corrected verdict as their finding, no error can be predicated thereon. *Marine Sav. Bank v. Young*, 5 Wash. 394.

1. *Gordon v. Higley*, Morr. (Iowa) 20.

2. *West v. Bank of Americus*, 63 Ga. 230; *Crich v. Williamsburg City F. Ins. Co.*, 45 Minn. 444; *Cohn v. Scheuer*, 115 Pa. St. 178.

3. *Roberts v. Hughes*, 7 M. & W. 399; *Doster v. Brown*, 52 Ga. 543; *Jones v. Smith*, 64 Ga. 711; *Layman v. Graybill*, 14 Ind. 166; *Orton v. State*, 4 Greene (Iowa) 140; *Swails v. Cissna*, 61 Iowa 693; *Little v. Larrable*, 2 Me. 37; 11 Am. Dec. 43; *Gipson v. State*, 38 Miss. 295; *Clough v. Clough*, 26 N. H. 24; *Hodgkins v. Mead*, 119 N. Y. 166; *Clark v. Lude*, 63 Hun (N. Y.) 363; *Haycock v. Greup*, 57 Pa. St. 438. See also *Griffin v. Larned*, 111 Ill. 432.

4. *Doe v. Perkins*, 3 T. R. 749; *Petrie v. Hannay*, 3 T. R. 659; *Matheson v. Grant*, 2 How. (U. S.) 281; *Tomes v. Redfield*, 7 Blatchf. (U. S.) 139; *Laber v. Cooper*, 7 Wall. (U. S.) 570; *West v. Bank of Americus*, 63 Ga. 230; *Barnard v. Whiting*, 7 Mass. 358; *Clark v. Lamb*, 8 Pick. (Mass.) 413; 19 Am. Dec. 332; *Burhans v. Tibbits*, 7 How. Pr. (N. Y. Supreme Ct.) 21; *Norris v. Durham*, 9 Cow. (N. Y.) 151; *Sayre v. Jewett*, 12 Wend. (N. Y.) 135; *Brush v. Kohn*, 9 Bosw. (N. Y.) 593; *Den v. Norman*, 2 Dev. (N. Car.) 496; *Roulain v. M'Dowall*, 1 Bay (S. Car.) 490.

5. *Matheson v. Grant*, 2 How. (U. S.) 281. See also *Peabody v. Hewett*, 52 Me. 34; 83 Am. Dec. 486.

6. See note to *Amendment by the Court*, *supra*, *Amending the Record—Matters of Substance*.

7. *Harrison v. Rex*, 1 B. & Ald. 161;

Clark v. Lamb, 8 Pick. (Mass.) 415; 19 Am. Dec. 332.

In giving the opinion of the court in *Matheson v. Grant*, 2 How. (U. S.) 281, Story, J., said: "There is no time absolutely fixed within which the amendment should be moved. All that the court requires is that it should be done within a reasonable time and when no such change of circumstances shall have occurred as to render it inconvenient or inexpedient. Nothing is more common than motions to amend the record after a writ of error has been brought; nay after a writ of error has been argued in the court above, and sometimes even after judgment in a court of error, pending its session."

Amendment after Recordation.—*Crary v. Carradine*, 4 Ark. 216; *Gordon v. Higley*, Morr. (Iowa) 19; *Ashton v. Touhey*, 131 Mass. 26; *Osborne v. Morris*, 21 Oregon 367; *Ivens's Appeal*, 33 Pa. St. 237; *Foster v. Caldwell*, 18 Vt. 176. *Compare Dana v. Farrington*, 4 Minn. 433.

Amendment at Subsequent Term.—Where a verdict was amended before final judgment, although at a subsequent term of the court, it was held not to be error. *Cane v. Watson*, Morr. (Iowa) 70; *Barnard v. Whiting*, 7 Mass. 358.

After Judgment.—A verdict may be amended after judgment has been rendered. *Lippe v. Metropolitan El. R. Co.* (Super. Ct.), 10 N. Y. Supp. 519; *Barclay v. Kerr*, 110 Pa. St. 130.

After Error Brought.—A verdict may be amended after error brought and joinder in error. *Short v. Coffin*, 5 Burr. 2730; *Doe v. Perkins*, 3 T. R. 749; *Acton v. Dooley*, 16 Mo. App. 449; *Clark v. Lamb*, 8 Pick. (Mass.) 415; 19 Am. Dec. 332; *Rew v. Barker*, 2 Cow. (N. Y.) 408; 24 Am. Dec. 515.

seems to be that the power of amendment may be exercised at any time, in the discretion of the court, so long as the substantial rights of the parties are not affected.¹

m. RECORDATION OF VERDICT.—Upon the rendition of a verdict by a jury, it is entered upon the minutes of the court, or, in less technical phraseology, "recorded."² This proceeding finally terminates the connection of the jury with the cause.³ Until the verdict is recorded, it lies in the power of the jury to alter, amend, or correct their finding,⁴ but, by entry upon the minutes, the verdict becomes a fixed legal fact, and may not afterwards be altered by them in form or substance.⁵ It is the duty of the clerk, who is the legally constituted scribe of the court, to enter the verdict upon the minutes when rendered, but in the absence of the clerk, the judge may act in this capacity.⁶

Misnomer.—In *Maus v. Maus*, 5 Watts (Pa.) 319, it was said: "It is never too late to amend the record merely for the purpose of correcting a misnomer by the clerk."

1. *Church v. Holcomb*, 45 Mich. 40; *Frederick v. Circuit Judge*, 52 Mich. 529; *Brooks v. Stephens*, 100 N. Car. 297; *Cohn v. Scheuer*, 115 Pa. St. 178; *Iven's Appeal*, 33 Pa. St. 237.

2. *Folger, J., in Warner v. New York Cent. R. Co.*, 52 N. Y. 437; 11 Am. Rep. 724.

In English practice the verdict was entered in the *Postea*, which was a record of the proceedings in a cause, subsequent to the joining of the issue and awarding of trial. *Anderson's Law Dict.* 793.

If a verdict is required by statute to be in writing, when affirmed by the jury it becomes a part of the record without being entered on the order book, and if lost may be supplied like any other paper in a cause, by a proved copy. *Sanders v. Sanders*, 24 Ind. 133.

In a suit before a justice of the peace, the effect of a judgment will be given to the verdict of a jury, as soon as it is entered on the justice's docket. *Rutherford v. Winn*, 3 Mo. 14; *Davis v. Wood*, 7 Mo. 162; *Cason v. Tate*, 8 Mo. 46; *Morse v. Brownfield*, 27 Mo. 224. And see *Franse v. Owens*, 25 Mo. 334.

Filing instead of Recording.—In *State v. Depositor*, 21 Nev. 107, it is held that the application of the statute, to the effect that no departure from, or error in, the proceedings, in a criminal case, shall render the same invalid unless prejudicial to the defendant (see *Gen. Stat. Nevada*, § 4469) renders the

act of the clerk, when a verdict of guilty of rape was rendered, in filing it, instead of recording it as ordered, immaterial, where he read it to the jury and it was affirmed by them.

Recording on Sunday.—A verdict may be recorded on Sunday. *Hodge v. State*, 29 Fla. 500; *True v. Plumley*, 36 Me. 466; *Hoghtaling v. Osborn*, 15 Johns. (N. Y.) 118; *Hiller v. English*, 4 Strobb. (S. Car.) 486.

3. 2 Hale 299; *Co. Litt.* 227 b; *Scott v. Scott*, 110 Pa. St. 387. "With the assent of the jury to the verdict as recorded, their functions with respect to the case cease, and the trial is closed." *Field, C. J., in Blum v. Pate*, 20 Cal. 69; *People v. Lee Yune Chong*, 94 Cal. 379. See also *supra*, this title, *Amendment of Verdict—By the Jury*.

4. See *supra*, this title, *Amendment of Verdict—By the Jury*. See also *CRIMINAL PROCEDURE*, vol. 4, p. 881.

5. See *supra*, this title, *Amendment of Verdict—By the Jury*.

Where the entry of the verdict was for the plaintiff for \$150, it was suggested that the usual dollar mark found in the recorded verdict was not contained in the written verdict brought into court by the jury; it was said that the recorded form must govern, as it was to that, that the jury presumably assented. *Leftwich v. Day*, 32 Minn. 512. But see *State v. Reonnals*, 14 La. Ann. 276. In this case it is held that, where the jury have written their verdict upon the indictment, but it is recorded differently, the verdict, as written by them, shows what was their meaning and intention, and must be regarded as the real and true verdict.

6. The clerk being the official scribe

n. SETTING ASIDE VERDICT.—(See NEW TRIAL, vol. 16, p. 500.)

2. **Partial Verdict.**—A partial verdict is one by which the jury in a criminal case acquit the defendant as to part of the accusation, and find him guilty of the residue.¹ The conviction may be on one of several counts, each charging a distinct offense, with a discharge upon the others, either in express terms,² or by silence, which is regarded as a constructive acquittal;³ or where a count is capable of division, the jury may find the defendant

of the court, it is his duty to keep regular and fair minutes of all proceedings therein, which minutes the judge authenticates by his signature. Nevertheless, the judge may keep the record himself by entering, or causing to be entered, the proceedings of the court, in a case, also authenticating them by his signature. *McClerkin v. State*, 20 Fla. 879.

California Penal Code, § 1164, directs that verdicts shall be entered in full upon the minutes before being read to the jury. However, in *People v. Gilbert*, 57 Cal. 96, the jury brought in a verdict of "guilty," whereupon the piece of paper which the foreman handed to the clerk was read to the jury, and the jurors all agreed that it was their verdict. The verdict was not entered upon the minutes until after the discharge of the jury, but it was held that the omission to record the verdict before reading it to the jury, did not affect the validity of the judgment of conviction, and that a new trial asked on that ground was properly denied. And see *Territory v. Harper*, 1 Arizona 399.

A verdict should not be recorded before it has been declared by the foreman, or, if sealed, read by the clerk, so that the parties may be distinctly informed of its purport. *Blum v. Pate*, 20 Cal. 69; *Beal v. Cunningham*, 42 Me. 363; *Cole v. Laws*, 104 N. Car. 651.

A verdict should be recorded as rendered by the jury, *Moody v. McDonald*, 4 Cal. 297; and, as it was held in *O'Connor v. State*, 9 Fla. 215, it should be recorded before the jury is discharged.

1. 2 *Bouvier's Law Dict.* 780.

In 1 *Chitty's Crim. Law* 637, it appears, "Thus, the jury may convict the defendant upon one count of the indictment, and acquit him on the charge contained in another, or upon one part of a count capable of division, and not guilty of the other part, as on a count for composing and publishing a libel, the de-

fendant may be found guilty of publishing only. And, in general, where from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue. . . . Where the accusation includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him for the less atrocious."

Species of General Verdict.—A partial verdict is in reality only a species of general verdict, being a general verdict of guilty as to a portion of the charge, and a general verdict of not guilty as to the residue. 2 *Bouvier's Law Dict.* 780.

Partial Finding of Entire Count.—But where the indictment charged "a riot and assault," and the jury found "guilty of a riot," this was held a partial finding of the entire count, and therefore void. *State v. Creighton*, 1 Nott. & M. (S. Car.) 256.

2. *Reg. v. Craddock*, 14 Jur. 1031; *Lynes v. State*, 46 Ga. 208; *Oxford v. State*, 33 Ala. 416.

Where a verdict is rendered on less than the whole number of counts, the verdict should specify the counts on which it is rendered. *Day v. People*, 76 Ill. 380.

The verdict may be found by naming on what counts the defendant is guilty. *Nabors v. State*, 6 Ala. 200; *Scully v. State*, 39 Ala. 240. And it is probably the better practice to do so. *Carter v. State*, 20 Wis. 647; *State v. Blunt*, 110 Mo. 322.

3. *Nabors v. State*, 6 Ala. 200; *Stoltz v. People*, 4 Ill. 168; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186; *State v. Stanley*, 42 La. Ann. 978; *State v. Phinney*, 42 Me. 384; *Swinney v. State*, 8 Smed. & M. (Miss.) 576; *Morris v. State*, 8 Smed. & M. (Miss.) 763; *People v. McDonald* (Supreme Ct.), 1 N. Y. Supp. 703; *Guenther v. People*, 24 N. Y. 100; *State v. Taylor*, 84 N. Car.

guilty as to part, and release him of the rest;¹ and it has also been held that, where it appears from the evidence that the guilt of the prisoner does not extend to the full charge specified in the indictment, a conviction as far as the evidence warrants is sufficient.² Where the crime charged includes one of a lesser degree, the prisoner may be found guilty of the inferior and acquitted of the greater.³

3. Special Verdict—*a.* DEFINITION.—A special verdict, says Blackstone, is where the jury state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant.⁴

773; Kirk v. Com., 9 Leigh (Va.) 627; Page v. Com., 9 Leigh (Va.) 683. But see State v. Sutton, 4 Gill. (Md.) 494.

Nolle Prosequi.—The prosecutor may enter a *nolle prosequi* as to the counts not passed upon. Com. v. Stedman, 12 Met. (Mass.) 444.

1. 1 Chitty's Crim. Law 638.

In Rex v. Hunt, 2 Campb. 583, the defendant was found guilty of publishing a libel, upon a count in an information which charged him with having "composed, printed, and published, a libel."

2. 1 Chitty's Crim. Law 250, 251, 637; 2 Hawk., ch. 26, § 75; Harris v. People, 64 N. Y. 148.

3. 1 Chitty's Crim. Law 638; Freel v. State, 21 Ark. 212; 2 Hawk., ch. 26, § 75; Rex v. Hunt, 2 Campb. 583; 2 Hale 302.

The verdict is sufficient if it finds the defendant guilty of the inferior offense by name. Carrick v. State, 18 Ind. 409; Freel v. State, 21 Ark. 212; Mackey v. People, 2 Colo. 13; State v. Frank, 103 Mo. 120; People v. Kennedy (Supreme Ct.), 11 N. Y. Supp. 244. And see State v. Burk, 89 Mo. 635.

Where an offense has degrees, the defendant may be found guilty of any degree not higher than that charged, or of any offense included in that charged. Carpenter v. State, 58 Ark. 233; Crim. Code, § 254 *et seq.*

Greater Includes the Less.—Where a felony was charged as one of the elements of a burglary, an acquittal of the burglary was adjudged to be an acquittal of the felony, Rex v. Corner, 1 Stark. 43; and where both burglary and larceny from the house are charged in the indictment, a general verdict of guilty convicts the accused of burglary, and whether the larceny be proved or

not is immaterial. Yarborough v. State, 86 Ga. 396.

4. 3 Black. Com. 377.

Another Sort.—There has existed another species of special verdict, as where the jury returned a general verdict for the plaintiff subject, nevertheless, to the opinion of the court on a special case stated by the counsel on both sides with regard to a matter of law. 3 Black. Com. 378; 2 Tidd's Pr. 899.

In Wallingford v. Dunlap, 14 Pa. St. 33, it is declared that this sort of special verdict does not seem to have found a place in our practice. See also, *infra*, this title, *Verdict Subject to Opinion*.

Statutory Enactments.—The practice on the subject of special verdict being, in the *United States*, generally regulated by statute, most of the states have adopted a statutory definition, for which reference must be made to the various codes. The statutory definitions will be found to vary in no material particular from the common-law conception. Care, however, must be taken regarding the distinction between special verdicts and special findings, the latter being frequently found inaccurately masquerading in the nomenclature of the former. In the *New York Code of Civil Procedure*, section 1187, a special verdict is defined to be "one by which the jury find the facts only, leaving the court to determine which party is entitled to judgment thereon."

The court, in *Eisemann v. Swan*, 6 Bosw. (N. Y.) 668, and also in *Williams v. Willis*, 7 Abb. Pr. (N. Y. C. Pl.) 90, expressly calls attention to the fact that the requisites of a special verdict, under this provision of the code, are the same as they were before its enactment.

b. ORIGIN AND OBJECT.—These verdicts are said to be grounded upon an early English statute, which enacts that “the justices of assize shall not compel the jurors to say precisely whether it be a disseisin or not, so as they state the truth of the fact, and pray the aid of the justices; but if they will say, of their own accord, that it is a disseisin, their verdict shall be admitted at their own peril.”¹

The jury were thus enabled to avoid the liability of attain, to which they were exposed, if the general verdict should prove erroneous; and although writs of attain have long since been abolished in *England*,² yet the advantages secured by a special verdict in an involved and complicated case, were, and are still, recognized and appreciated.³

c. RIGHT TO RETURN.—At common law it seems to have been wholly within the discretion of the jury whether they should return a general or special verdict,⁴ the court neither having

In *Seward v. Jackson*, 8 Cow. (N. Y.) 409, Jones, C. J., in discussing the subject of special verdict said: “It is of the essence of a special verdict that it should be a finding by the jury of the facts on which the court is to pronounce the law. . . . The jury is to find the facts in issue between the parties. . . . To the court it belongs to apply the law to the facts; but the court has no jurisdiction to decide upon evidence or to enter into any question of fact that may arise in a cause. This is a cardinal rule in the law of special verdicts, which has always been observed and enforced by courts of law, and ought, in my opinion, never to be relaxed.” See also *Rex v. Aire*, 2 T. R. 660; *Bird v. Appleton*, 1 East 111; *Hubbard v. Johnstone*, 3 Taunt. 177; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 600; 18 Am. Dec. 463; *Williams v. Willis*, 7 Abb. Pr. (N. Y. C. Pl.) 90.

Texas.—In *Sayles' Texas Civ. Stat.*, vol. 1, art. 1330, a special verdict is defined to be, “one wherein the jury find the facts only, on issues made up and submitted to them under the direction of the court.” The next paragraph, art. 1331, declares the “requisites of,” holding that the special verdict must find the facts as established by the evidence, and not the evidence by which they are established, and the findings must be such as that nothing remains for the court but to draw from such facts the conclusions of law. See *Robinson v. Moore*, 1 Tex. Civ. App. 93; *Umschied v. Scholz*, 84 Tex. 265.

1. *Westminster II.*, 13 Edw. I., ch. 20, § 2.

It was resolved, however, by all the justices in Common Bench in *Dowman's Case*, 9 Coke 12, that the statute was but an affirmation of the common law.

2. Statute of 6 Geo. IV., ch. 50, § 60.

3. “Sometimes, if there arises in a case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attained, will find a special verdict.” 3 Bl. Com. 377.

4. *Bouvier's Law Dict.*, “Verdict;” 4 Black. Com. 361; *Stevens* on Pl. 19; *Bacon's Abr.*, “Verdict,” d.; *Dowman's Case*, 9 Coke 12; *Devizes v. Clark*, 3 Ad. & El. 506; 1 *Chitty's Cr. Law* 642.

It is said, however, in 1 *Chitty's Crim. Law* 637, “To this rule there seems, indeed, to have been an exception in the case of libel until lately, where the jury were directed to find the defendant guilty, on proof of the mere fact of authorship or publication, and were excluded from entering into any discussion as to the libelous quality of the paper charged as seditious; and, of course, from taking it all into consideration the defendant's motive for the publication or its tendency. But after this anomalous principle had undergone much and a very able discussion by Lord Erskine, in the various stages of the prosecution against the Dean of St. Asaph, it was entirely destroyed by legislative provision. The Statute of 32 Geo. III., refers the whole of the case to the jury—the nature of the work, as well as the fact that it is published—and enables them to give a general verdict to the merits, as in any

authority to require,¹ nor the right to refuse a special verdict, if the jury choose to render one, provided, of course, in the latter instance, the matter specially found was pertinent to the issue.²

Statutes in many of the states prescribe limits to, or wholly deprive juries of the exercise of this discretion.³

other case, where malicious intention is necessary to constitute guilt." The author continues, "But there are many cases where the law is doubtful, in which it may be prudent for them to find the facts specially, and leave the inference to the court."

There was also a case at common law where the jury were required, in giving the general verdict, to set forth the facts, which were when the jury, upon an indictment for murder, found the homicide to be in *se defendendo* or *per infortunium*, so that if they were mistaken, the court might give such a verdict as was warranted by the circumstances. Hawk P. C. b. 2, § 4; 2 Hale 302; 1 Chitty's Crim. Law 642.

The right of jurors to find special verdicts has existed in *England* since the passage of the Statute of Westminster II., 18 Edw. I., ch. 30, § 2.

1. *Devizes v. Clark*, 3 Ad. & El. 506; Co. Litt. 227 b; *Anonymous*, 3 Salk. 373.

2. Bacon's Abr., "Verdict," b; *Dowman's Case*, 9 Coke 12; Co. Litt. 228 a; *Anonymous*, 3 Salk. 373.

3. In *California*, a statute has been enacted providing that in actions for the recovery of money only, or specific property, it is within the discretion of the jury as to whether they shall render a special or general verdict. In cases other than this, the court may direct the jury to find a special verdict in writing. *American Co. v. Bradford*, 27 Cal. 360.

Colorado.—A statute, in this respect similar to the *California* provision just cited, has been enacted. *Thompson v. Gregor*, 11 Colo. 531. Under this statute it has been held that in an action of replevin, where the pleadings only raised issues regarding the recovery of money, the court has no power to order special findings. *Meyers v. Hart* (Colo. App. 1893), 33 Pac. Rep. 647.

In *Indiana*, it is held to be the duty of the court, whenever a special verdict is demanded, to give each of the parties the privilege and time required to prepare with care a draft of the special verdict, and if either of the parties re-

fuse to avail himself of this right, he cannot complain of undue advantage gained by the other party in thus presenting his views of the evidence to the jury. *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294; 10 Am. Rep. 111; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18. In this latter case, it is declared to be the duty of the jury, upon the request of the parties for a special verdict, to return the material facts which they find to have been proved to the court without any regard to the legal value or ultimate consequences of such facts. It then becomes the duty of the court to declare the law upon the facts returned.

Under the *Iowa Code*, § 2807, it is held to be within the discretion of the jury to render a general or special verdict. In *Schultz v. Cremer*, 59 Iowa 182, it is held that where the court instructed the jury against the defendant's objection to render a special verdict only, the court erred in depriving the jury of that discretion to which they were entitled, and to which the defendant was entitled that they should have. Under the provision of the code cited, the court might have directed the jury, if they had found a general verdict, to find a special verdict, or more properly to make the findings on particular questions of fact, but it had no right to instruct them to find a special verdict alone. *Heffner v. Bromwell*, 78 Iowa 648; *White v. Adams*, 77 Iowa 295. And see *Hall v. Carter*, 74 Iowa 364.

In *State v. Ridley*, 48 Iowa 370, it is held that this section of the code (2807), to the effect that it is in the discretion of the jury whether a verdict shall be general or special, but where the jury find a general verdict, they may be required by the court, and must be so required, on the request of any party to the action, to find specially upon any particular questions of fact, is applicable to civil cases only.

Kansas.—It seems that in this state statutes have been enacted abolishing special verdicts, but regulations exist providing for special findings of fact which achieve practically the same result. In *Foster v. Turner*, 31 Kan.

58, it was held that in a cause tried by the court and a jury, either party might request the court to direct the jury to find upon particular questions of fact, but such party should himself state the particular facts with reference to which he wished the jury to find, leaving the jury merely to give answers with reference to such facts, and generally such party should not expect the court to direct the jury to find with reference to facts not stated particularly by the party himself.

It seems that the court may, in its discretion, refuse to require the jury to state new facts showing why it finds in a particular way upon some very general question of fact stated by one of the parties. *Johnson v. Husband*, 22 Kan. 277; *Atchison, etc., R. Co. v. Plunkett*, 25 Kan. 188; *Atchison, etc., R. Co. v. Ferry*, 28 Kan. 686; *Prescott v. Leonard*, 32 Kan. 145; *Gripton v. Thompson*, 32 Kan. 370. And see *Atchison, etc., R. Co. v. Johns*, 36 Kan. 784.

Missouri.—The provision of the revised statutes of *Missouri* concerning special and general verdicts is, "In all actions the jury shall, upon the issues made up and submitted to them by the court, return a general verdict; and the court, upon the request of either party, shall direct the jury, under proper instructions, to find a special verdict upon all or any of the issues submitted to them, which submissions shall be in writing, distinctly specifying each issue on which the jury are to find, and such special finding shall be recorded with the verdict." This statute has been construed as one intending that the issues in the case shall be submitted to the jury for special finding, and not particular questions of fact as may be done in some states. *Turner v. Kansas City, etc., R. Co.*, 23 Mo. App. 12.

Nebraska.—*Nebraska Code*, § 293, provides that in every action for the recovery of money only or specific real property, the jury in their discretion may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues. *Marx v. Kilpatrick*, 25 Neb. 107.

New Jersey.—See *Springer v. Reeves*, 4 N. J. L. 207.

Trial Before Justice.—A jury may find a special verdict in such a case. *Springer v. Reeves*, 4 N. J. L. 207.

New York.—*New York Code Civ. Proc.*, § 1187, provides: "In an action

to recover a sum of money only, or real property, or a chattel, the jury may render a general or a special verdict, in its discretion. In any other action, except where one or more specific questions of fact, stated under the direction of the court, are tried by a jury, the court may direct the jury to find a special verdict, upon all or any of the issues."

Ohio.—*Ohio Civil Code*, § 5201, provides: "In all actions, the jury, unless otherwise directed by the court, may, in its discretion, render either a general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues," etc. For a construction of this section, see *Cleveland, etc., R. Co. v. Terry*, 8 Ohio St. 570; *Adam's, etc., Express v. Pollock*, 12 Ohio St. 618.

Pennsylvania.—The jury have a right in all cases whatever, whether capital or otherwise, to find a special verdict by which the facts of the case are put on record, and the law is submitted to the judges. *Com. v. Chatham*, 50 Pa. St. 181; 38 Am. Dec. 539.

South Carolina.—See *Code of Civil Proc.*, § 282; *Rumph v. Hiatt*, 35 S. Car. 444.

Texas.—The *Texas Code of Procedure* provides for special verdicts in writing on issues made up under the direction of the court. *Kuhlman v. Medlinka*, 29 Tex. 385.

References to the codes of the above states, prescribing the practice in respect to special verdicts, are made merely for the purpose of illustrating the general nature of the statutory provisions on the subject, manifestly not being intended as a complete guide to the practice prevailing in the various jurisdictions.

United States Courts.—Although the courts of the state in which the trial is, are required to submit a special verdict upon request, it seems that the *United States* courts holding session in such state are not bound to do so, it being decided that such proceeding is not within the meaning of the revised statutes of the *United States*, providing that the pleading, practice, forms, and modes of proceeding in the federal courts, shall conform as near as may be to those existing in the courts of the states where such federal courts are held. *U. S. Mut. Accident Assoc. v. Barry*, 131 U. S. 100.

Instructions by the Court.—When a

d. REQUISITES—(1) In General.—A special verdict should find all the facts which are necessary to enable the court to determine, by consideration of the pleadings and the verdict alone, which party is by law entitled to judgment, without referring to the evidence.¹ For the purpose, therefore, of deciding what judgment is to be given, the court is not warranted in examining the

jury has been required to return a special verdict, general instructions as to the law of the case are not proper. They should be instructed only as to the nature of the action, the issues, and the general principles regulating their duties in the premises.

In Louisville, etc., R. Co. v. Frawley, 110 Ind. 18, Mitchell, J., in delivering the opinion of the court, said: "There is neither propriety nor fitness that the court should, either upon its own motion or at the request of either party, give general instructions as to the law of the case. The jury should be left entirely free to find the facts material to the several issues, without instruction as to whether the law will declare one way or the other, upon any fact or state of facts which may be found. A statement by the court of the matters put in issue by the pleadings, and of the rules for weighing or reconciling conflicting testimony, with whatever else may be necessary to enable the jury clearly to comprehend the subjects which are to be covered by their special verdict, is all that is proper when a special verdict is to be returned." Pittsburgh, etc., R. Co. v. Ruby, 38 Ind. 309; Toler v. Keiher, 81 Ind. 383; Indianapolis, etc., R. Co. v. Bush, 101 Ind. 582; Louisville, etc., R. Co. v. Flanagan, 113 Ind. 488; Louisville, etc., R. Co. v. Buck, 116 Ind. 566; Louisville, etc., R. Co. v. Hart, 119 Ind. 274. And see Spalding v. Mayhall, 27 Mo. 377; Chopin v. Badger Paper Co., 83 Wis. 192.

1. Peterson v. U. S., 2 Wash. (U. S.) 36; Bellows v. Hollowell, etc., Bank, 2 Mason (U. S.) 47; Lee v. Campbell, 4 Port. (Ala.) 198; Clay v. State, 43 Ala. 350; Garfield v. Knight's Ferry, etc., Water Co., 17 Cal. 510; Goldsby v. Robertson, 1 Blackf. (Ind.) 247; Dixon v. Duke, 85 Ind. 434; Vinton v. Baldwin, 95 Ind. 433; Glantz v. South Bend, 106 Ind. 305; Noblesville Gas, etc., Co. v. Loehr, 124 Ind. 79; Crouch v. Dermore, 59 Iowa 43; Walker v. Dewing, 8 Pick. (Mass.) 520; Buckley v. Great Western R. Co., 18 Mich. 121; Sisson v. Barrett, 2 N. Y. 406; Hill v.

Covill, 1 N. Y. 522; Langley v. Warner, 3 N. Y. 327; Casey v. Dwyre, 15 Hun (N. Y.) 153; Eisemann v. Swan, 6 Bosw. (N. Y.) 668; Jenks v. Hallet, 1 Cal. (N. Y.) 60; Williams v. Jackson, 5 Johns. (N. Y.) 502; Morse v. Chase, 4 Watts (Pa.) 456; Wallingford v. Dunlap, 14 Pa. St. 33; Loew v. Stocker, 61 Pa. St. 347; State v. Watts, 10 Ired. (N. Car.) 369; State v. Stewart, 91 N. Car. 566; Farr v. Thompson, 1 Spear (S. Car.) 93; Claiborne v. Tanner, 18 Tex. 68; Robinson v. Brock, 1 Hen. & M. (Va.) 213; Tunnell v. Watson, 2 Hen. & M. (Va.) 283; and see Mumford v. Wardwell, 6 Wall. (U. S.) 426; Evans v. Queen Ins. Co., 5 Ind. App. 198. See opinion of Nott, J., in Ross v. U. S., 12 Ct. of Cl. 565, in which the principles on which the requisites and sufficiency of a special verdict are treated extensively.

In an action to recover damages, caused by the act of the defendant in tearing down a gate and allowing cattle to trespass on the plaintiff's land, the jury did not find that the trespassing cattle belonged to the defendant, or that the defendant had anything to do with them, and the verdict was therefore insufficient. Casey v. Dwyre, 15 Hun (N. Y.) 153.

In an information upon the statute of usury, the verdict found that the defendant received profits to the value of sixty pounds, in performance of the corrupt agreement, but did not find the loan as set out in the information, and for this reason it was held imperfect. Cook v. Lauday, Cro. Jac. 210. See also Rex v. Francis, Stra. 1015; Cas. Temp. Hardw. 113.

Pleadings and Verdict.—In Barto v. Himrod, 8 N. Y. 485; 59 Am. Dec. 506, as the case presented no general verdict, but simply a special finding by the jury of the value of the property taken, leaving all other facts upon which the legal rights of the parties depended as stated in the pleadings, it became a point whether the case presented any legal question upon which the court could act. In the first con-

sultation it was doubted by a majority of the court, whether it could go behind the verdict and ascertain from the pleadings what facts were admitted in them, and then examine those facts in connection with the fact found by the jury, in order to determine what questions of law were presented, and whether the special verdict should not, in order to properly present the legal questions to this court, contain as well the facts admitted by the pleadings, as those found by the jury. Upon reargument, however, all the judges agreed that the facts admitted by the pleadings, together with those found by the jury, presented the whole case in proper form for the consideration of the court.

False Pretenses.—On a trial for the offense of obtaining money by false pretenses, a verdict was rendered in the following words: "We, the jury, find the defendant guilty of obtaining money on false pretenses to the amount of \$500." This was held to be a special and not a general verdict, and as a special verdict altogether too defective to authorize any judgment to be rendered upon it. It should have stated what the pretense was, to whom it was made, from whom the money was obtained, to whom the money belonged, and in what county the offense was committed; and being a special verdict, it could not be helped by intentment, or by reference to extraneous facts which might appear upon the record. *Clay v. State*, 43 Ala. 350.

Detinue.—In an action of detinue for slaves, the jury found a special verdict as to some of the slaves, omitting to state circumstances which were necessary to ascertain whether the plaintiff was entitled to them or not. It was held that the verdict was insufficient and a *venire facias de novo* should have been awarded. *Robinson v. Brock*, 1 Hen. & M. (Va.) 213.

Obstructing Road.—A special verdict, in a case rendered on a trial for obstructing a road, is defective if it does not state that the user of the road by the public was as of right and adversary, for, unless it was such, it would not impose an easement upon the defendant's land. *State v. Stewart*, 91 N. Car. 566.

Construction of Devise.—A special verdict, intending to present the question of the construction of a devise, referred to the devise as being contained in the will of I. W., mentioning

the date of the will and of the probate, but not stating the devise. It was held that such a verdict was defective in substance. *Walker v. Dewing*, 8 Pick. (Mass.) 520.

Mixed Question of Law and Fact.—If a special verdict, on a mixed question of law and fact, finds facts from which the court can draw clear conclusions, it is no objection to the verdict that the jury have not themselves drawn such conclusions and stated them as facts in the case. *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Moukhouse v. Hay*, 8 Price 256.

Facts Only.—A special verdict should set forth facts only, as distinguished from evidence, immaterial circumstances, argumentative inferences, or conclusions of law. *Ross v. U. S.*, 12 Ct. of Cl. 565; *Erwin v. Clark*, 13 Mich. 10.

Conclusion of Law.—A special verdict which amounts only to a conclusion of law must be set aside. Where the jury found "We, the jury, find that the plaintiff had a right to replevy the mill," it was held that such finding would not authorize a judgment for the possession of the property. *Keller v. Boatman*, 49 Ind. 104; *Hatfield v. Lockwood*, 18 Iowa 296. See *infra*, this title, *Surplusage*, and notes thereto.

Negatives.—As a general rule, negatives need not be found by a special verdict, yet they must be, when it is necessary to show that a person or thing does not come within a particular exception. *Mayor v. Lambert*, Willes 117; *Com. v. Dooley*, 6 Gray (Mass.) 360.

The facts involved in the finding of a special verdict, are evidentiary and inferential. It is the duty of the jury to consider the evidentiary facts but to find the inferential facts, and if the special verdict shows upon its face that the jury found the evidentiary facts but not the inferential, the verdict is ill because it shows that the jury ought to have found other facts, namely, the inferential. The jury should not find evidence of facts but the inferential facts. *Locke v. Merchants' Nat. Bank*, 66 Ind. 353.

Duty of Jury.—In framing and returning a special verdict, the whole duty of the jury is discharged when they have found and set forth, in an orderly and intelligible manner, all the principal facts which are proven within the issues submitted to them. *Conner v. Citizen's St. R. Co.*, 105 Ind. 62; 55 Am. Rep. 177.

evidence adduced at the trial.¹ Even though some of the material facts may be undisputed, it seems that they should, nevertheless, be incorporated by the jury in their special verdict.² That the special verdict should contain facts, and not mere evidence of facts, is a vital principle regulating its formation.³

1. *Eisemann v. Swan*, 6 Bosw. (N. Y.) 668; *Jenks v. Hallet*, 1 Cai. (N. Y.) 60; *Williams v. Jackson*, 5 Johns. (N. Y.) 502; *Wallingford v. Dunlap*, 14 Pa. St. 33. See *infra*, this title, *Special Verdict—Construction*; catch line in notes, *Nothing to Be Intended*.

The definition of a special verdict imports by the plainest implication that the special verdict must contain all the facts which are in issue by the pleadings, the determination of which is necessary to enable the court to give judgment; and it clearly excludes the idea that the court can look into the evidence itself to ascertain the facts, or any one of them. *Eisemann v. Swan*, 6 Bosw. (N. Y.) 668. The supreme court of *Wisconsin*, in several of its decisions, seems to depart from this principle, holding that if a special verdict does not find upon a question of fact not admitted by the pleadings, which it is necessary should be found in favor of the party for whom judgment is entered, in order to sustain such judgment, such omission in the special verdict will not be error for which the judgment will be reversed, if it appears from the bill of exceptions that uncontradicted evidence in the case establishes such fact in favor of the party for whom such judgment was entered. *Ward v. Busack*, 46 Wis. 408; *McNamara v. Chicago*, etc., R. Co., 41 Wis. 69; *Hutchinson v. Chicago*, etc., R. Co., 41 Wis. 541; *Williams v. Porter*, 41 Wis. 422.

2. **Undisputed Facts.**—A special verdict should find all the facts upon which the court is to pronounce judgment, even though some of the facts may be undisputed. Hence, if the court states to the jury that certain facts are undisputed, and directs a special verdict as to the disputed facts alone, and the jury return such a verdict, it is error to pronounce judgment thereon. *Wallingford v. Dunlap*, 14 Pa. St. 33; *Vansyckel v. Stewart*, 77 Pa. St. 124.

Facts Admitted by Pleadings.—It is declared by the supreme court of *Wisconsin*, that a special verdict need not find facts admitted by the pleadings. *Catlin v. Henton*, 9 Wis. 476; *Hawkes*

v. Dodge County Mut. Ins. Co., 11 Wis. 188; *Donner v. Sexton*, 17 Wis. 30; *Krause v. Krause*, 23 Wis. 354; *Ward v. Busack*, 46 Wis. 407. And see *Demming v. Weston*, 15 Wis. 236.

3. *Rex v. Royce*, 4 Burr. 2077; *Tancred v. Christy*, 12 M. & W. 316; *Hubbard v. Johnstone*, 3 Taunt. 177; *Rex v. Huggins*, Ld. Raym. 1581; *Fryer v. Roe*, 12 C. B. 437; *Prentice v. Zane*, 8 How. (U. S.) 484; *Bertrand v. Morrison*, 1 Ill. 175; *State v. Bray*, 89 N. Car. 480; *State v. Watts*, 10 Ired. (N. Car.) 369; *Sisson v. Barrett*, 2 N. Y. 406; *Hill v. Covell*, 1 N. Y. 522; *Langley v. Warner*, 3 N. Y. 327; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Fuller v. Van Geesen*, 4 Hill (N. Y.) 171; *Birkhead v. Brown*, 5 Hill (N. Y.) 634; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 479; 24 Am. Dec. 51; *Rogers v. Fire Ins. Co.*, 9 Wend. (N. Y.) 623; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463; *Walsh v. Bowers Sav. Bank*, 10 Civ. Pro. Rep. (N. Y. City Ct.) 32; *Blake v. Davis*, 20 Ohio 231; *Hambleton v. Dempsey*, 20 Ohio 168; *Leach v. Church*, 10 Ohio St. 148; *Clark v. Halberstadt*, 1 Miles (Pa.) 26; *Kinsley v. Coyle*, 58 Pa. St. 461; *Farr v. Thompson*, 1 Spears (S. Car.) 93; *Lawrence v. Beaubieu*, 2 Bailey (S. Car.) 623; *McGrath v. Lorton*, 2 McCord (S. Car.) 26; *Suydam v. Williamson*, 20 How. (U. S.) 427; *Henderson v. Allens*, 1 Hen. & M. (Va.) 235; *Brown v. Ralston*, 4 Rand. (Va.) 504; *Blank v. Foushee*, 4 Munf. (Va.) 61; *Brummel v. Enders*, 18 Gratt. (Va.) 873.

"In *Tsack v. Clark*, 1 Roll. 132, Lord Coke says: 'If a deed of feoffment were given in evidence made forty years previous, if possession had gone according to the deed, although it could not be proved that livery was made, this would be good evidence for the jury, and that he would direct them to find a livery, for that would be presumed.' But if the jury found all these matters specially, the court could not adjudge this to be a good feoffment without livery. In such a case, if all the evidence necessary to presume the fact is found by the special verdict, but

(2) *Responsiveness*.—In order to support a judgment it is held that the special verdict must pass upon all the material issues made by the pleadings.¹

the verdict is imperfect in not finding the fact itself, which ought to have been presumed by the jury, a *venire de novo* may be awarded to supply the defective finding." Walworth, Ch., in *Rogers v. Eagle F. Ins. Co.*, 9 Wend. (N. Y.) 611.

Upon a special verdict, the court cannot draw, from other statements contained therein, any inferences of facts necessary to the determination of the case. *Tancred v. Christy*, 12 M. & W. 316; *Hubbard v. Johnstone*, 3 Taunt. 209.

If the evidence necessary to presume a fact is found by the special verdict, but the verdict is imperfect in not finding the fact itself, which ought to have been presumed by the jury, a *venire de novo* will be awarded to supply the defective finding of the jury. Walworth, Ch., in *Rogers v. Eagle F. Ins. Co.*, 9 Wend. (N. Y.) 611. See also *Witham v. Earl of Derby*, 1 Wils. 55.

If a special verdict does not find facts, but simply sets out evidence from which the facts might be inferred, an appellate court, which is empowered only to pass upon mistakes of law committed in the lower courts, cannot find the omitted facts even with the consent of both parties. *Seward v. Jackson*, 8 Cow. (N. Y.) 406.

In *Blank v. Fonshee*, 4 Munf. (Va.) 61, it is held that a verdict submitting to the court, for its judgment as to the law, certain documents and other evidence, oral and written, without finding the facts established thereby, is too uncertain and insufficient for a judgment to be founded thereupon. *Henderson v. Allens*, 1 Hen. & M. (Va.) 235.

A special verdict, to enable the court of errors to act upon it, must find facts and not merely state the evidence. Where it states evidence merely, without stating the conclusions of the jury, the court cannot act upon matters so found, but if other facts are found properly, and judgment in the court below be rendered contrary to the facts so properly found, the judgment will be reversed, though the evidence stated in the special verdict may have warranted a verdict and judgment the other way. *Seward v. Jackson*, 8 Cow. (N. Y.) 406. Per *Jones, Chancellor, LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463.

In *Barnes v. Williams*, 11 Wheat.

(U. S.) 415, the plaintiff's claim was founded upon a bequest of certain slaves, and it was therefore essential, to recover at law, that the assent of the executor to the legacy should be proved; the special verdict, instead of distinctly stating this fact, detailed a mere account of the evidence going to prove it, and also, as to the defendant's defense under the Statute of Limitations, the special verdict did not find any facts by which the court could ascertain at what time the right of action accrued. Chief Justice Marshall, upon inspecting the record, stated that for the above reasons, the special verdict was too imperfect to enable the court to render judgment upon it, "although," said the learned judge, "in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the facts, yet they have not found it, and the court could not, upon a special verdict, intend it." *Garland v. Davis*, 4 How. Pr. (N. Y.) 131; *Prentice v. Zane*, 8 How. (U. S.) 484; *Suydam v. Williamson*, 20 How. (U. S.) 441; *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.) 268.

Relevancy of Testimony.—A special verdict, presenting no other question than the relevancy of testimony adduced on the trial of a cause, is irregular, unauthorized, and presents no foundation upon which a judgment can be pronounced. *Weiland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 479; 24 Am. Dec. 51.

Circumstantial Evidence.—Where the facts established by the evidence are circumstantial, the jury should exhaust their function by going to the very furthest limit of their jurisdiction, declaring the ultimate deduction from the circumstantial facts found. *Ross v. U. S.*, 12 Ct. of Cl. 565.

Facts Unsupported by Evidence.—No finding should be made in a special verdict as to facts upon which there was no evidence at the trial. *Lafayette v. Allen*, 81 Ind. 166.

Conclusive Legal Presumption.—A special verdict, finding a state of facts which the law has made conclusive evidence of a certain other fact, is equivalent to the finding of such fact. *John v. Bates*, Litt. Sel. Cas. (Ky.) 106.

1. 2 Roll. Abr. Pl. 722; *Auncelme*

(3) *Certainty*.—A special verdict should be sufficiently certain to stand as a final decision of the special matters with which it deals,¹

v. Auncelme, Cro. Jac. 31; *Woolmen v. Caston*, Cro. Jac. 113; *Treswell v. Middleton*, Cro. Jac. 653; *Rex v. Hays*, 2 Ld. Raym. 1518; *Barnes v. Williams*, 11 Wheat. (U. S.) 415; *Clay v. State*, 43 Ala. 350; *Kealing v. Voss*, 61 Ind. 466; *Hershman v. Hershman*, 63 Ind. 451; *Waymire v. Lank*, 121 Ind. 1; *Louisville, etc., R. Co. v. Brice*, 84 Ky. 208; *Lowell v. North*, 4 Minn. 52; *Meighen v. Strong*, 6 Minn. 111; 80 Am. Dec. 441; *Armstrong v. Hinds*, 9 Minn. 341; *Pint v. Bauer*, 31 Minn. 4; *Lane v. Lenfest*, 40 Minn. 375; *State v. Allen*, 69 Miss. 508; *Mirwan v. Ingersoll*, 3 Cow. (N. Y.) 367; *Prentice v. Zane*, 8 How. (U. S.) 484; *Carrington v. Pratt*, 18 How. (U. S.) 63; *Suydam v. Williamson*, 20 How. (U. S.) 441; *Hilliard v. Outlaw*, 92 N. Car. 266; *Moore v. Moore*, 67 Tex. 293; See *supra*, this title, *General Verdict—Responsiveness*.

Whether the jury find a general or special verdict, it is their duty to decide every point in issue, and although a court in which a cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court or to the appellate court that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. *Patterson v. U. S.*, 2 Wheat. (U. S.) 221.

All "Litigated" Issues.—"A special verdict," said the court, in *Ward v. Busack*, 46 Wis. 407, "which disposes of all the litigated issues in an action, is sufficient."

Where a special verdict is an insufficient response to the issue, judgment for this reason cannot be rendered on it. *Clay v. State*, 43 Ala. 350.

A verdict which finds but part of the issue, and says nothing as to the rest, is insufficient, because the jury have not tried the whole issue. So if several pleas are joined and the jury find some of them well, and as to others find a special verdict, which is imperfect, a *venire facias de novo* will be granted for the whole. 2 Roll. Abr. Pl. 722; *Auncelme v. Auncelme*, Cro. Jac. 31; *Woolmen v. Caston*, Cro. Jac. 113; *Treswell v. Middleton*, Cro. Jac. 653; *Rex v. Hays*, 2 Ld. Raym. 1518.

A special verdict which is defective cannot form the basis of a valid judgment, unless it finds all the material facts put in issue by the pleadings; and this, though the evidence may clearly establish the existence of the facts not found. *Moore v. Moore*, 67 Tex. 293.

When a special verdict is ambiguous or imperfect, or when it finds only the evidence of facts and not the facts themselves, or finds but a part of the facts in issue and is silent as to others, the court will regard the finding as a mistrial and order a *venire facias de novo*. *Barnes v. Williams*, 11 Wheat. (U. S.) 415; *Prentice v. Zane*, 8 How. (U. S.) 484; *Carrington v. Pratt*, 18 How. (U. S.) 63; *Suydam v. Williamson*, 20 How. (U. S.) 441.

In *Housworth v. Bloomhuff*, 54 Ind. 487, Howk, J., in delivering the opinion of the court, used this language: "A special verdict must contain a finding by the jury, pro and con, as to every material fact in issue necessary to constitute the plaintiff's cause of action or the defendant's defense. And the reason of this requirement is, that the court can neither supply an omitted necessary fact, nor can it render judgment upon an imperfect verdict. If the special verdict should not contain a finding by the jury, either for or against each material fact in issue necessary to constitute the cause of action or cause of defense, then the proper remedy for the aggrieved party is a motion to set aside the verdict and for a *venire facias de novo*." *Bosseker v. Cramer*, 18 Ind. 44; *Cincinnati, etc., R. Co. v. Washburn*, 25 Ind. 259; *Smith v. Jeffries*, 25 Ind. 376; *Jenkins v. Parkhill*, 25 Ind. 473.

1. "A verdict," said Lord Coke (Co. Litt. 227 a), "finding matter uncertainly and ambiguously, is insufficient, and no judgment will be rendered thereon." *Loew v. Stocker*, 61 Pa. St. 347; *Kansas, etc., R. Co. v. Pointer*, 14 Kan. 37; *McLean v. Copper*, 3 Call (Va.) 367; *Goosely v. Holmes*, 3 Call (Va.) 424; *Clay v. Ransome*, 1 Munf. (Va.) 454; *Tunnell v. Watson*, 2 Munf. (Va.) 283; *Geddy v. Butler*, 3 Munf. (Va.) 345; *Robinson v. Brock*, 1 Hen. & M. (Va.) 213; *Cropper v. Carlton*, 6 Munf. (Va.) 277; *Brown v. Ralston*, 4 Rand. (Va.) 504; *Brown v. Fer-*

for it is of the gravest importance that the record should be definite and certain, and show unequivocally what matters have been adjudicated, and that the decision should be ultimate regarding the questions in issue.¹

(4) *Formality*.—The form of a special verdict seems to be immaterial, so that the facts found are distinctly and intelligibly set forth.² Some courts have held, however, that the conditional conclusion—finding for the plaintiff if the law on the facts found is adjudged to be in his favor, and if otherwise, then for the defendant—is essential to the validity of the verdict;³ but the

guson, 4 Leigh (Va.) 37; 24 Am. Dec. 707.

Where a special verdict is imperfect by reason of ambiguity or uncertainty, so that the court cannot say for which party judgment should be given, a *venire facias de novo* should be awarded; but if the verdict be not ambiguous in itself, but the plaintiff has stated a defective case or a defective title, then the judgment should be for the defendant, and a *venire facias de novo* ought not to be granted. *Bellows v. Bank*, 2 Mason (U. S.) 31. And see *State v. Curtis*, 71 N. Car. 56.

Direct and Intelligible.—In *Carroll v. Bohan*, 43 Wis. 218, it is said: "The statute providing for special verdicts is an excellent one, tending to dispel the occasional darkness visible in general verdicts. But special verdicts are worse than useless, if courts do not submit for them single, direct, and plain questions, and insist upon positive, direct, and intelligible answers. Indirect, evasive, uncertain, or unmeaning answers should never be received. And when none other can be drawn from a jury, the verdict should not stand for a moment."

Ambiguous.—Where there are such inconsistencies or ambiguities in a special verdict as to render it uncertain or doubtful which way the jury intended to find, it is proper to award a *venire facias de novo*. *Mitchell, J.*, in *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488.

Inconsistent.—In *Cottrill v. Cramer*, 59 Wis. 231, it is held that a special verdict in an action of libel, finding facts which would justify the giving of exemplary damages but awarding nominal damages only, should be set aside as inconsistent. *Murray v. Abbott*, 61 Wis. 198; *Puffer v. Lucas*, 107 N. Car. 322. As to inconsistency, see also *McBride v. Union Pac. R. Co.*, 3

Wyoming 247; *McCurdy v. Locker*, 2 Tex. Civ. App. 220.

Documents in Evidence.—The requisite certainty may not be attained by reference to documents given in evidence at the trial. *Walker v. Dewing*, 8 Pick. (Mass.) 520; *Eisemann v. Swan*, 6 Bosw. (N. Y.) 668; *Jackson v. State*, 21 Tex. 668.

In *McArthur v. Porter*, 1 Pet. (U. S.) 626, the special verdict referred to a deed of conveyance, which was described, but not set out substantially or literally. A deed was found in the record, but the court refused to consider it as part of the finding of the jury or refer to it in aid of the verdict.

1. *Dray v. Crich*, 3 Oregon 300.

Unmistakable Language.—A special verdict must find all the issues made by the pleadings in language which does not admit of mistake. It should be the end and not result in a continuance of the controversy. *Moore v. Moore*, 67 Tex. 293.

2. A special verdict, however informal, is good if the court can understand it. It is to have a reasonable construction and not to be avoided unless from necessity. If rendered upon substantial issues of fact, it should not be disregarded for mere technical defects. *Daniels v. McGinnis*, 97 Ind. 549; *Clark v. Clark*, 132 Ind. 25.

Substantially Good.—It is sufficient if the verdict is substantially good, mere artificial wording being immaterial. *Fenn v. Blanchard*, 2 Yeates (Pa.) 543; *Evansville, etc., R. Co. v. Taft*, 2 Ind. App. 237.

Criminal Case.—It is sufficient if the jury find all the substantial requisites of the charge, without following the technical language used in the indictment. *Com. v. Chatham*, 50 Pa. St. 181; 38 Am. Dec. 539; *Chitty's Crim. L.* 642.

3. It is held in the case of *State v.*

better doctrine is believed to be that, while usual and proper, the conditional conclusion is not absolutely necessary.¹

e. CONSTRUCTION.—The special verdict of a jury must be read as an entirety,² and in the light of the issues formed by the pleadings.³ In rendering judgment thereon, the court can look only

Wallace, 3 Ired. (N. Car.) 195, that the jury in a special verdict must show that they find one way or the other according as the opinion of the court may be upon the law. This case was an action on an indictment for assault and battery, and the jury returned the following verdict: "The jury find that while the prosecutor was sitting in a chair, the defendant raised his gun in a striking position, being within striking distance of the prosecutor, and declared that if he repeated certain words just uttered, he would strike him, which words were not repeated by the prosecutor, and the jury submit to the court whether this is in law an assault." "In this case," said the court, "the jury submit to the court whether the defendant be guilty of an assault, but they do not find the defendant guilty, if, in the opinion of the court, he is guilty; and not guilty if, in the opinion of the court, he is not guilty." *State v. Stewart*, 91 N. Car. 566; *State v. Monger*, 107 N. Car. 771; *State v. Divine* (S. Car. 1887), 4 S. E. Rep. 477.

1. "The want of a technical ending," said the court, in *Hendrickson v. Walker*, 32 Mich. 68, "is immaterial. When the jury find facts, they find for the party who should prevail on those facts, and he is entitled to judgment."

The case of *State v. Moore*, 7 Ired. (N. Car.) 228, has been cited by the courts of this state to support the position which they assume, holding the essentiality of the conditional conclusion. It would seem to us, however, to be an authority for exactly the opposite contention, for in this case it is held, "that a special verdict is in itself a verdict of guilty or not guilty, as the facts found in it do or do not state in law the offense charged." See also *State v. Ewing*, 108 N. Car. 755; *State v. Spray* (N. Car. 1893), 18 S. E. Rep. 700.

In *Toler v. Keiher*, 81 Ind. 383, it is held that where a jury return a special verdict, which is imperfect by the omission of a formal conclusion, the court may instruct them as to the same, and direct them to retire and add it.

2. If a portion of a verdict is doubtful or obscure, reference may be had

to the context for the purpose of ascertaining the true meaning. *Alhambra, etc., v. Water Co. v. Richardson*, 72 Cal. 598. And see *Elliott, J., in Woodward v. Davis*, 127 Ind. 172; *Miller v. Shackleford*, 4 Dana (Ky.) 271.

3. *Foster v. Jackson*, Hob. 52; *Rex v. Saddler's Co.*, 7 Jur. N. S. 143; *Eisemann v. Swan*, 6 Bosw. (N. Y.) 668; *Barto v. Himrod*, 4 Seld. (N. Y.) 483; 59 Am. Dec. 506.

In *Rex v. Plummer*, 12 Mod. 627, it was declared by Holt, C. J., that though in an indictment for manslaughter, it be necessary to say that it was done voluntarily, yet it is not necessary it should be found in a special verdict; for if it be found that he did the act, without any more, it must be understood that he did it voluntarily, as it is laid in the indictment, if the contrary do not appear; for a man is a free agent, and what he does must be intended to be done voluntarily, if the contrary does not appear.

Liberality of Construction.—Although the verdict seems to wander and not answer formally to the words of the issue, yet if the point in issue may be concluded out of it, the verdict will serve. "A special verdict," observed Elliott, J., in *Woodward v. Davis*, 127 Ind. 172, "is not to be defeated by strict interpretation, but a reasonable construction is to be given it, and the construction is to be put upon it in an entirety, and not in fragmentary parts." *Miller v. Shackleford*, 4 Dana (Ky.) 271; *Plummer v. Currier*, 52 N. H. 287.

"More or Less."—As to construction of the words "more or less," see *Gonzales v. Leon*, 31 Cal. 98.

On a *sci. fa.* against the executors of Thomas Jackson, the defendants pleaded that the testator was taken in execution by virtue of a *capias ad satisfaciendum*. The special finding set out that the testator was taken in execution by virtue of an *alias capias ad satisfaciendum*. This was adjudged as maintaining the plea of the defendant, and it was laid down that, "In every act there is a substance, a body, a principal, and there are certain accessories or incidents; and concerning this it is

to such facts as properly arise under the issues joined, and which appear in the verdict itself,¹ for whatever facts do not appear in a special verdict must be taken not to exist.² In a criminal case,

a true axiom, *unumquodque maxime est id quod est principalius in ipso*, and therefore things are nominated *ex eo quod sunt per se, non per accidens*. Now where the substance be *capias*, whether it be first *alias* or *pluries*, those are but distinctions of number or order. *Foster v. Jackson*, Hob. 52.

An indictment charged the defendant with forging an indorsement upon a bank note by erasing a memorandum of payment, and the jury found that he forged the face of the note where, by the method of the company, the minute of payment was made. The defendant's counsel insisted that an indorsement signified a writing upon the back of any note or deed, but it was held by all the judges, that the defendant was guilty, for the writing upon the face of the note was of the same effect as an indorsement, being introduced by the company instead of writing on the back, and always accepted for an indorsement, and therefore was within the words of the indictment. *Rex v. Bigg*, Stra. 18.

Upon a charge for murder three wounds were mentioned, but the verdict only spoke of two, finding that the first alone was mortal, yet the court said that this was a good verdict, for it found the death of the party killed from a wound given by the defendant. *King v. Morgan*, 1 Bulst. 87; *Hawkins* ch. 47, § 4, note.

1. *McCarty v. Hudsons*, 24 Wend. (N. Y.) 291. In this case it was held also that though a fact found by the special verdict would prevent a recovery or defeat the defense if properly pleaded, it would not be regarded by the court.

"In judging upon a special verdict," says Ashe, J., in *State v. Blue*, 84 N. Car. 807, "the court is confined to the facts expressly found, and cannot supply the want thereof as to any material part, by an agreement or implication from what is expressly found; and when the facts are of an equivocal character, which may mean one thing or another, the court cannot determine as a question of law the guilt or innocence of the defendant." *State v. Curtis*, 71 N. Car. 56.

In rendering judgment on a special verdict, the court must be confined to the verdict itself and not look to the

facts proved but not found in the verdict. Where the verdict is found upon special issues alone, the court cannot look beyond it to any other fact apparent in the record in aid of the judgment. *Kuhlman v. Medlinka*, 29 Tex. 385. See also cases cited in following notes.

Inherent Qualities.—A special verdict must be self-sustaining; it cannot be aided by a reference to extrinsic facts, appearing in the record. It must stand or fall according to its own inherent qualities. *Vansyckel v. Stewart*, 77 Pa. St. 124.

2. **De Non Apparentibus et Non Existentibus Eadem est Ratio et Judicium.**—This maxim is applicable to special verdicts. *People v. Wells*, 8 Mich. 104; *Collins v. Riley*, 104 U. S. 327; *Thayer v. Society of United Brethren*, 20 Pa. St. 60; *Wallingford v. Dunlap*, 14 Pa. St. 33; *Berks County v. Jones*, 21 Pa. St. 413; *Vansyckel v. Stewart*, 77 Pa. St. 124; *Lawrence v. Beaubien*, 2 Bailey (S. Car.) 653; 23 Am. Dec. 155.

A special verdict must contain all the facts from which the law is to arise, and whatever is not found therein is, for the purpose of a decision, to be construed as not existing. It must present in substance the whole matter upon which the court is asked to determine the legal rights of the parties, and cannot be aided by intendment, or by extraneous facts, although such facts may appear elsewhere in the record. *Collins v. Riley*, 104 U. S. 327.

In a proceeding to recover rent due upon a perpetual lease granted out of land with right of distress and entry if the rent is not paid, a special verdict finding the entry of the grantee of the rent upon the land, and the holding by him and those claiming under him for 43 years, but which does not find that the original entry was under the right of entry given by the deed, or that the parties held adversely, nor any facts from which such an entry or such a possession results as a conclusion of law, affords no ground upon which the court can infer either fact. *Turner v. Smith*, 18 Gratt. (Va.) 831.

On a petition for freedom, where the petitioners claimed to be descended from one Ann Joice, a free woman of

where the jury return a special verdict, all the circumstances which constitute the offense must be set forth to enable the court

England, the special verdict found that she came into the country with Charles, Lord Baltimore, when he came from *England*, but did not expressly find that she came from *England*. The court held the verdict to be imperfect because every word might have been true, yet Ann Joice might never have been in *England*. *Mahoney v. Ashton*, 4 Har. & M. (Md.) 210.

Necessary Consequence.—In *State v. Duncan*, 2 McCord (S. Car.) 129, Johnson, J., in delivering the opinion of the court declared, that "To authorize the court in pronouncing its judgment on a special verdict, the legal affirmative or negative conclusion must follow as a necessary consequence of the facts stated. This cannot happen where they are doubtful, for the obvious reason that the premises from which the deduction is to be drawn are wanting, nor can it happen for the same reason where distinct facts are set in opposition to each other."

"Nothing to be Intended."—It is a widely recognized rule of law, that nothing is to be intended in aid of a special verdict. To this effect, see *Tancred v. Christy*, 12 M. & W. 316; *Rex v. Aire*, 2 T. R. 660; *Sewall v. Gladden*, 1 Ala. 52; *Stodder v. Powell*, 1 Stew. (Ala.) 287; *Lee v. Campbell*, 4 Port. (Ala.) 198; *Clay v. State*, 43 Ala. 350; *Hann v. Field*, Litt. Sel. Cas. (Ky.) 376; *State v. Ritchie*, 3 La. Ann. 511; *People v. Wells*, 8 Mich. 104; *Hodge v. Ludlum*, 45 Minn. 290; *Knickerbocker, etc., Min. Co. v. Hall*, 3 Nev. 194; *Jenks v. Hallet*, 1 Cai. (N. Y.) 60; *State v. Custer*, 65 N. Car. 339; *Blake v. Davis*, 20 Ohio 231; *Fenn v. Blanchard*, 2 Yeates (Pa.) 542; *Crousillat v. Ball*, 3 Yeates (Pa.) 375; 2 Am. Dec. 375; *Wallingford v. Dunlap*, 14 Pa. St. 33; *Pittsburgh, etc., R. Co. v. Evans*, 53 Pa. St. 250; *Loew v. Stocker*, 61 Pa. St. 347; *Lawrence v. Beaubien*, 2 Bailey (S. Car.) 623; 23 Am. Dec. 155; *Allen v. Fogler*, 6 Rich. (S. Car.) 54; *Jones v. State*, 2 Swan (Tenn.) 399; *Kuhlman v. Medlinka*, 29 Tex. 385; *Collins v. Riley*, 104 U. S. 327; *Alexandria Bank v. Swann*, 4 Cranch (U. S.) 136; *McMichen v. Amos*, 4 Rand. (Va.) 137; *Brown v. Ralston*, 4 Rand. (Va.) 504; *Stribbling v. Valley Bank*, 5 Rand. (Va.) 159; *Tunnell v. Watson*, 2 Munf. (Va.) 283.

Inferences of Law.—The rule excluding "intendment" in aid of a special verdict refers to inferences of fact. The court may draw inferences of law from the facts found in the special verdict. Thus, it was held to be sufficient that the special verdict found facts which amounted to usury, though not finding the corrupt argument in technical words. *Gibson v. Fristoe*, 1 Call (Va.) 72; 1 Am. Dec. 502. And in *State v. Fuller*, 1 Bay. (S. Car.) 245; 1 Am. Dec. 610, it was resolved that if a special verdict states the passage of a forged note, knowing of the forgery, it is sufficient to warrant a judgment of conviction, though such finding does not express that it was done with fraudulent intent, for the fraudulent intention springs out of the knowledge of the forgery as a natural and legal consequence.

Issues Ignored.—It has been held that where a special verdict, not defective on its face, fails to determine all the issues by the facts found, such issues as are ignored must be regarded as not sustained by the party on whom rests the burden of proof. *Graham v. State*, 66 Ind. 386; *Jones v. Baird*, 76 Ind. 164; *Henderson v. Dickey*, 76 Ind. 264; *Lafayette v. Allen*, 81 Ind. 166; *Glantz v. South Bend*, 106 Ind. 305; *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273; *Brazil, etc., Coal Co. v. Hoodlet*, 129 Ind. 327; *Davis v. Schmidt* (Ind. App. 1892), 31 N. E. Rep. 840; *Evansville, etc., R. Co. v. Charlton*, 6 Ind. App. 56; *Evansville, etc., R. Co. v. Maddux* (Ind. 1893), 33 N. E. Rep. 345; *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304.

An objection that a special verdict, which is otherwise sufficient, does not cover the issues in the cause, or so far covers them that the plaintiff is entitled to a judgment, is not presented by a motion for a *venire facias de novo*, but by a motion for a new trial or by a motion for judgment on the verdict. *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273.

A special verdict should contain a finding by the jury upon every material fact in issue necessary to state the plaintiff's cause of action, or the defendant's defense upon which there is evidence. There should be no finding upon immaterial facts, nor upon facts not within the issue. A failure to find upon

to render judgment.¹ When a verdict is deficient in this respect, it has been held that the court may direct the jury to retire for

any material fact in issue, is equivalent to a finding against the party upon whom the burden of proof rests to establish such fact. *Brazil, etc., Coal Co. v. Hoodlet*, 129 Ind. 327.

1. Thus, where the carrying away and disposing of the slave of another constitutes no offense under the statute, unless the owner is thereby deprived of the use and benefit of the slave, and the verdict does not state that the carrying away was without the owner's consent, no judgment can be rendered on it. *State v. Ritchie*, 3 La. Ann. 511. See *Charleston v. Gadsden*, 8 Rich. (S. Car.) 180.

A special verdict finding the defendant guilty of embezzlement of a sum of money less than twenty-five dollars, without more, is insufficient to support a judgment of conviction. It should state that the money was the property of the person named in the indictment, and that the offense was committed in the county in which the court sat, with all other material ingredients of the offense. *Huffman v. State*, 89 Ala. 33.

When intent is an element of a crime it should be stated. As where a person was charged with obtaining money by false pretense the special verdict omitted to find that the act was done with the intent to defraud. *State v. Oakley*, 103 N. Car. 408. So, on an indictment for larceny, the jury stated that the defendant obtained a piece of mutton, representing himself as the agent of another person, and saying that he would be back in a few minutes to pay for it. He did not come back immediately, but afterward returned saying the mutton was for his own use and that he would pay for it. The special verdict did not find that the act was done *animo furandi* and was, therefore, held imperfect. *State v. Bray*, 89 N. Car. 480. Again, in *Jackson v. State*, 21 Tex. 668, where proceedings of disbarment were had against an attorney for malpractice, the verdict found him to have abandoned one side of a cause and taken up the other, but did not allege that he did so from any corrupt motive or evil intent, and this was considered a vital omission.

Where an offense consisted in tempting or persuading a slave to leave his master's service, with the design or intent to convey the slave out of the state

and deprive the true owner thereof, and the special verdict in the prosecution omitted to state that the facts were done with this intent or design, although from what was stated there was sufficient *prima facie* evidence of the intent, yet the verdict was set aside. *Jones v. State*, 2 Swan (Tenn.) 399.

Where the special verdict simply found that the representation made by the defendant was false, but did not find the intent with which the representation was made, it was held to be insufficient, inasmuch as the intent to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense, and the verdict should have found the fact distinctly one way or the other, either that the defendant made the representation with the intention to cheat, or that he made the statement with an honest conviction of its truth. *State v. Blue*, 84 N. Car. 807.

On a complaint for selling intoxicating liquor, without any license, appointment, or authority, a special verdict "that the sale was made as set forth in the complaint," or "that defendant made the sale as set forth in the complaint," is not sufficient to warrant a judgment against the defendant, because it does not show that the sale was unauthorized. *Com. v. Dooly*, 6 Gray (Mass.) 360. And see *Com. v. Call*, 21 Pick. (Mass.) 513; 32 Am. Dec. 284.

In criminal cases, the county in which the offense was committed may be a necessary element. Thus, for example, upon an indictment for murder the special verdict did not find in what county the murder was committed, and the counsel for the crown argued that the indictment having been found by the grand jury, and the verdict having been rendered by the petty jury of Burton, that fact was sufficient to determine the county, but Buller, J., said: "If all the facts be found, and all those facts be true, yet if they are found in another county than that in which they are laid in the indictment, judgment cannot be given, and, therefore, to enable the court to give judgment, the verdict should find the facts in the same county as is laid in the indictment." *Hazel's Case*, 1 Leach 372. See

further consideration,¹ the defective finding not entitling the accused to a discharge nor operating as an acquittal.²

f. SURPLUSAGE.—If a special verdict, in addition to the facts at issue, contains conclusions of law, or inferences upon the facts in the nature of legal conclusions, facts collateral to or outside of the issue, or evidence of facts instead of the facts themselves, such additional matter is surplusage, and may be ignored by the court;³

also *Com. v. Call*, 21 Pick. (Mass.) 509; 32 Am. Dec. 284.

Where the defendant was charged with adultery, a verdict was returned, that "The jury find the defendant guilty of having sexual intercourse with Eliza Foster, the person named in the indictment, she at the same time being an unmarried woman and the defendant being a married man and having a lawful wife at the time then living." As the county in which the offense was committed was not stated, the verdict was declared imperfect. *Com. v. Call*, 21 Pick. (Mass.) 509; 32 Am. Dec. 284.

No facts can be inferred by the court which the jury have not inferred and set forth. Especially is this the case against a defendant in a criminal case. *People v. Wells*, 8 Mich. 104.

1. When the verdict returned on the trial of a criminal case fails to pronounce affirmatively or negatively on all the facts necessary to enable the court to give judgment, the order of the court should be that the jury retire for further deliberation, but when this order is not made, it does not entitle the defendant to a discharge, but the court may set aside the defective verdict and order a new trial. *State v. Arthur*, 21 Iowa 322. And see *State v. Curtis*, 71 N. Car. 56; *State v. Wallace*, 3 Ired. (N. Car.) 195; *State v. Lowry*, 74 N. Car. 121.

2. *State v. Arthur*, 21 Iowa 322; *State v. Ritchie*, 3 La. Ann. 511.

Contra.—The statement that a verdict, deficient in setting forth the essential elements of the offense charged, does not operate as an acquittal, is contradicted by the decision rendered in *State v. Belk*, 76 N. Car. 10. Observe the remarks of the court: "It is familiar law," says Rodman, J., in this case, "that nothing can be added to a special verdict by inference. If it omits to set forth any fact essential to constitute the offense charged, it is defective and the defendant must be held acquitted; in like manner, if it shows a defense, the defendant must be acquitted."

3. *Buszard v. Capel*, 8 B. & C. 141; *Priddle v. Napper*, 11 Coke 13; *Dowman's Case*, 9 Coke 1; Anonymous, Dyer 362; *Foster v. Jackson*, Hob. 52; *Rowe v. Huntingdon*, Vaughn 77; *Stodder v. Powell*, 1 Stew. (Ala.) 287; *Louisville, etc., R. Co. v. Hart*, 119 Ind. 274; *Indiana, etc., R. Co. v. Finnell*, 116 Ind. 414; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488; *Conner v. Citizen's St. R. Co.*, 105 Ind. 62; 55 Am. Rep. 177; *Louisville, etc., R. Co. v. Balch*, 105 Ind. 93; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582; *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. 186; *Dixon v. Duke*, 85 Ind. 434; *Hamilton County v. Newlin*, 132 Ind. 27; *Evansville, etc., R. Co. v. Taft*, 2 Ind. App. 237; *Kitts v. Wilson*, 130 Ind. 492; *Hankey v. Downey*, 3 Ind. App. 325; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18; *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304; *Richmond v. Tallmadge*, 16 Johns. (N. Y.) 307; *McCarty v. Hudsons*, 24 Wend. (N. Y.) 291; *U. S. v. Collier*, 3 Blatchf. (U. S.) 325; *Butler v. Hopper*, 1 Wash. (U. S.) 499.

Legal Conclusions.—The court is to draw legal conclusions upon the facts; if the jury draw such conclusions, the court may reject that portion of the special verdict and pronounce judgment upon the facts alone. *Butler v. Hopper*, 1 Wash. (U. S.) 499; *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582; *Louisville, etc., R. Co. v. Balch*, 105 Ind. 93; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488. And see *Smith v. Inland*, 4 Utah 187.

Motion to Strike Out.—If conclusions of law are stated in a special verdict, the court will disregard them, but it is not error to refuse to strike them out. *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18.

Facts in Issue.—A special verdict should be limited to the case made by the pleadings, should find all the facts proven under the issues, and should not embody or state conclusions of law.

and if the verdict, stripped of its superfluity, is yet sufficient to support a judgment either way under the issues, a motion for a *venire facias de novo* will be overruled.¹

g. FORM—PREPARATION OF.—The jury have nothing to do with the formal preparation of the special verdict. When it is agreed that such a verdict shall be given, the jury merely state their conclusions as to the existence of any fact remaining in doubt, and the verdict is then adjusted as to form by the counsel on both sides under the supervision of the judge.²

Pittsburgh, etc., R. Co. v. Adams, 105 Ind. 151; Indiana, etc., R. Co. v. Finnell, 116 Ind. 414; U. S. v. Collier, 3 Blatchf. (U. S.) 325.

In an action of debt brought against a sheriff for the escape of a prisoner who had been in execution at the suit of the plaintiffs, the jury found a special verdict to the effect that the prisoner had returned voluntarily before the suit was brought, and continued that the defendant had not filed with his plea an affidavit that the escape was without his knowledge or consent. It was held that the fact found by the jury that the plea was accompanied by no such affidavit, was a finding not within the issue before them, as they had nothing to do with the legal requisites of the plea, and that this excess was to be rejected as surplusage. *Richmond v. Tallmadge*, 16 Johns. (N. Y.) 307.

Inferential Conclusions.—The jury, in an action of negligence, after stating the facts which occasioned the misfortune, said that, "The conduct of the plaintiff on the occasion of the injury was ordinarily prudent and cautious under the circumstances, and that he did not wholly contribute to the said injury by any fault or negligence on his part, but that said injury was caused mostly by the agent of the defendant, driver of said car." Mitchell, J., in delivering the opinion of the court, observed that, in determining the legal value and quality of the facts found, the paragraph set out was nothing more than inferences on conclusions, drawn by the jury upon the precedent facts, and upon these it was not the province of the jury, either to express opinions or draw conclusions. *Conner v. Citizens' St. R. Co.*, 105 Ind. 62; 55 Am. Rep. 177.

In *Rowe v. Huntingdon*, Vaughn 77, it was said that, "As a witness may prove the contents of a deed or will, so may a jury find them, the deed or will itself not being found in *haec verba*. But if a jury by their verdict shall take

upon themselves to collect the contents of a deed, and yet by the same verdict find that deed in *haec verba*, the court is not to regard the collection they have made of the substance of the deed itself."

1. *Heyden's Case*, 4 Coke 426; U. S. v. Collier, 3 Blatchf. (U. S.) 325; *Conner v. Citizens' St. R. Co.*, 105 Ind. 62; 55 Am. Rep. 177; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; *Indiana, etc., R. Co. v. Finnell*, 116 Ind. 144; *Louisville, etc., R. Co. v. Green*, 120 Ind. 367; *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 542; *Reeves v. Grotendick*, 131 Ind. 107.

Where the jury, in their special verdict, not only find facts but also conclusions of law, the court, in rendering judgment, may look only to the facts, disregarding the conclusions of law. Thus, a special verdict which seems to be incongruous in finding that in any event the defendant was entitled to certain items, and yet declaring that the allowance of such items depended upon conclusions of law to be submitted to the decision of the court, has been construed, as not restricting the authority of the court to pass upon the whole subject-matter including those items. *U. S. v. Collier*, 3 Blatchf. (U. S.) 325.

Opinion of Jury.—The jury in an action of trover, after stating the facts, declared that if a certain usage, alleged by the defendant, was allowed to prevail, the plaintiff could not recover; but the court finding sufficient facts to sustain the claim, disregarded the opinion of the jury and entered judgment on the verdict. *Erwin v. Clark*, 13 Mich. 10.

2. **English Practice.**—Under the old English practice a minute or memorandum was made of the facts on which it was desired that the jury should pass, and submitted to the judge for his approval. It was then signed by one counsel for each party, although if all

the counsel for one side refused to sign it, the court might still present it to the jury as signed by only one party. After passing through the hands of the jury the finding was entered in the minute book of the clerk, and a copy furnished to counsel. From these minutes it was the duty of the party, at whose request special facts were found, to draw the formal verdict. Either litigant, however, was privileged to do so. The whole proceedings were then entered on the record and argued before the court in bank. 10 Bacon's Abr., "Verdict" D.

Speaking of the present practice in *England*, it is said, in Stephen on Pleading 91, "that the jury have nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled, under the correction of the judge, by the counsel and attorneys on either side, according to the state of facts as found by the jury, with respect to all particulars on which they have delivered an opinion; and with respect to other particulars, according to the state of facts which it is agreed that they ought to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered on record, and the question of law arising on facts found, is argued before the court in bank, and decided by that court as in case of demurrer." See also 2 Tidd's Practice 897.

American Practice.—Each party may draw up a special verdict in proper form, setting forth such facts as he thinks the evidence establishes and are necessary to be incorporated therein, and have it submitted to the jury for their deliberation. If this is done by both parties, the jury will have before them the proper form, and the state of facts which is claimed to be proved by each party. They may adopt either in whole or in part, or reject both and prepare such a recital of facts as, in their judgment, is warranted by the evidence.

Buskirk, J., delivering the opinion of the court, in *Pittsburg, etc., R. Co. v. Ruby*, 38 Ind. 309, said: "The jury had before them the outline of the facts that each party claimed to have proved upon the trial, and the proper form and manner of stating them, with the in-

structions of the court and the argument of counsel. The evidence was fresh in their recollections. They were entirely competent to determine what facts had been proved. They were required to find facts from their own convictions, and upon their own responsibility. They had the undoubted right to adopt either draft submitted to them, if they found, as a question of fact, upon their oaths, that it contained the facts; or they had the right to alter or change them to correspond with their recollections of the testimony; or they had the right to prepare a special verdict for themselves. We think that it is the duty of the court, whenever a special verdict is demanded, to give each of the parties the privilege and time required to prepare with care the draft of a special verdict. If either of the parties should refuse to do so, this would in no manner deprive the other party of the right; and the party refusing would have no right to complain that the other party had gained an advantage over him by presenting his views of the evidence to the jury. Jurors are very competent to understand the evidence, find facts and draw conclusions from the facts found; but as a general rule, and especially in complicated cases, they are not equal to the task of preparing a special verdict. They do not know what facts should be found to cover the issues, nor the manner of stating them." See also *Hopkins v. Stanley*, 43 Ind. 558.

In *Pittsburg, etc., R. Co. v. Ruby*, 38 Ind. 294; 10 Am. Rep. 111, the draft of the special verdict was written out in full by the attorneys for each side, and both forms submitted to the jury with proper instructions from the court. The amount of damages was inserted in the draft prepared by the plaintiff's attorney, was signed by the foreman and returned into court without any other change or alteration.

Supervision of Court.—In *Miller v. Shackelford*, 4 Dana (Ky.) 264, it is said: "A jury is not expected to be able (especially in a complicated case) to draw up a special verdict without assistance. The facts are to be found upon their own convictions and responsibility; the form of the finding, and its sufficiency as to the extent of the facts embraced, must be looked to by the court."

When a special verdict is demanded, the court has a large discretion in fixing the term and scope of the specific

h. AMENDMENT OF SPECIAL VERDICT.—It seems that a special verdict may be amended so as to be put in proper form in the same manner as a general verdict.¹ However, if the alteration amounts to a substantial variation from the verdict as returned, the consent of the parties to the suit is requisite.²

questions to be submitted; but they must necessarily cover all the controverted issues. *Knowlton v. Milwaukee R. Co.*, 59 Wis. 278. And see *Doran v. Ryan*, 81 Wis. 63; *Herbst Importing Co. v. Burnham*, 81 Wis. 408.

The form of the verdict submitted is largely within the discretion of the trial court, and it should see that the questions cover all the controverted issues of fact; otherwise, there must necessarily be a failure to determine such issues, resulting in a mistrial. *Pratt v. Peck*, 65 Wis. 463.

It is no objection to a special verdict that it is drawn up by counsel in the case, in order to show what facts must be inserted (if found true) and the proper form of stating them, provided that the rights and duties of the jury, the effect of their verdict, etc., is fully explained to them by the court. *Miller v. Shackelford*, 4 Dana (Ky.) 264.

May Be Drawn by the Court.—In *Carlin v. Donegan*, 15 Kan. 173, the parties having asked for a special verdict, a form was prepared by the court and submitted to the jury, without the knowledge of the counsel for either party. The jury adopted this form and on appeal the special verdict was sustained.

It was said, however, by Buskirk, J., in *Pittsburg, etc., R. Co. v. Ruby*, 38 Ind. 294; 10 Am. Rep. 111, that "The court should not be required to prepare a special verdict for many reasons. In the first place, the opinion of the court as to what had been proved would have undue influence with the jury. In the next place the court is required to pass upon the form and sufficiency of the special verdict. And in the third place, after the verdict has been returned, the court is frequently required to pass upon motions for *venire de novo*, new trial, and in arrest of judgment; and this cannot be fairly and satisfactorily done, if the judge has been required to prepare a draft of what he believed had been proved at the trial." And see *Germond v. Central Vermont R. Co.*, 65 Vt. 126.

Should Be Drawn by Counsel.—"The counsel engaged in a trial of a cause, understand the issues involved, the

facts necessary to be found to cover the issues, the testimony in the cause, and the requisite form to be adopted. Nor do we think that there is any danger that an attorney would take advantage of his position to deceive or mislead the jury. An attorney acts under the solemnity of an oath, and the responsibility that he owes the court, the jury, his client, and the public; and all these weighty considerations would induce him to act fairly and truthfully in preparing a special verdict. Besides, he knows that if he does not state the facts correctly, the fraud would be discovered by the jury, and would operate to the prejudice of his client and the injury of his cause." Buskirk, J., in *Pittsburg, etc., R. Co. v. Ruby*, 38 Ind. 294; 10 Am. Rep. 111.

Duty of Plaintiff's Counsel.—It is the duty of the plaintiff's counsel to have the special verdict properly drawn up, settled, and entered of record. *Wallingford v. Dunlap*, 14 Pa. St. 33. And see *Percival v. Jones*, 1 Johns. Cas. (N. Y.) 393.

Every Issuable Fact.—Where the form of the special verdict is prepared before hand by the court or counsel of the parties, and submitted to the jury, it should cover every controverted issuable fact. *Hoppe v. Chicago, etc., R. Co.*, 61 Wis. 358; *McLimans v. Lancaster*, 63 Wis. 604; *Pratt v. Peck*, 65 Wis. 463.

Positive, Direct, Intelligible.—The questions submitted for a special verdict should admit of positive, direct, and intelligible answers. *Murray v. Abbot*, 61 Wis. 198.

1. *Archibold's Crim. Pl. & Ev.* 148; 1 *Bishop's Crim. Proc.*, § 1013, note 9; *Quinn v. State*, 123 Ind. 59; *Crich v. Williamsburg F. Ins. Co.*, 45 Minn. 444; *Sleight v. Hartshorn*, 1 Johns. (N. Y.) 149. See *supra*, this title, *Amendment of Verdict*.

2. *Walker v. Dewing*, 8 Pick. (Mass.) 520; *U. S. v. Bird*, 2 Brev. (S. Car.) 85. The court on its own responsibility alone can never amend a special verdict in matter of substance. *Archibold's Crim. Pl. & Ev.* 148; 1 *Bishop's Crim. Proc.*, § 1013; *Rex v. Hayes*, 2 Stra. 843;

4. **Verdict Subject to Opinion.**—It seems that at common law a jury may return a general verdict for the one party or the other, subject to the opinion of the court on a point of law.¹ This is not properly a general, nor yet is it a special verdict,² though some text-writers have designated it a species of the latter class;³ it seems rather to be a hybrid, partaking of the characteristics of both a general and special verdict.

Rex v. Keat, 1 Salk. 47; *Walker v. Dewing*, 8 Pick. (Mass.) 519; *People v. Wells*, 8 Mich. 103; *Crich v. Williamsburg F. Ins. Co.*, 45 Minn. 444; *Wallingford v. Dunlap*, 14 Pa. St. 31; *Olhweiler v. Lohmann*, 82 Wis. 198.

1. An illustration of this species of verdict is afforded by the case of *Castle v. Hobbs*, Cro. Car. 21, which was an action of ejectment for lands in which letters patent from the Crown were the basis of contention. Here the jury concluded "that if it were a good patent, then for defendant; if otherwise, then for the plaintiff."

Where a doubtful question of law arises in the trial of a cause, by agreement of counsel it may be reserved and the trial proceed, and a verdict rendered subject to the opinion of the court upon this point of law. *Brooks v. Ratcliff*, 11 Ired. (N. Car.) 321.

Points of law reserved for the decision of the court on which the fate of the case depends, ought to appear on the record before it is closed. *Robinson v. Scotts*, 5 T. B. Mon. (Ky.) 278.

In the case of *McMichen v. Amos*, 4 Rand. (Va.) 134, which was an action brought by a slave to recover his freedom, the jury brought in a verdict: "We, the jury, find for the plaintiffs their freedom and one cent damages, subject to the opinion of the court whether the removal of A B with his family, from the State of Maryland to the county of Rockingham in this state, in the month of November, 1800, and the bringing with him the plaintiffs, and the taking the oath prescribed by law within sixty days after his arrival in Rockingham county, by C, the wife of said A B, was a compliance with the law regulating the importation of slaves. If, in the opinion of the court, the law be for the defendant, then we find for the defendant."

2. The court, in *McMichen v. Amos*, 4 Rand. (Va.) 134, in its observations regarding the verdict set forth above, said: "This is not a special verdict in the usual acceptance of the term; a

verdict finding all the facts supposed to belong to the case and referring to the court the decision of the law arising on those facts. The jury do not profess to find all the facts which constitute the case. On the contrary, the finding is a general one that the plaintiffs are free, unless, upon a single point of law reserved, the court shall be of the opinion that the law is for the defendant. There can be no difficulty in comprehending the true nature of a verdict like this, although writers in attempting to name it may not have used terms of the greatest precision."

3. "Another method," says Blackstone, "of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject, nevertheless, to the opinion of the judge of the court above, on a special case, stated by the counsel on both sides with regard to a matter of law." 3 Bl. Com. 378.

Pennsylvania.—Citing this portion of Blackstone the court, in *Wallingford v. Dunlap*, 14 Pa. St. 33, said: "But this proceeding has gone out of practice; perhaps it never existed in *Pennsylvania*."

However, in *Watsontown Car Co. v. Elmsport Lumber Co.*, 99 Pa. St. 605, a general verdict subject to a point reserved was rendered, and in this connection it was held that the question thus reserved must be distinctly stated, and the facts on which it arises must either be admitted on the record, or found by the jury. See also *Wilson v. Steamboat Tuscarora*, 25 Pa. St. 317; *Ferguson v. Wright*, 61 Pa. St. 258.

In 2 Tidd's Practice 898, it is said: "Another method of finding a species of special verdict is when the jury find a verdict generally for either party, but subject, nevertheless, to the opinion of the court, on a special case, stated by the counsel on both sides with regard to a matter of law."

Difference of Nomenclature.—In 1 Archibold's Practice 192, it appears: "Also, where a difficulty in point

5. Special Findings—*a*. AT COMMON LAW.—Under the common law, as it existed in *England*, a jury, possessing the unquestioned right to return, at their discretion, either a general or a special verdict, could not be compelled to do more, the court having no power to require, in addition to a general verdict, findings as to the existence of particular facts.¹

of law arises, the jury may, *instead* of finding a *special* verdict find a general verdict for the plaintiff, subject to the opinion of the judge, or the court above, on a special case stated by the counsel on both sides in regard to a matter of law."

In an action of waste, a verdict finding for the plaintiff and assessing damages is, nevertheless, a general verdict, though it is subject to the opinion of the court, whether upon certain facts stated the plaintiff can maintain the action. *Dejarnatte v. Allen*, 5 Gratt. (Va.) 499.

In *New York*, the Code of Civil Procedure, § 1185, provides that where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict subject to the opinion of the court.

The provision of the code which authorizes the verdict to be directed subject to the opinion of the court, applies only to cases where, the facts being found or conceded, it only remains to pronounce the law. *Whitaker v. Merrill*, 28 Barb. (N. Y.) 526; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Bell v. Shibley*, 33 Barb. (N. Y.) 610; *People v. Ransom*, 56 Barb. (N. Y.) 514; *Briggs v. Merrill*, 58 Barb. (N. Y.) 389; *Wilcox v. Hoch*, 62 Barb. (N. Y.) 509; *Brooklyn City Bank v. McChesney*, 20 N. Y. 240; *Purchase v. Matteson*, 25 N. Y. 211; *Byrnes v. Cohoes*, 67 N. Y. 204; *Biddlecom v. Newton*, 13 Hun (N. Y.) 582; *Purchase v. New York Exch. Bank*, 10 Bosw. (N. Y.) 564; *Brower v. Orser*, 2 Bosw. (N. Y.) 365.

In *Howell v. Adams*, 68 N. Y. 316, the trial court directed a verdict subject to the opinion of the general term. This was held to be no error by the court of appeals, as there was no conflict of evidence as to the material facts, nor any doubtful inferences to be deduced from the facts proved, nor any exception but to the denial of the motion for nonsuit made when the plaintiff rested, and also at the close of the whole evidence.

In *Whitesboro Fire Department v. Thomson*, 16 Hun (N. Y.) 474, the order directing the verdict subject to the opinion of the court was held to be illegal, inasmuch as exception had been taken by each party to the rulings admitting or excluding evidence, and the defendants had also excepted to the refusal of the judge to submit to the jury certain questions of fact. See also *Hall v. Hall*, 13 Hun (N. Y.) 306.

Where a verdict is ordered subject to the opinion of the court, without qualification, exceptions cannot be heard, and the only question before the general term is, which party is entitled to final judgment on the uncontroverted facts. For that reason it is improper to direct a verdict subject to the opinion of the court where exceptions have been taken on the trial or the facts are controverted. *Durant v. Abendroth*, 69 N. Y. 148; 25 Am. Rep. 158.

On Exceptions.—A disputed question of fact, conflicting evidence in relation thereto, and exceptions to the exclusion of evidence, prevent the court at a special term from sending the case to be heard in the first instance at the general term unless on exceptions. *Cobb v. Cornish*, 16 N. Y. 602; *Gilbert v. Beach*, 16 N. Y. 606; *Brower v. Orser*, 2 Bosw. (N. Y.) 365; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180.

Inferences in Support of Verdict.—When a verdict is taken subject to the opinion of the court, every inference which a jury would be justified in drawing from the evidence, the court will draw in support of the verdict. *Williams v. North America Ins. Co.*, 1 Hilt. (N. Y.) 345.

1. In *Devizes v. Clark*, 3 Ad. & El. 506; 30 E. C. L. 135, it was held that the jury have a right to find a general verdict (the case being tried on the general issue) and they cannot be required to find a particular fact. The same principle was recognized in *Davies v. Lowndes*, 1 Bing. N. Cas. 619. Upon the trial at bar of a writ of right the tenant claimed to hold the property in dispute under a will, but the court, with a view to render superfluous any ques-

The practice of having the jury find specially on one or more questions of fact, at the time their general verdict is returned, for the purpose of exhibiting the grounds upon which it is founded, seems to have been accorded its first distinct recognition in some of the *New England* States, as the offspring of practical utility and convenience, rather than the creature of legislative enactment.¹

In these jurisdictions it is held that the presiding judge may interrogate the jury, when they return their general verdict, as to the grounds upon which they found it,² or may instruct them to return with their general verdict findings as to certain facts, the existence of which is material to the rights of the parties,

tion as to the effect of the will, requested the members of the grand assize, before considering their general verdict, to find whether or not the defendant, who claimed as heir of the blood of the person last seised, had established her pedigree to their satisfaction. The members of the grand assize found a general verdict for the tenant and refused to express any opinion upon the defendant's pedigree, and, though a bill of exceptions was tendered on other grounds, neither the counsel nor the court excepted to the general verdict.

1. The case of *Hix v. Drury*, 5 Pick. (Mass.) 302, is the first instance of this practice which we have noticed. In this case, the court held that the jury, by their oath to give a true verdict, were as much bound to make true answers in court touching their verdict as if they had been sworn specifically for that purpose.

2. *Lawler v. Earle*, 5 Allen (Mass.) 22; *Spoor v. Spooner*, 12 Met. (Mass.) 281; *Mair v. Bassett*, 117 Mass. 356; *First Congregational Church v. Holyoke Mut. Ins. Co.* (Mass. 1893), 33 N. E. Rep. 572; *Smith v. Putney*, 18 Me. 91; *Dyer v. Greene*, 23 Me. 464; *Gordon v. Wilkins*, 20 Me. 134; *Walker v. Bailey*, 65 Me. 354; *Walker v. Sawyer*, 13 N. H. 196; *Smith v. Powers*, 15 N. H. 546; *Johnson v. Haverhill*, 35 N. H. 74; *Clough v. Clough*, 26 N. H. 24; *Dearborn v. Newhall*, 63 N. H. 301; *Morris v. Haverhill*, 65 N. H. 89.

At the close of the charge of the judge in *Mair v. Bassett*, 117 Mass. 356, he said to the jury: "I shall, when you come in, if you find for the plaintiff, ask you upon which count you find, and will thank you to be prepared to state. If you find for the defendant, you

need not say anything more." When the jury returned into court with their verdict, which was for the defendant, they also, in answer to a question from the judge, said they found their verdict on the ground that no loan or payment of money had been made to the defendant, etc. The plaintiff excepted to this question, but it was held by the appellate court that the presiding judge, in the exercise of his discretion, could properly inquire of the jury the grounds upon which they found their verdict for the defendant. He was not even precluded from doing so, because he stated to them, at the conclusion of his charge, that if they found for the plaintiff, he should ask them to say upon which count, but if they found for the defendant, they need say nothing more.

Inquiry—When Made.—In *Maine*, in the case of *Smith v. Putney*, 6 Me. 91, it was held that the inquiry to determine whether the verdict of a jury be conformable to legal principles, must be made at the time of the return of the verdict. In *New Hampshire*, it has been held in *Clough v. Clough*, 26 N. H. 24, and *Dearborn v. Newhall*, 63 N. H. 301 that this may be done after the jury have been discharged from the case and have separated.

The object of these interrogations is that it may be determined, by the answers elicited, whether or not the case has been properly tried. *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Parrott v. Thacher*, 9 Pick. (Mass.) 431; *Walker v. Sawyer*, 13 N. H. 196; *Smith v. Powers*, 15 N. H. 546; *Clough v. Clough*, 26 N. H. 24; *Johnson v. Haverhill*, 35 N. H. 74; *Dearborn v. Newhall*, 63 N. H. 301; *Norris v. Haverhill*, 65 N. H. 89.

constituting the premises from which the conclusion of the jury is derived.¹

Where the special findings are irreconcilably inconsistent with the general verdict, the latter is thereby rendered void;² likewise,

1. In *Barstow v. Sprague*, 40 N. H. 27, it was held to be the proper course for the judge who tries the cause to direct the jury, against the objection of the defendant, to return, with a general verdict, answers to specific questions submitted to them, and it was held that this might be done as well against the objection of both parties. *Richardson v. Weare*, 62 N. H. 80. See *Florence Mach. Co. v. Daggett*, 135 Mass. 582; *M. E. Parish v. Clarke*, 74 Me. 110.

In *Wheeler v. Schroeder*, 4 R. I. 383, it was held that where there were two or more grounds of action or defense under the same issue, it was proper for the court, in its discretion, to direct the jury specially to declare upon what ground their verdict was found, in order to ascertain whether a particular instruction of the court affected the verdict.

New York.—This practice existed also in *New York*, before the adoption of the code making express provision for it, for in *McMasters v. Westchester County Mut. Ins. Co.*, 25 Wend. (N. Y.) 379, the course of the trial judge in submitting questions to the jury, with the request that they might be answered separately in the verdict which they should render, was approved by the supreme court. It was held that such practice was not uncommon, and that it frequently avoided the trouble and expense of a new trial.

Effect of Special Findings.—It seems that the special findings of the jury, under certain circumstances, may cure irregularities occurring at the trial, by showing that the alleged error could not have affected the jury in the rendition of their general verdict. Thus, in *Lawler v. Earle*, 5 Allen (Mass.) 22, which was an action for slander, and in which a verdict had been rendered for the defendant on the ground that the alleged slanderous words were privileged, questions arising in the course of the trial respecting the admission or exclusion of evidence, in reference to the truth of the words spoken, and as to the defense of justification on the ground of the truth of the statements made by the defendant, were by the special finding of the jury rendered immaterial.

Another instance of this remedial effect is afforded by the case of *Spurr v. Shelburne*, 131 Mass. 429, where, in an action against a town to recover for injury to the plaintiff's horse sustained by falling into a ditch in the highway, the defect charged being the want of suitable railings, it appeared that the animal left the wrought and traveled part of the road and proceeded some twenty-five or thirty feet along a ditch outside of the highway, fell in and was injured. The jury found for the defendant and stated that on account of the nature of the land and the distance of the ditch from the traveled way, that no railing was necessary. It was held that this finding rendered immaterial a question as to the correctness of an instruction, that if no railing was reasonably required at the place where the horse left the traveled way, the town would not be liable for want of a railing at the place where the accident happened.

2. *Richardson v. Weare*, 62 N. H. 80. And see *Walker v. Sawyer*, 13 N. H. 191; *Willard v. Stevens*, 24 N. H. 271.

Where Not Inconsistent.—Where the jury returned a general verdict for the plaintiff and a special finding not inconsistent therewith, it was held that the judge, in his discretion, might set aside the special finding and allow the general verdict to stand. *Monies v. Lynn*, 119 Mass. 273.

Where a jury render a general verdict and also find specially in response to a question by the court, the general verdict will not be set aside on account of the alleged obscurity and uncertainty of the special finding, where the special finding does not qualify the general verdict, and where it appears from the bill of exceptions that the special finding was put into the form in which it appeared of record, through misapprehension and mistake. *Roche v. Ladd*, 1 Allen (Mass.) 436.

Where the jury returned with their general verdict, a special finding, without direction of the court, which is immaterial to the issue and not inconsistent with the general verdict, such special finding should be disregarded, and a judgment rendered on the general verdict. *Billings Slate, etc., Co. v. Hanger*, 62 Vt. 160.

where the verdict is shown, by the answers to the interrogatories, to be founded on unsubstantial grounds, or the result of misconception, it will not be allowed to stand;¹ in general, this practice has been held not to be dependent upon the consent of the parties or their counsel, but as resting within the sound discretion of the court, to be exercised for the promotion of justice or the prevention of unnecessary litigation.²

Withdrawal of Interrogatories.—In *Florence Mach. Co. v. Daggett*, 135 Mass. 582, it was held that where questions in writing have been submitted to a jury, and the jury return their general verdict ignoring the questions, it is within the discretion of the presiding judge to withdraw the interrogatories and accept the verdict as returned.

1. *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Parrott v. Thacher*, 9 Pick. (Mass.) 431.

2. **Discretionary with Court.**—It is within the exercise of the discretion of the presiding justice to put inquiries to the jury, as to the grounds upon which they found their verdict, and the answers of the foreman assented to by his fellows, may be made a part of the record and will have the effect of special findings of the facts stated by him, and no exception lies to the exercise of this discretion. *Spurr v. Shelburne*, 131 Mass. 429; *Lawler v. Earle*, 5 Allen (Mass.) 22. And see *Spoor v. Spooner*, 12 Met. (Mass.) 281; *Mair v. Bassett*, 117 Mass. 356; *Barstow v. Sprague*, 40 N. H. 27.

The court, in its discretion and for the purpose of promoting justice or restraining useless litigation, has a right to inquire of the jury, when they return a verdict, upon which of several grounds taken by the parties, the verdict was based, or the rule upon which they assessed damages, though it is often said that this power is to be exercised very sparingly and with great caution. *Walker v. Bailey*, 65 Me. 354.

Consent of Parties.—In *Dorr v. Fenno*, 12 Pick. (Mass.) 525, Morton, J., in reference to this practice of questioning the jury in relation to their verdict, observed: "This practice does not depend upon the consent of the parties. The presiding justice has a discretionary power to make such inquiries of the jury in relation to the business before them as the proper administration of justice may require. Such has ever been the usage of this court. It sometimes happens that the verdict first

returned by the jury is not entirely certain, or does not precisely meet the issue joined or some of the issues do not appear to be definitely found. In such cases, before the verdict can be drawn in form, it is not only proper, but necessary, to ascertain from the jury the real meaning of their finding, that, when the verdict is affirmed, it may with certainty express the true intent of the jury, or that the jury may again be sent out for further deliberation, if any material question appears not to have been determined by them. And even after the verdict has been affirmed and recorded, it may be important to the due administration of justice or to prevent unnecessary litigation, to ascertain whether certain points have been determined, and how they have been determined. It is not uncommon to have several grounds relied upon in a trial, when it cannot be ascertained from the verdict itself upon which ground it was found. In such cases, the court will make the proper inquiries of the jury, and if it appear to have been found upon an illegal principle, or if the jury did not all agree upon any one ground, the verdict may be set aside."

In *Lawler v. Earle*, 5 Allen (Mass.) 22, it is held that the presiding judge may inquire of the jury on what grounds they find their verdict, in the absence of, and without the knowledge or consent of, the parties or their counsel.

Notwithstanding the objection of both parties, the court may direct the jury to return, with their general verdict, answers to specific questions. *Richardson v. Weare*, 62 N. H. 80.

New Hampshire.—In *Walker v. Sawyer*, 13 N. H. 191, a distinction is made between the practice of submitting questions to the jury before they retire for the consideration of their verdict, for the purpose of having particular facts found, and that of questioning the jury upon the return of their general verdict as to the grounds upon which they proceeded. The right of the court, in its discretion, to resort to the latter

b. BY STATUTE.—Statutory provisions in many of the states have been made for the regulation of the practice relating to special findings, a reference to which, together with the citation of cases adjudicating numerous questions arising in its operation and application, will be found in the notes below.¹

practice, is expressly approved on the authority of several *Massachusetts* cases, and one *Maine* adjudication; but upon the consideration of an English case, *Devizes v. Clark*, 3 Ad. & El. 506; 30 E. C. L. 135, it is held that where the trial is upon the general issue, the court cannot submit a particular question of fact to the jury to be found and returned by their verdict, except by the consent of the parties. *Willard v. Stevens*, 24 N. H. 271; *Richardson v. Weare*, 62 N. H. 80.

Some time afterward, in *Johnson v. Haverhill*, 35 N. H. 74, another distinction is made; namely, that the rule requiring the consent of parties for the submission of questions as to particular facts, when the trial is upon the general issue, applies where the direction of the court is to return the special findings instead of a general verdict; that where the direction is to return special findings with the general verdict, no consent is required; that a party cannot be permitted to lie by and await the result, and then raise his objection, is certain.

Consent Presumed.—In cases where consent of parties is necessary, it will be presumed, unless, when such questions are proposed to be submitted, objection is made. *Allen v. Aldrich*, 29 N. H. 63; *Walker v. Sawyer*, 13 N. H. 191; *Willard v. Stevens*, 24 N. H. 271; *Barstow v. Sprague*, 40 N. H. 27; *Richardson v. Weare*, 62 N. H. 80.

In *Walker v. Sawyer*, 13 N. H. 191, the supreme court said that usually, when the court proposes to give other than general instructions, the intention is stated to the parties, that objection, if any, may be suggested. But this is not necessary, as the matter is one of practice, and the objection, if raised, could be obviated at the time, by a change of the instructions from special to general. Therefore, the objection should be stated before the case goes to the jury.

1. Object of These Statutes.—Referring to the *Indiana* statute on the subject, the court, in *Buntin v. Rose*, 16 Ind. 210, said: "Before the enactment of our statute enabling a party to ask

that a jury shall respond to interrogatories, it was difficult to have placed upon the record of a trial, the component parts of, or elements which entered into and formed, the verdict of a jury. This was felt and considered as operating injuriously in many instances, because of the current of decisions in this court for many years, to the effect that a verdict in a civil case should not be disturbed on the evidence where there was any proof tending to sustain it." *Cole v. Boyd*, 47 Mich. 98; *Rombauer, J., in Benton v. St. Louis, etc., R. Co.*, 25 Mo. App. 156.

Difference Between Special Findings and Special Verdicts.—In *Chicago, etc., R. Co. v. Dunleavy*, 129 Ill. 143, *Bailey, J.*, in delivering the opinion of the court, used this language: "It is manifest, of course, that a special finding by a jury upon material questions of fact submitted to them, under the provisions of the statute, is not a special verdict, but an essentially different proceeding. A special verdict cannot be found where there is a general verdict, but the special findings of fact provided for by the statute can be required only in case a general verdict is rendered. But while this is so, much light in relation to special findings upon questions of fact, and their office and objects, may be derived from the rules applicable to special verdicts. Both forms of verdict are provided for by the same statute, and they must, therefore, be construed as being *in pari materia*. In giving construction to the statute, the first, and perhaps the most important, question relates to the scope and meaning of the phrase, 'material question or questions of fact.' May such questions relate to mere evidentiary facts, or should they be restricted to those ultimate facts upon which the rights of the parties directly depend? Evidently the latter. Not only does this conclusion follow from analogy to the rules relating to special verdicts, but it arises from the very nature of the case. It would clearly be of no avail to require the jury to find mere matters of evidence, because, after being found, they would in no way aid

the court in determining what judgment to render. Doubtless a probative fact from which the ultimate fact necessarily results would be material, for there the court could infer such ultimate fact as a matter of law. But where the probative fact is merely *prima facie* evidence of the fact to be proved, the proper deductions to be drawn from the probative fact presents a question of fact and not of law, requiring further action by the jury, and it cannot, therefore, be made the basis of any action by the court. Requiring the jury to find such probative fact is merely requiring them to find the evidence and not the facts, and results in nothing which can be of the slightest assistance to the parties or the court in arriving at the proper determination of the suit."

Arkansas.—Mansfield's *Arkansas Dig.*, § 5142; Little Rock, etc., R. Co. v. Miles, 40 Ark. 298; 48 Am. Rep. 10; Dyer v. Taylor, 50 Ark. 314; Arkansas Midland R. Co. v. Canman, 52 Ark. 517; St. Louis, etc., R. Co. v. Jones (Ark. 1894), 26 S. W. Rep. 595.

California.—Leese v. Clark, 20 Cal. 387; American Co. v. Bradford, 27 Cal. 360; Sloss v. Allman, 64 Cal. 47; Waring v. Freear, 64 Cal. 54; Carman v. Ross, 64 Cal. 249; Johnson v. Klein, 70 Cal. 186; Lonvall v. Gridley, 70 Cal. 507; Warren v. Robinson, 71 Cal. 380; Allen v. Haley, 77 Cal. 575; Pereira v. Smith, 79 Cal. 232; Greenberg v. Hoff, 80 Cal. 81; Vaughn v. California Cent. R. Co., 83 Cal. 18; Bulwer Consolidated Min. Co. v. Standard Consolidated Min. Co., 83 Cal. 613; Kullman v. Greenebaum, 84 Cal. 98; Himmelman v. Henry, 84 Cal. 104; Hawes v. Clark, 84 Cal. 272; Goldman v. Rogers, 85 Cal. 574; Dedmon v. Moffitt, 89 Cal. 211; Hick v. Thomas, 90 Cal. 289; Montgomery v. Sayre, 91 Cal. 206; Porteous v. Reed (Cal. 1886), 12 Pac. Rep. 117; Brown v. Central Pac. R. Co. (Cal. 1887), 12 Pac. Rep. 512; Trope v. Kerns (Cal. 1888), 20 Pac. Rep. 82; Murdock v. Clarke, 73 Cal. 25.

Colorado.—*Colorado Code of Proc.*, § 199; Rio Grande Southern R. Co. v. Deasy, 3 Colo. App. 196.

Idaho.—*Idaho Rev. Stat.* (1887), § 4397; Burke v. McDonald, 2 Idaho 646; Idaho, etc., Land Imp. Co. v. Bradbury, 132 U. S. 509.

Illinois.—Chicago, etc., R. Co. v. Dunleavy, 129 Ill. 132; Consolidated Coal Co. v. Maehl, 130 Ill. 551; McMa-

hon v. Sankey, 133 Ill. 636; Chicago, etc., R. Co. v. Clough, 134 Ill. 586; Jacksonville, etc., R. Co. v. Southworth, 135 Ill. 250; Lake Shore, etc., R. Co. v. Johnson, 135 Ill. 641; Rockford Ins. Co. v. Stroig, 137 Ill. 646; Ohio, etc., R. Co. v. Ramey, 139 Ill. 9; Chicago Anderson Pressed Brick Co. v. Reinneiger, 140 Ill. 334; Ingall v. Allen, 144 Ill. 535; Elgin, etc., R. Co. v. Raymond, 148 Ill. 241; Chicago, etc., R. Co. v. Johnson, 137 Ill. App. 351; St. Louis Bridge Co. v. Schaub, 29 Ill. App. 549; Fortune v. Jones, 30 Ill. App. 116; Terre Haute, etc., R. Co. v. Barr, 31 Ill. App. 57; St. Louis Bridge Co. v. Fellows, 31 Ill. App. 282; Bagley v. Grand Lodge, 31 Ill. App. 618; Chicago, etc., R. Co. v. Elmore, 32 Ill. App. 418; Smith v. McCarthy, 33 Ill. App. 176; Treffert v. Ohio etc., R. Co., 36 Ill. App. 93; Lake Erie, etc., R. Co. v. Morain, 36 Ill. App. 632; Ohio, etc., R. Co. v. Ramey, 39 Ill. App. 409; Stein v. Chicago, etc., R. Co., 41 Ill. App. 38; Cleveland, etc., R. Co. v. Doerr, 41 Ill. App. 530; Chicago Anderson Pressed Brick Co. v. Rembarz (Ill. 1894), 37 N. E. Rep. 239.

Indiana.—*Rev. Stat.* (1881), §§ 546-547; Rice v. Rice, 6 Ind. 100; Bird v. Lanius, 7 Ind. 621; LaGrange County v. Kromer, 8 Ind. 446; Buntin v. Rose, 16 Ind. 210; Allen v. Davison, 16 Ind. 416; Horn v. Eberhart, 17 Ind. 118; Odell v. Brown, 18 Ind. 288; Noble v. Enos, 19 Ind. 72; Aiken v. Bruen, 21 Ind. 137; Crassen v. Swoveland, 22 Ind. 427; Amidon v. Gaff, 24 Ind. 128; Morse v. Morse, 25 Ind. 156; Toledo, etc., R. Co. v. Goddard, 25 Ind. 185; Delawter v. Sand Creek Ditching Co., 26 Ind. 407; Wood v. Ostram, 29 Ind. 177; Noakes v. Morey, 30 Ind. 103; Malady v. McEnary, 30 Ind. 273; Sage v. Brown, 34 Ind. 464; Eudaly v. Eudaly, 37 Ind. 440; Wisler v. Holderman, 40 Ind. 106; Ridgeway v. Dearing, 42 Ind. 157; Skillen v. Jones, 44 Ind. 136; Shanks v. Albert, 47 Ind. 461; Mutual Ben. L. Ins. Co. v. Cannon, 48 Ind. 264; Comer v. Himes, 49 Ind. 482; Toledo, etc., R. Co. v. Milligan, 52 Ind. 505; Murray v. Phillips, 59 Ind. 56; Bremmerman v. Jennings, 61 Ind. 334; Indianapolis, etc., R. Co. v. McCaffrey, 62 Ind. 552; Nelson v. Neely, 63 Ind. 194; Grand Rapids, etc., R. Co. v. Boyd, 65 Ind. 526; Todd v. Fenton, 66 Ind. 28; Woollen v. Wishmier, 70 Ind. 108; McCallister v. Mount, 73 Ind. 559; Byram v. Galbraith, 75 Ind. 134; Stevens v. Logansport, 76 Ind. 498; Lawson v. Hilgenberg, 77 Ind.

221; *Cook v. Howe*, 77 Ind. 442; *Chambers v. Chambers*, 78 Ind. 400; *Indianapolis v. Kollman*, 79 Ind. 504; *Carver v. Leedy*, 80 Ind. 335; *Toler v. Keiher*, 81 Ind. 383; *Growcock v. Hall*, 82 Ind. 202; *Froman v. Rous*, 83 Ind. 94; *Keesling v. Ryan*, 84 Ind. 89; *Lassiter v. Jackman*, 88 Ind. 118; *Strecker v. Conn*, 90 Ind. 469; *North Western Mut. L. Ins. Co. v. Heinmann*, 93 Ind. 24; *North Western Mut. F. Ins. Co. v. Blankenship*, 94 Ind. 535; 55 Am. Rep. 693; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *Grand Rapids, etc., R. Co. v. McAnnally*, 98 Ind. 412; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551; *Hereth v. Hereth*, 100 Ind. 35; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Parmater v. State*, 102 Ind. 90; *Perry v. Makemson*, 103 Ind. 300; *Baltimore, etc., R. Co. v. Rowan*, 104 Ind. 88; *Louisville, etc., R. Co. v. Worley*, 107 Ind. 320; *Redelsheimer v. Miller*, 107 Ind. 485; *McComas v. Haas*, 107 Ind. 512; *Rice v. Evansville*, 108 Ind. 7; 58 Am. Rep. 22; *Porter v. Waltz*, 108 Ind. 40; *Pittsburgh, etc., R. Co. v. Hixon*, 110 Ind. 225; *Ft. Wayne, etc., R. Co. v. Beyerle*, 110 Ind. 100; *Rice v. Manford*, 110 Ind. 596; *Becholdt v. Grand Rapids, etc., R. Co.*, 113 Ind. 343; *Cincinnati, etc., R. Co. v. Clifford*, 113 Ind. 461; *Duesterberg v. State*, 116 Ind. 144; *Stringer v. Frost*, 116 Ind. 477; *McKinley v. First Nat. Bank*, 118 Ind. 375; *Smith v. Heller*, 119 Ind. 212; *Indianapolis, etc., R. Co. v. Lewis*, 119 Ind. 218; *Louisville, etc., R. Co. v. Kane*, 120 Ind. 140; *Cleveland, etc., R. Co. v. Asbury*, 120 Ind. 289; *Waymire v. Lank*, 121 Ind. 1; *Bowen v. Swander*, 121 Ind. 164; *Sherfey v. Evansville, etc., R. Co.*, 121 Ind. 427; *Lake Shore, etc., R. Co. v. Stupak*, 123 Ind. 210; *Whitcomb v. Smith*, 123 Ind. 329; *Gates v. Scott*, 123 Ind. 459; *Summers v. Farney*, 123 Ind. 560; *Norwich Union F. Ins. Co. v. Girton*, 124 Ind. 217; *Chicago, etc., R. Co. v. Burger*, 124 Ind. 275; *Lowman v. Sheets*, 124 Ind. 416; *Lockwood v. Rose*, 125 Ind. 588; *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35; *Poseyville v. Lewis*, 126 Ind. 80; *Nickless v. Pearson*, 126 Ind. 477; *Tarkington v. Purvis*, 128 Ind. 182; *Dickey v. Shirk*, 128 Ind. 278; *Cook v. McNaughton*, 128 Ind. 410; *Cadwallader v. Louisville, etc., R. Co.*, 128 Ind. 518; *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 542; *Reddick v. Keesling*, 129 Ind. 128; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; *Shoner v. Pennsylvania Co.*, 130 Ind. 170; *Kitts v. Willson*, 130 Ind. 492; *Toledo, etc.,*

R. Co. v. Adams, 131 Ind. 38; *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82; *Reeves v. Grottendick*, 131 Ind. 107; *Brundage v. Deschler*, 131 Ind. 174; *Louisville, etc., R. Co. v. Summers*, 131 Ind. 241; *Hamilton County v. Newlin*, 132 Ind. 27; *Matchett v. Cincinnati, etc., R. Co.*, 132 Ind. 334; *Wabash, etc., R. Co. v. Morgan*, 132 Ind. 430; *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533; *Louisville, etc., R. Co. v. Schmidt*, 134 Ind. 16; *Todd v. Badger*, 134 Ind. 204; *Chicago, etc., R. Co. v. Spilker*, 134 Ind. 380; *Cincinnati, etc., R. Co. v. Smock*, 133 Ind. 411; *Miller v. Lively*, 1 Ind. App. 6; *Taylor v. Wootan*, 1 Ind. App. 188; *Evansville, etc., R. Co. v. Gilmore*, 1 Ind. App. 468; *Lake Shore, etc., R. Co. v. Van Auken*, 1 Ind. App. 492; *Heiney v. Garretson*, 1 Ind. App. 548; *Weller v. Bechtell*, 2 Ind. App. 228; *Evansville, etc., R. Co. v. Taft*, 2 Ind. App. 237; *Hoffman v. Toll*, 2 Ind. App. 287; *Evansville v. Thacker*, 2 Ind. App. 370; *Schaffner v. Kober*, 2 Ind. App. 409; *Atkinson v. Soltsman*, 3 Ind. App. 139; *Sheeks v. Fillion*, 3 Ind. App. 262; *Gaar v. Rose*, 3 Ind. App. 269; *Hankey v. Downey*, 3 Ind. App. 325; *Byers v. Davis*, 3 Ind. App. 387; *Block v. Haseltine*, 3 Ind. App. 491; *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69; *Ohio, etc., R. Co. v. Wrape*, 4 Ind. App. 100; *Case v. Ellis*, 4 Ind. App. 224; *Reeves v. Moore*, 4 Ind. App. 492; *Stewart v. Patrick*, 5 Ind. App. 50; *Jewell v. Sullivan*, 5 Ind. App. 188; *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372; *Chicago, etc., R. Co. v. Brannegan*, 5 Ind. App. 540; *Ohio, etc., R. Co. v. Smith*, 5 Ind. App. 560; *Wabash R. Co. v. Ferris*, 6 Ind. App. 30; *Knight v. Knight*, 6 Ind. App. 268; *Cleveland, etc., R. Co. v. Johnson*, 7 Ind. App. 441; *Chicago, etc., R. Co. v. Ostrander*, 116 Ind. 259; *Lauderback v. Rouch* (Ind. App. 1892), 31 N. E. Rep. 578; *Ohio, etc., R. Co. v. Heaton* (Ind. 1893), 35 N. E. Rep. 687; *McCullough v. Martin* (Ind. App. 1893), 35 N. E. Rep. 719; *Shuck v. State* (Ind. 1893), 35 N. E. Rep. 993; *Pottlitzer v. Wesson* (Ind. App. 1893), 35 N. E. Rep. 1030; *Valparaiso v. Cartwright* (Ind. App. 1893), 35 N. E. Rep. 1051; *Pennsylvania Co. v. Myers* (Ind. 1894), 36 N. E. Rep. 32; *Lynch v. Chicago, etc., R. Co.* (Ind. App. 1894), 36 N. E. Rep. 44; *Fowler v. Linquist* (Ind. 1894), 37 N. E. Rep. 133; *Pittsburgh, etc., R. Co. v. Burton* (Ind. 1894), 37 N. E. Rep. 150; *Lake Erie, etc., R. Co. v. McHenry* (Ind. App. 1894), 37

N. E. Rep. 186; Chicago, etc., R. Co. v. Branyan (Ind. App. 1894), 37 N. E. Rep. 190; Louisville, etc., R. Co. v. Miller (Ind. 1894), 37 N. E. Rep. 343; Becknell v. Hosier (Ind. App. 1894), 37 N. E. Rep. 580; Kepler v. Jessup (Ind. App. 1894), 37 N. E. Rep. 655.

Iowa.—*Iowa Rev. Code*, §§ 2808–2809; Lamb v. Presbyterian Soc., 20 Iowa 127; Hardin v. Branner, 25 Iowa 364; Bills v. Ottumwa, 35 Iowa 107; Marshall v. Blackshire, 44 Iowa 475; Darling v. West, 51 Iowa 259; Fisk v. Chicago, etc., R. Co., 74 Iowa 427; Miles v. Wikel, 74 Iowa 712; Sage v. Haines, 76 Iowa 581; Cormac v. Western White Bronze Co., 77 Iowa 32; Mack v. Leedle, 78 Iowa 164; Seekell v. Norman, 78 Iowa 254; Toledo Sav. Bank v. Rathmann, 78 Iowa 288; Monroe Bank v. Gifford, 79 Iowa 300; Pence v. Chicago, etc., R. Co., 79 Iowa 389; Thomas v. Schee, 80 Iowa 237; McMarshall v. Chicago, etc., R. Co., 80 Iowa 757; Kemper v. Burlington, 81 Iowa 354; Plear v. Chicago, etc., R. Co., 82 Iowa 148; Arndt v. Hosford, 82 Iowa 499; Krauskopf v. Krauskopf, 82 Iowa 535; Des Moines, etc., Land, etc., Co. v. Polk County Homestead, etc., Co., 82 Iowa 663; Johnson v. Miller, 82 Iowa 693; Capital City Bank v. Wakefield, 83 Iowa 46; Fisk v. Chicago, etc., R. Co., 83 Iowa 253; Scagel v. Chicago, etc., R. Co., 83 Iowa 380; Buetzier v. Jones, 85 Iowa 721; Clifton v. Granger, 86 Iowa 573; Willson v. Phelps, 86 Iowa 735; Sutherland v. Standard L., etc., Ins. Co. (Iowa, 1893), 54 N. W. Rep. 453; Bryson v. Chicago, etc., R. Co. (Iowa, 1894), 57 N. W. Rep. 430; Citizens' State Bank v. Council Bluffs Fuel Co. (Iowa, 1894), 57 N. W. Rep. 444; Aultman v. Shelton (Iowa, 1894), 57 N. W. Rep. 857; Patterson v. Omaha, etc., R., etc., Co. (Iowa, 1894), 57 N. W. Rep. 880; Roberts v. Roberts (Iowa, 1894), 59 N. W. Rep. 25; Martin v. Widner (Iowa, 1894), 59 N. W. Rep. 345.

Kansas.—Gen. Stat. (1889), §§ 4381–4382; Nichols v. Weaver, 7 Kan. 373; Leavenworth, etc., R. Co. v. Rice, 10 Kan. 426; Wyandotte v. White, 13 Kan. 101; Bent v. Philbrick, 16 Kan. 190; Atchison, etc., R. Co. v. Campbell, 16 Kan. 200; Usher v. Hiatt, 18 Kan. 195; Tobie v. Brown County, 20 Kan. 14; Morrow v. Saline County, 21 Kan. 484; Atchison, etc., R. Co. v. Plunkett, 25 Kan. 188; Wyandotte v. Gibson, 25 Kan. 236; Baehler v. Consolidated Ranch Co., 31 Kan. 502; Atchison, etc., R. Co. v. McCandless, 33 Kan. 266;

Clark v. Missouri Pac. R. Co., 35 Kan. 350; St. Louis, etc., R. Co. v. Weaver, 35 Kan. 412; 57 Am. Rep. 176; Atchison, etc., R. Co. v. McKee, 37 Kan. 592; Union Pac. R. Co. v. Shannon, 38 Kan. 476; Allen v. Dodson, 39 Kan. 220; Aultman v. Mickey, 41 Kan. 348; Leroy, etc., R. Co. v. Anderson, 41 Kan. 528; Atchison, etc., R. Co. v. Morgan, 42 Kan. 23; American Cent. Ins. Co. v. Hathaway, 43 Kan. 399; Lemon v. Dryden, 43 Kan. 477; Deatherage v. Henderson, 43 Kan. 684; Stevens v. Matthews, 45 Kan. 594; Southern Kan. R. Co. v. Walsh, 45 Kan. 653; Leavenworth, etc., R. Co. v. Wilkins, 45 Kan. 674; Phelps, etc., Windmill Co. v. Buchanan, 46 Kan. 314; Fort Scott, etc., R. Co. v. Karracker, 46 Kan. 511; Southern Kan. R. Co. v. Gorsuch, 47 Kan. 583; Jones v. Annis, 47 Kan. 478; Smith v. Beeler, 48 Kan. 669; McPheeters v. Birk, 48 Kan. 784; Russell v. Gregg, 49 Kan. 89; Green v. Tower, 49 Kan. 302; Latshaw v. Moore (Kan. 1894), 36 Pac. Rep. 342; Kansas City v. Slangstrom (Kan. 1894), 36 Pac. Rep. 706.

Kentucky.—*Kentucky Civil Code*, § 317; Adams v. Louisville, etc., R. Co., 82 Ky. 603; Louisville, etc., R. Co. v. Brice, 84 Ky. 298.

Michigan.—Howell's Ann. Stat., § 7606; Crane v. Reeder, 25 Mich. 303; Sheahan v. Barry, 27 Mich. 217; Fowler v. Hoffman, 31 Mich. 215; Hendrickson v. Walker, 32 Mich. 68; Frankenberg v. Decatur First Nat. Bank, 33 Mich. 46; Harbaugh v. People, 33 Mich. 241; Johnson v. Continental Ins. Co., 39 Mich. 33; Swift v. Plessner, 39 Mich. 178; Daniels v. Aldrich, 42 Mich. 58; Pettibone v. Maclem, 45 Mich. 381; Cole v. Boyd, 47 Mich. 98; Banner Tobacco Co. v. Jenison, 48 Mich. 459; Dickerson v. Dickerson, 50 Mich. 37; People v. White, 53 Mich. 538; Pigott v. Engle, 60 Mich. 221; Beecher v. Galvin, 71 Mich. 391; Babbitt v. Burnpus, 73 Mich. 331; International Wrecking, etc., Co. v. McMorran, 73 Mich. 467; Darrah v. Gow, 77 Mich. 16; Cortland Mfg. Co. v. Platt, 83 Mich. 419; Mechanics' Bank v. Barnes, 86 Mich. 632; Zucker v. Karpeles, 88 Mich. 413; Hemenway v. Burnham, 90 Mich. 227;

Minnesota.—Stat. 1891, §§ 4851–4852; Iltis v. Chicago, etc., R. Co., 40 Minn. 273; Schneider v. Chicago, etc., R. Co., 42 Minn. 68; Crich v. Williamsburg City F. Ins. Co., 45 Minn. 441; Watson v. Chicago, etc., R. Co., 46 Minn. 321; Stensgaard v. St. Paul Real Estate Title Ins. Co., 50 Minn. 429.

Missouri.—Rev. Stat. (1889), § 2162; Evans, etc., *Fire Brick Co. v. St. Louis*, etc., R. Co., 21 Mo. App. 648; McGuire v. Missouri Pac. R. Co., 23 Mo. App. 325; Flannery v. Missouri Pac. R. Co., 23 Mo. App. 120; Benton v. St. Louis, etc., R. Co., 25 Mo. App. 158; Jackson v. German Ins. Co., 27 Mo. App. 77; Anderson v. McPike, 41 Mo. App. 328.

Montana.—*Montana Code Civ. Proc.*, § 275; Johnson v. Bielenberg (Mont. 1894), 37 Pac. Rep. 12.

Nebraska.—*Nebraska Con. Stat.* (1893), § 4813; Missouri Pac. R. Co. v. Vandeventer, 26 Neb. 222; North Bend First Nat. Bank v. Miltonberger, 33 Neb. 847; Atchison, etc., R. Co. v. Lawler (Neb. 1894), 58 N. W. Rep. 968; Union Pac. R. Co. v. Cobb (Neb. 1894), 59 N. W. Rep. 355; Murphy v. Gould (Neb. 1894), 59 N. W. Rep. 383.

Nevada.—*Nevada Gen. Stat.* (Bailey & Hammond), § 3199; Lambert v. McFarland, 7 Nev. 159.

New York.—*Code Civ. Proc.*, § 1181; Leprell v. Kleinschmidt, 112 N. Y. 364; Naser v. New York First Nat. Bank, 116 N. Y. 492; Carr v. Carr, 4 Lans. (N. Y.) 314; Lake Shore Nat. Bank v. Butler Colliery Co., 51 Hun (N. Y.) 63; Kerr v. Hammer, 61 Hun (N. Y.) 619; Welsh v. Metropolitan El. R. Co., 57 N. Y. Super. Ct. 408; Fitch v. Armour, 59 N. Y. Super. Ct. 413; Moss v. Priest, 1 Robt. (N. Y.) 632; Dempsey v. New York, 10 Daly (N. Y.) 417; Forrest v. Forrest, 6 Duer (N. Y.) 102; U. S. Trust Co. v. Harris, 2 Bosw. (N. Y.) 75; Brush v. Kohn, 9 Bosw. (N. Y.) 589; Frasier v. Henriques, 6 Abb. Pr. N. S. (N. Y.) 251; Moss v. Priest, 19 Abb. Pr. (N. Y. Super. Ct.) 314; Benson v. Townsend (Supreme Ct.), 7 N. Y. Supp. 162; Garfield v. Blair (Supreme Ct.), 10 N. Y. Supp. 340; Fitch v. Armour (Super. Ct.), 14 N. Y. Supp. 319; Kerr v. Hammer (Supreme Ct.), 15 N. Y. Supp. 605; Levy v. Beekman Pub. Co. (Supreme Ct.), 19 N. Y. Supp. 751; Terwilleger v. Ontario, etc., R. Co. (Supreme Ct.), 26 N. Y. Supp. 268; Robbins v. Springfield F., etc., Ins. Co. (Supreme Ct.), 29 N. Y. Supp. 513.

North Carolina.—*Code Civ. Proc.* (Clark), §§ 409-410; Forsyth v. Lash, 89 N. Car. 159; Porter v. Western N. Car. R. Co., 97 N. Car. 66; Emry v. Raleigh, etc., R. Co., 102 N. Car. 209; Propst v. Fisher, 104 N. Car. 214; Cole v. Laws, 104 N. Car. 651; State v. Crump, 104 N. Car. 763; Gilchrist v. Middleton, 107 N. Car. 663; Bean v.

Western N. Car. R. Co., 107 N. Car. 732; Horne v. Peoples' Bank, 108 N. Car. 109; Bottoms v. Seaboard, etc., R. Co., 109 N. Car. 72; Kornegay v. Kornegay, 109 N. Car. 188; Pioneer Mfg. Co. v. Phoenix Assur. Co., 110 N. Car. 176; Blackwell v. Lynchburg, etc., R. Co., 111 N. Car. 151; Hamilton v. Buchanan, 112 N. Car. 463; McMillan v. Baxley, 112 N. Car. 578; Simpson v. Carolina Cent. R. Co., 112 N. Car. 703; Brown v. Mitchell (N. Car. 1889), 9 S. E. Rep. 702.

Ohio.—*Ohio Rev. Stat.* (1892), §§ 5021-5022. This statute regulates the practice, in this connection, in this state.

Oregon.—*Ann. Code* (Hill), § 215; Wild v. Oregon Short-Line R. Co., 21 Oregon 159; Swift v. Mulkey, 14 Oregon 59; Loewenberg v. Rosenthal, 18 Oregon 178; Knahtla v. Oregon Short-Line, etc., R. Co., 21 Oregon 136.

South Dakota.—*Comp. Laws* (1887), § 5061; National Refining Co. v. Miller, 1 S. Dak. 548; Cronk v. Chicago, etc., R. Co. (S. Dak. 1892), 52 N. W. Rep. 420; Enos v. St. Paul F., etc., Ins. Co. (S. Dak. 1894), 57 N. W. Rep. 919.

Utah.—*Utah Comp. Laws* (1888), § 5574; Webb v. Denver, etc., R. Co., 7 Utah 17; Warner v. U. S. Mut. Accident Assoc., 8 Utah 431.

Washington.—*Code of Proc.*, § 430; Stewart v. Walla Walla Printing, etc., Co., 1 Wash. 521; Wilkie v. Chandon, 1 Wash. 355; Pencil v. Home Ins. Co., 3 Wash. 485; Bell v. Washington Cedar Shingle Co., 8 Wash. 27; Redford v. Spokane St. R. Co. (Wash. 1894), 36 Pac. Rep. 1085.

West Virginia.—*West Virginia Code*, ch. 131, § 5; McKelvey v. Chesapeake, etc., R. Co., 35 W. Va. 500; Peninsular Land Transp., etc., Co. v. Franklin Ins. Co., 35 W. Va. 666; Andrews v. Mundy, 36 W. Va. 22; Carrico v. West Virginia Cent., etc., R. Co. (W. Va. 1894), 19 S. E. Rep. 571.

Wisconsin.—*Ann. Stat.* (1889), §§ 5858-5860; Caswell v. Chicago, etc., R. Co., 42 Wis. 193; Davis v. Farmington, 42 Wis. 425; Urbanek v. Chicago, etc., R. Co., 47 Wis. 59; Fick v. Mulholland, 48 Wis. 310; Schultz v. Chicago, etc., R. Co., 48 Wis. 375; Eberhardt v. Sanger, 51 Wis. 72; Steinke v. Diamond Match Co. (Wis. 1894), 58 N. W. Rep. 842; Hogan v. Chicago, etc., R. Co., 59 Wis. 139; Knowlton v. Milwaukee City, etc., R. Co., 59 Wis. 278; Treat v. Hiles, 75 Wis. 265; Stringham v.

III. FORM OF VERDICT—1. In General.—The form of a verdict seems to be immaterial, so the intention of the jury is sufficiently apparent. Irregularities or peculiarities of expression, and technical inaccuracies, will alike be disregarded, if the verdict, notwithstanding these defects, is intelligible.¹

Cook, 75 Wis. 589; *Sherman v. Menominee River Lumber Co.*, 77 Wis. 14; *Winchell v. Abbot*, 77 Wis. 371; *Ryan v. Rockford Ins. Co.*, 77 Wis. 611; *Kalbus v. Abbot*, 77 Wis. 621; *Wright v. Mulvaney*, 78 Wis. 89; *Bush v. Maxwell*, 79 Wis. 114; *Shenners v. West Side St. R. Co.*, 78 Wis. 382; *Geisinger v. Beyl*, 80 Wis. 443; *St. Paul Second Nat. Bank v. Larson*, 80 Wis. 469; *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540; *Karger v. Rich*, 81 Wis. 177; *Robinson v. Washburn*, 81 Wis. 404; *Haley v. Jump River Lumber Co.*, 81 Wis. 412; *Ohlweiler v. Lohmann*, 82 Wis. 198; *Chopin v. Badger Paper Co.*, 83 Wis. 192; *McCoy v. Milwaukee St. R. Co.* (Wis. 1894), 59 N. W. Rep. 453.

1. *Lincoln v. Iron Co.*, 103 U. S. 412; *Snyder v. U. S.*, 112 U. S. 216; *Hopkins v. Orr*, 124 U. S. 510; *Glenn v. Sumner*, 132 U. S. 152; *Thompson v. Musser*, 1 Dall. (U. S.) 458; *Parks v. Turner*, 12 How. (U. S.) 39; *Baldwin v. Stebbins*, Minor (Ala.) 180; *Hall v. Dargan*, 4 Ala. 696; *Rambo v. Wyatt*, 32 Ala. 363; 70 Am. Dec. 544; *Steed v. Barnhill*, 71 Ala. 157; *Wiggins v. Witherington*, 96 Ala. 535; *Vaden v. Ellis*, 18 Ark. 355; *Algier v. Maria*, 14 Cal. 167; *People v. McCarty*, 48 Cal. 557; *People v. Welch*, 49 Cal. 177; *People v. Buckley*, 49 Cal. 241; *People v. Perdue*, 49 Cal. 425; *People v. Monteith*, 73 Cal. 7; *Golden Gate Mill, etc., Co. v. Joshua Hendy Mach. Works*, 82 Cal. 184; *Johnson v. Visher*, 96 Cal. 310; *White v. Barley*, 14 Conn. 272; *Day v. Webb*, 28 Conn. 140; *Roberts v. State*, 14 Ga. 8; 68 Am. Dec. 528; *Spencer v. Holman*, 30 Ga. 646; *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Hartford F. Ins. Co. v. Vanduzor*, 49 Ill. 489; *Findley v. Buchanan*, 1 Blackf. (Ind.) 12; *Collins v. Makepeace*, 3 Ind. 448; *Jones v. Julian*, 12 Ind. 274; *Hall v. King*, 29 Ind. 205; *Thames L. and T. Co. v. Beville*, 100 Ind. 309; *Wabash Co. v. Pearson*, 120 Ind. 426; *Beggs v. State*, 122 Ind. 54; *Carnahan v. Chenoweth*, 1 Ind. App. 178; *Polson v. State* (Ind. 1893), 35 N. E. Rep. 907; *McDaniel v. Marygold*, 2 Iowa 499; 65 Am. Dec. 786; *Miller v. Mabon*,

6 Iowa 456; *State v. Funck*, 17 Iowa 365; *State v. Lee*, 80 Iowa 75; *Knox v. Gregorious*, 43 Kan. 26; *Crozier v. Gano*, 1 Bibb (Ky.) 257; *Pickett v. Richet*, 2 Bibb (Ky.) 178; *Denny v. Booker*, 2 Bibb (Ky.) 427; *State v. Faulk*, 30 La. Ann. 831; *State v. Adam*, 31 La. Ann. 717; *State v. Wilson*, 40 La. Ann. 751; *McClellan Dry Dock Co. v. Farmers, etc., Steamboat Line*, 43 La. Ann. 258; *Porter v. Rummery*, 10 Mass. 64; *Miller v. Morgan*, 143 Mass. 25; *Hartford County v. Wise*, 71 Md. 43; *White v. Bailey*, 10 Mich. 155; *State v. Framness*, 43 Minn. 490; *Henry v. Halsey*, 5 Smed. & M. (Miss.) 573; *Ryors v. Prior*, 31 Mo. App. 555; *Carter v. Blankenship*, 3 Mo. 583; *Preuit v. People*, 5 Neb. 377; *Pettes v. Bingham*, 10 N. H. 514; *Litchfield v. Londonderry*, 39 N. H. 247; *Chase v. Deming*, 42 N. H. 274; *Stout v. Hopping*, 6 N. J. L. 125; *Feller v. Mulliner*, 2 Johns. (N. Y.) 181; *French v. Cresswell*, 13 Oregon 418; *Kelsey v. Chicago, etc., R. Co.*, 1 S. Dak. 80; *Lowrey v. Brown*, 3 Sneed (Tenn.) 17; *Lindsay v. State*, 1 Tex. App. 327; *Bland v. State*, 4 Tex. App. 15; *Taylor v. State*, 5 Tex. App. 569; *Jones v. State*, 7 Tex. App. 103; *Patton v. Gregory*, 21 Tex. 513; *Van Valkenburg v. Ruby*, 68 Tex. 139; *Shannon v. Jones*, 76 Tex. 141; *Floegel v. Wiedner*, 77 Tex. 311; *Roberts v. State* (Tex. Civ. App. 1894), 24 S. W. Rep. 895; *Lewallen v. State* (Tex. Crim. App. 1894), 24 S. W. Rep. 907; *Bartlett v. Hunt*, 17 Wis. 214; *Allard v. Lamirande*, 29 Wis. 502; *Wausau Boom Co. v. Plumer*, 49 Wis. 118; *Harrair v. Klaus*, 79 Wis. 383; *Andrews v. Roseland Iron, etc., Co.*, 89 Va. 393. See NEW TRIAL, vol. 16, p. 562.

While, as has been stated, the form of a verdict, subject to certain qualifications, is immaterial, it is eminently proper that approved and established precedents should be regarded. For this purpose, a reference to some reliable book of forms should be made.

Technical Objections Disregarded.—In *Pickett v. Richet*, 2 Bibb (Ky.) 178, the court said: "Verdicts are to be favorably construed, and technical objections to the want of form in word-

ing them disregarded," and in *Lindsay v. State*, 1 Tex. App. 327, Ector, J., delivering the opinion of the court, observed, that "technical objections to form are to be disregarded." See also *Mays v. Lewis*, 4 Tex. 38.

Where the jury, in their verdict, found the defendant guilty and assessed her punishment at the sum of five dollars, it was, nevertheless, held not to be invalid for using the word "punishment" instead of the word "fine." *Beggs v. State*, 122 Ind. 54.

"We, the Jury, Believe."—A verdict, "we, the jury, believe" has been upheld, though the words, "we, the jury, find" are admittedly better form. The court held that the expressions are substantially equivalent, inasmuch as what the jury find, or what they believe is alike derived from the evidence, and either form of expression amounts to the same thing. *Patton v. Gregory*, 21 Tex. 513.

Form—Debt—Trespass.—It is held, in *Scudder v. Bloomfield*, 3 N. J. L. 950, that a verdict in action of debt must not be in form of that in trespass; and in *Wheeler v. Allen*, 49 Barb. (N. Y.) 460, it is maintained that a verdict in form as if action were on the case, is totally unwarranted in an action for the claim and delivery of personal property.

Misconception as to Nature of Action.

—An action having been brought in debt under a penal act, for \$96, for cutting down twelve trees, a verdict for \$8.41 was held insufficient, the jury evidently considering the action as one of trespass. *Scudder v. Bloomfield*, 3 N. J. L. 950.

Criminal Cases.—Though a verdict in a criminal case may be informal, it is nevertheless valid if it can be clearly understood as a general verdict of guilty or not guilty. *People v. McCarty*, 48 Cal. 557; *People v. Welch*, 49 Cal. 177; *People v. Buckley*, 49 Cal. 241; *People v. Perdue*, 49 Cal. 425.

Nor is it necessary that the verdict should state the name of the prisoner or the specified crime for which he is condemned. *State v. Faulk*, 30 La. Ann. 831; *State v. Adam*, 31 La. Ann. 717; *Cooper v. State* (Tex. Crim. App. 1893), 20 S. W. Rep. 979.

In *Missouri*, this practice prevails as regards specification of the crime, with the qualification that where the conviction is of a crime inferior in degree to that charged in the indictment, the offense of which the defendant is

found guilty should be set forth in the verdict. *State v. Matrassey*, 47 Mo. 295.

But the defendant must in some manner be designated as the guilty party, for in *Williams v. State*, 6 Neb. 334, a verdict, "We, the jury in this case, being duly impaneled and sworn, do find and say that — is guilty of manslaughter," was declared void for failing to comply with this requirement.

Failure to Name Cause.—In *Miller v. Morgan*, 143 Mass. 25, where the jury merely brought in a verdict for the plaintiff without naming the cause, an objection was taken thereto for this reason. The court denounced the exception as frivolous and said: "Although it does not mention the name of the case in which it was rendered, the record of the court supplies this omission, as it shows that it was rendered in open court as the verdict in this case, and was filed in the case as such verdict."

Objections to—When Taken.—Objections to form should be taken when the verdict is returned; such objections cannot be raised for the first time on writ of error. *Davis v. People*, 50 Ill. 199.

Before It Is Recorded.—Objections to the form of a verdict should be taken before it is received and recorded. *Algier v. Maria*, 14 Cal. 170; *Alhambra, etc., v. Water Co. v. Richardson*, 72 Cal. 598.

Instructing Jury as to Form.—See *Montag v. People*, 141 Ill. 75.

Formulation by Prosecuting Attorney.

—In the case of *Brantley v. State*, 87 Ga. 149, which was a prosecution for a felony, it was allowed the solicitor general, at the request of the jury, to reduce their verdict of conviction to proper form.

Substantial Correctness.—In respect to verdicts, it seems that substantial correctness will satisfy all legal requirements. *Riggs v. Maltby*, 2 Metc. (Ky.) 88; *Emery v. Osgood*, 1 Allen (Mass.) 244; *Jones v. King*, 30 Minn. 368; *DeFord v. Furniss*, 43 Miss. 132; *Morrissey v. Schindler*, 18 Neb. 672; *Kolb v. Bankhead*, 18 Tex. 228; *Hart v. State*, 38 Tex. 382; *Allard v. Lamirande*, 29 Wis. 502; *Wausau Boom Co. v. Plumer*, 49 Wis. 118.

Form Furnished by Court.—It is not necessary that the jury be furnished with a form for a verdict by the court. *Territory v. McFarlane* (N. Mex. 1894), 37 Pac. Rep. 1111.

Abbreviations may be employed,¹ or words may be even omitted,² without rendering the verdict fatally defective, subject to the qualification just stated.

The law does not require that jurors shall be orthographeists or philologists; hence, bad spelling,³ the misuse of words,

1. **Figures with Dollar Mark.**—A verdict in figures, with the symbolical prefix denoting dollars, is good. *Mayson v. Sheppard*, 12 Rich. (S. Car.) 254.

In *Stout v. Hopping*, 6 N. J. L. 125, it was contended that the verdict should be set aside on the ground that it was entered in figures. The court declined to notice this objection, stating that as the judgment thereon was entered in words at length, it cured the irregularity in form.

2. **Omission of Words.**—In *Hopkins v. Orr*, 124 U. S. 510, the omission of the word "dollars" was held to be not such a defect as to prevent the rendering of judgment according to the manifest intent of the jury, and *Jones v. State*, 7 Tex. App. 103, decides that it is not a valid objection to a verdict that it omits to say "confinement in" the penitentiary.

An Iowa case, *State v. Lee*, 80 Iowa 75, is authority for the statement that the omission of the word "find" is immaterial, while in *Shaw v. State*, 2 Tex. App. 487, exactly the reverse is held.

Omission of "Intent."—Where, upon the trial of an indictment for the statutory offense of "an assault with a deadly weapon with intent to inflict bodily injury," the jury returned a verdict of "assault with a deadly weapon to inflict bodily injury" (omitting the words "with intent"), the finding was held not to be materially defective. *State v. Collyer*, 17 Nev. 275; *Jenkins v. State* (Ga. 1893), 17 S. E. Rep. 693.

3. *State v. Ross*, 32 La. Ann. 855; *State v. Smith*, 33 La. Ann. 1414; *State v. Wilson*, 40 La. Ann. 751; *Kellum v. State*, 64 Miss. 226; *State v. McNamara*, 100 Mo. 100; *Taylor v. State*, 5 Tex. App. 569; *Haines v. State*, 7 Tex. App. 32; *Curry v. State*, 7 Tex. App. 91; *McMillan v. State*, 7 Tex. App. 100; *McCoy v. State*, 7 Tex. App. 379; *Wilson v. State*, 12 Tex. App. 481; *Reynolds v. State*, 17 Tex. App. 413; *Partain v. State*, 22 Tex. App. 100; *Harwell v. State*, 22 Tex. App. 251; *Shelton v. State*, 27 Tex. App. 443; *Pharer v. State* (Tex. Crim. App. 1892), 20 S. W. Rep. 555; *Birdwell v. State* (Tex.

Crim. App. 1892), 20 S. W. Rep. 556; *Stepp v. State*, 31 Tex. Crim. App. 349; *Pace v. State* (Tex. Crim. App. 1892), 20 S. W. Rep. 762; *Parks v. Turner*, 12 How. (U. S.) 39; *Lincoln v. Iron Co.*, 103 U. S. 412; *Snyder v. U. S.*, 112 U. S. 216.

"The law does not require jurors to be philologists," said the court, in *State v. Smith*, 33 La. Ann. 1414. "All that the law requires is their ability to appreciate the facts and apply the law. When they have done that and expressed their sense in an intelligible and unequivocal form, the law is satisfied." In this case, a verdict of guilty of "mansluder" was held to be a sufficient verdict.

To the same effect, are the cases of *Parks v. Turner*, 12 How. (U. S.) 39; *Lincoln v. Cambria Iron Co.*, 103 U. S. 412; *Snyder v. U. S.*, 112 U. S. 216, holding that bad English will not vitiate a verdict where the intention and finding of the jury, upon the issue submitted to them, is clearly manifested.

In *State v. Ross*, 32 La. Ann. 855, the verdict was: "*Gilty without capitel purnish*," but the court held that it was not illegal and approved the judgment; and a verdict reading, "we, the *joshurys* find the defendant *gilty*" was held to be not substantially defective, in *Shelton v. State*, 27 Tex. App. 443.

A verdict, "We, the jury, find the accused guilty with *and* assault by *sut-inge* with intent to murder," was upheld in *State v. Wilson*, 40 La. Ann. 751, as the supreme court declared that it was clear that the idea the jury intended to convey was, that they found the prisoner guilty of an assault with intent to murder, and they only clothed that idea with inartificial verbiage.

"Penitentiary."—The spelling of the word "penitentiary" seems to have proved an obstacle which the learning of many juries has been unable to surmount, but as their attempt rarely fails to betray their intent, such errors have not been regarded as serious. Some of the cases in which this mistake has been made are, *State v. McNamara*, 100 Mo. 100; *Haines v. State*, 7 Tex. App. 32; *McMillan v. State*, 7 Tex. App.

and grammatical errors form no substantial ground for objection.¹

2. Oral Verdict.—Under the common law, the result of the jury's deliberations is usually declared orally by a member of the jury;² a practice originating, perhaps, in the general illiteracy of jurors.³ The announcement is most frequently made by a designated spokesman, called the foreman, the other jurors being presumed to consent to the verdict unless they express their dissatisfaction when it is rendered.⁴

3. Written Verdict.—Statutes to the effect that verdicts shall

100; *Reynolds v. State*, 17 Tex. App. 413. In the last mentioned case the court observed, in regard to the insubstantial and immaterial character of an error in spelling, that neither bad spelling nor bad grammar would vitiate a verdict when its meaning was clear. Technical and insubstantial objections to a verdict would not be considered in determining its sufficiency, and the omission of the letter "i" forming the second syllable of the word penitentiary, was immaterial.

1. When the sense is clear, neither bad spelling nor bad grammar may vitiate a verdict. *Taylor v. State*, 5 Tex. App. 569.

Where a verdict assessed a "fine" against the defendant, it was held that the context clearly enough showed that the word was intended for "fine," and such construction was adopted. *Bland v. State*, 4 Tex. App. 15.

In *Dillon v. Rogers*, 36 Tex. 152, however, a verdict finding a certain sum as "impunitive" damages was pronounced void on the ground of unintelligibility.

Transposition of a Letter.—Where the jury, in entitling their verdict, by the transposition of a letter made the name "Framness" read "Farmness," it was held to be an error so slight as to be immaterial. *State v. Framness*, 43 Minn. 490.

2. Roberts v. State, 14 Ga. 18.

It is maintained, in *State v. Jenkins*, 43 La. Ann. 917, to be an elementary principle that a verdict may be validly rendered orally in open court, even where no foreman is appointed. So, also, when it is returned written, though unsigned either by the foreman or any member of the jury, or not containing the name of the accused, or describing the offense charged. *State v. Moore*, 8 Rob. (La.) 525; *State v. Briscoe*, 30 La. Ann. 434; *State v.*

Smith, 33 La. Ann. 1416; *State v. Howard*, 34 La. Ann. 369; *State v. Simon*, 37 La. Ann. 569.

In *State v. Ross*, 32 La. Ann. 854, Todd, J., said: "The law does not require even in capital cases that the jury should reduce their verdict to writing. It is sufficient if it is delivered orally." And see *State v. Daniel*, 31 La. Ann. 96; *State v. Nolan*, 8 Rob. (La.) 513.

Criminal Cases.—In *Lord v. State*, 16 N. H. 326; 41 Am. Dec. 391, the court said: "The custom in criminal cases is for the jury to render their verdict of guilty or not guilty orally and in open court, and a record to be made of it. . . . The written verdict which the foreman undertook to make, was irregular and was correctly rejected by the court below." See also *Com. v. Durfee*, 100 Mass. 146.

3. See *Nisbet, J.*, in *Roberts v. State*, 14 Ga. 18.

4. In *Blum v. Pate*, 20 Cal. 69, the court disposed of the objection that the assent to the verdict was expressed by the foreman and not by the jurors themselves, by stating that "there is nothing in it." The court continued: "The jurors, acting as a body, speak through their foreman. . . . His assent is conclusive upon all, unless a disagreement be expressed at the time."

Where the jury were inquired of by the judge whether they had agreed upon a verdict, their foreman answered that they had, and handed the verdict to the judge, who read it aloud and then accepted it, but it was not otherwise ascertained by inquiry of the jury, or in any other way, that they had all concurred in the verdict, it was held that in the absence of any objection made at the time, to this mode of rendering and taking the verdict, it was sufficiently authenticated. *Raymond v. Bell*, 18 Conn. 81. See also *Roberts v. State*, 14 Ga. 18.

be reduced to writing exist in some of the states.¹ Whether such enactments are peremptory, or directory only, depends upon the construction which they have received from the judicatures whose proceedings they control.²

Signing Verdict.—As there is no rule of the common law requiring that a verdict shall be in writing, naturally there is none that it shall be signed.³ In some of the states this practice is regulated by statute,⁴ generally in connection with a direction

1. See statutes of *Iowa, Indiana, Kentucky, Missouri, Ohio, Texas*, and other states.

In *Griffin v. Larned*, 111 Ill. 432, it was held that a verdict may be reduced to writing and signed by the jury, or it may be delivered *ore tenus* by the foreman. The validity of a verdict does not depend upon its being reduced to writing and signed by the members of the jury, but whatever may be pronounced as the verdict by the jury in open court, whether in writing or verbally through the foreman, is to be regarded as the verdict of the jury.

In Foreign Language.—In *Walsh v. Barrow*, 3 La. Ann. 265, the verdict was returned written in French, the jury being able to write only in that language. In this form the verdict was received by the court, translated into English under its direction, read to the jury as translated, and as read assented to by them, signed by the foreman, and recorded in their presence. This was held to be the proper proceeding.

Written with Lead Pencil.—It seems that a statute requiring a verdict to be in writing will be satisfied by a verdict in lead pencil. *Ellis v. State*, 30 Tex. App. 601. And see *State v. Anderson* (La. 1893), 12 So. Rep. 737.

Verdict Written by Officer.—Where it appeared that after the jury had arrived at a verdict of guilty, one of the jurors had an officer of the court write out the verdict at his dictation, which verdict was returned by the jury, it was held that while this was a censurable practice, the verdict should not be disturbed, as it did not appear that it had anything to do with the result reached, or that the defendant's rights were impaired. *Territory v. Edie* (N. Mex. 1892), 30 Pac. Rep. 851.

Written on Quashed Indictment.—Where a verdict of guilty is inadvertently written by the jury on a quashed indictment, instead of on the indictment on which the prosecution is based, it is not for that reason void, as it is not es-

sential that the verdict be written, or when written that it be signed or put on the indictment. *State v. Jenkins*, 43 La. Ann. 917.

2. The supreme court of *Iowa*, for example, in *Morrison v. Overton*, 20 Iowa 465, regards the section of the code of that state, providing that "the verdict must be written and signed," etc., as directory, and not peremptory. A similar view has been taken by the judiciaries of other states. In *Sage v. Brown*, 34 Ind. 464, a contrary position was maintained.

3. Boyle, C. J., delivering the opinion of the court in *Com. v. Ripperdon*, Litt. Sel. Cas. (Ky.) 195, said: "We are not apprised of any law requiring the verdict of a petit jury, either in a criminal or civil case, to be signed; and it would, no doubt, be good without a signature; yet we know that it is the usual practice for one of the jury to sign it, and very often as foreman. But most certainly the omission of this circumstance would not render a verdict void."

4. In *Indiana*, for instance, a statute has been passed directing that the verdict of a jury shall be reduced to writing, signed, and returned to the court by the foreman. Under this statute, in *Sage v. Brown*, 34 Ind. 464, a verdict lacking the signature of the foreman was held void.

In *Missouri*, a similar statute has been enacted. *Menne v. Neumeister*, 25 Mo. App. 300.

In *Texas*, the rule seems to be that the jurors must all sign the verdict; but where a member of the jury is excused by consent of the counsel of both parties after the trial has begun, and a verdict is rendered by the remaining eleven, as may be done under the *Texas* statutes, it is not necessary that all the jurors, including the one who is dismissed, shall sign it. *Tram Lumber Co. v. Hancock*, 70 Tex. 312. See *Yarber v. State* (Tex. Crim. App. 1894), 24 S. W. Rep. 645.

that the verdict be reduced to writing, but in the absence of enactment on the subject no signature is necessary.¹

a. SEALED VERDICT. — A convenient practice prevails in most jurisdictions of allowing a jury, when they agree upon a verdict during an adjournment of the court, to seal it up and separate; then to reassemble and bring it into court at the expiration of the period of adjournment.² The general rule is that the

Burton v. Bondies, 2 Tex. 204, was decided before the enactment of any statutes in this state making it necessary that a verdict should be signed, hence, in this case, following the common-law rule, it was distinctly stated that no signature was requisite.

When the parties to an action in the county court consented to reduce the number of jurors to five, it was held that the signature of one of the jurors to the verdict, as foreman, was sufficient, since the rule requiring the signatures of all the jurors does not apply in such cases. *Bluefields Banana Co. v. Wolfe* (Tex. Civ. App. 1893), 22 S.W. Rep. 269.

Kentucky. — In *Berry v. Pusey*, 80 Ky. 166, the requirement of the code that a verdict shall be signed by the foreman of the jury, is regarded as directory only. See also *Thomas v. Com.* (Ky. 1891), 15 S.W. Rep. 861.

Iowa Rev. Stat., § 3073 (Rev. of 1860), direct that a verdict should be signed. This section, however, has been held to be directory and not imperative; hence, a judgment should not be reversed because the verdict was not signed by the foreman of the jury when returned by the jury into court and received. *Morrison v. Overton*, 20 Iowa 465. See also *Miller v. Mabon*, 6 Iowa 456, holding that a verdict need not be signed.

Illinois. — In *Harrison v. Singleton*, 3 Ill. 21, it is maintained that a verdict need not be signed, except where the trial is before a ministerial officer.

1. *Anderson v. State*, 5 Ark. 444.

In *Georgia*, it is held that, though verdicts are usually signed by the foreman, if in any case it be not done and the verdict appears in the record without his signature, and a judgment is signed thereupon, it must be presumed that the verdict was satisfactory to the court and deemed by it to be sufficient in form and substance to warrant a judgment. *Harris v. Barden*, 24 Ga. 72. See also *Malony v. Harkey*, Ga. Dec. 159; *Roberts v. State*, 14 Ga. 18; *Woods v. Com.*, 86 Va. 933; *Hall v. Com.*, 16 Va. L. Jour. 547.

It was held, in *Patterson v. Murphy*, 63 Ga. 281, that although a verdict was not signed by any member of the jury, that as the names of the jurors who rendered the verdict appeared in the record, there was no error in overruling the defendant's motion in arrest of judgment on this ground.

In criminal cases, said the court, in *State v. Faulk*, 30 La. Ann. 831, it is not necessary that the verdict of the jury should be written or signed. It is sufficient that a member of the jury delivers it orally.

2. *Paige v. O'Neal*, 12 Cal. 483; *People v. Kelly*, 46 Cal. 357; *State v. Babcock*, 1 Conn. 401; *Whitner v. Hamlin*, 12 Fla. 18; *Nolan v. State*, 53 Ga. 137; *Franklin v. Wiggins*, 88 Ga. 169; *White v. Martin*, 3 Ill. 69; *Reins v. People*, 30 Ill. 256; *Pierce v. Hasbrouck*, 49 Ill. 23; *Chicago v. Rogers*, 61 Ill. 188; *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474; *Chicago v. Langlass*, 66 Ill. 361; *Jarrell v. State*, 58 Ind. 293; *Tyrrell v. Lockhart*, 3 Blackf. (Ind.) 136; *Tifield v. Adams*, 3 Iowa 487; *Miller v. Mabon*, 6 Iowa 456; *Bass v. Hanson*, 9 Iowa 563; *Hamilton v. Barton*, 20 Iowa 505; *Higley v. Newell*, 28 Iowa 516; *Jessup v. Chicago, etc., R. Co.*, 82 Iowa 243; *Wood v. Van Buren County, Morr. (Iowa)* 581; *State v. Hodges*, 45 Kan. 389; *State v. Emmons*, 45 Kan. 397; *Doe v. Harrow*, 3 Bibb (Ky.) 446; *McIntosh v. Smith*, 2 La. Ann. 756; *State v. Populus*, 12 La. Ann. 710; *State v. Hornsby*, 32 La. Ann. 1268; *Vennard v. McConnell*, 11 Allen (Mass.) 555; *Pritchard v. Hennessey*, 1 Gray (Mass.) 294; *Lincoln v. Lincoln*, 12 Gray (Mass.) 45; *Chapman v. Coffin*, 14 Gray (Mass.) 454; *Winslow v. Draper*, 8 Pick. (Mass.) 170; *Lawrence v. Stearns*, 11 Pick. (Mass.) 501; *Com. v. Dorus*, 108 Mass. 488; *Com. v. Carrington*, 116 Mass. 37; *Com. v. Costello*, 128 Mass. 88; *Com. v. Slattery*, 147 Mass. 423; *Bolster v. Cummings*, 6 Me. 85; *Beal v. Cunningham*, 43 Me. 362; *Anonymous*, 63 Me. 590; *Steele*

v. Etheridge, 15 Minn. 501; *Loudy v. Clarke*, 45 Minn. 477; *Friar v. State*, 3 How. (Miss.) 422; *State v. Weber*, 22 Mo. 324; *Rogers v. Sample*, 28 Neb. 141; *State v. Prescott*, 7 N. H. 288; *Hertzberg v. Murray*, 40 N. Y. Super. Ct. 271; *Horton v. Horton*, 2 Cow. (N. Y.) 589; *People v. Douglass*, 4 Cow. (N. Y.) 32; 15 Am. Dec. 332; *Oliver v. First Presbyterian Church*, 5 Cow. (N. Y.) 284; *Bunn v. Hoyt*, 3 Johns. (N. Y.) 255; *Root v. Sherwood*, 6 Johns. (N. Y.) 68; 5 Am. Dec. 191; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; 20 Am. Dec. 616; *People v. Ransom*, 7 Wend. (N. Y.) 423; *Wright v. Birchfield*, 3 Ohio 53; *Sutliff v. Gilbert*, 8 Ohio 405; *Sargent v. State*, 11 Ohio 472; *State v. Engle*, 13 Ohio 490; *Davis v. State*, 15 Ohio 72; 14 Am. Dec. 559; *Com. v. Boyle*, 9 Phila. (Pa.) 592; *Walters v. Jenkins*, 16 S. & R. (Pa.) 415; 16 Am. Dec. 585; *McConnell v. Linton*, 4 Watts (Pa.) 357; *Wolfran v. Eyster*, 7 Watts (Pa.) 39; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Perry v. Mays*, 2 Bailey (S. Car.) 354; *Devereux v. Champion Cotton Press Co.*, 14 S. Car. 396; *Hancock v. Winans*, 20 Tex. 320; *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338; *U. S. v. Potter*, 6 McLean (U. S.) 186; *Maling v. Crummey*, 5 Wash. 222; *High v. Johnson*, 28 Wis. 72.

In most of the above cases, the practice of allowing the jury to seal up their verdict and separate, and the course to be pursued upon the reassembling of the jury, is distinctly recognized and set forth. Some of them, however, as it will be noticed, are only applicable by way of analogy, holding that even though there has been no verdict, nor sealing, the separation of the jury may be immaterial. Hence, it would seem *a fortiori* that a sealed verdict would be good.

Graham, in his practice, says: "Where the jury are liable to be absent for some time and the business of the day is through, it is usual to ask them when they have agreed upon their verdict to seal it and bring it into court the next morning. Whether the judge may do this without the consent of the parties has never been expressly decided." *Graham's Prac.* (2d ed.) 316.

Upon the trial of a case in the circuit court, by the consent of counsel, the jury were authorized to return a sealed verdict and the court adjourned; but before the judge had left his seat on the bench, the jury, having agreed, delivered an open verdict, in the pres-

ence of the judge, clerk, and the plaintiff's attorney, in favor of the plaintiff, but in the absence of the defendant and his counsel, and the jury were discharged. It was held that as the agreement was that the verdict should be sealed, it was violated by receiving an open verdict, and under the circumstances it should have been refused. *Chicago v. Rogers*, 61 Ill. 188.

The jury in a criminal case, after it had been committed to them, were allowed, during an adjournment of the court, to disperse by direction of the judge, upon stating to the officer that they had agreed and sealed up a verdict; upon coming into court after such dispersion they rendered a verdict orally without the sealed verdict being opened; the verdict thus rendered was held invalid. *Com. v. Durfee*, 100 Mass. 146.

In the case of *Oliver v. First Presbyterian Church*, 5 Cow. (N. Y.) 283, the jury procured their liberation by pretending to the constable that they had agreed upon a sealed verdict when in reality they had not. After the separation of the jury, a conversation was carried on in the presence of some of them, relative to the cause, by persons not on the jury. Upon reassembling, they were sent out again, though not without the protest of the plaintiff, and they then returned with a verdict for the defendant. It was held that under such circumstances the verdict must be set aside.

Where there was an understanding between the parties to the suit that if the jury agreed upon a verdict they might seal it up and hand it to the clerk, but instead of pursuing this course they sealed up a paper which stated that they could not agree and delivered it to the clerk and then dispersed, it was held that such a proceeding was a gross violation of their duty as jurors, and that the cause could not be given to the jury again, even if the parties did not object. *White v. Martin*, 3 Ill. 69.

Unsealed.—The jury were instructed to reduce their verdict to writing and have it signed by the foreman, and bring it into court the next morning; at the appointed time they brought in the indictment on which the trial was proceeding, but in an unsealed envelope, with a verdict of guilty written upon it, and presented it to the court as the verdict agreed upon and signed before the jury separated the evening before. The jury, to a question by the clerk

sealed verdict must be delivered in open court,¹ when any member of the jury may dissent from the conclusion previously reached;² and when this is the case the verdict is not to be received.³ If the sealed verdict as returned is informal, it is proper

whether the defendant was "guilty or not guilty," replied "Guilty," and the verdict was affirmed, received, and recorded. It was held that it sufficiently appeared that the jury agreed before they separated upon the verdict which they returned. *Com. v. Slattery*, 147 Mass. 423. In this case it will be seen that the jury, perhaps through inadvertence, failed to comply with the direction of the court to seal their verdict. Some other irregularities may be deemed more serious. For instance, in a criminal case, the jury, upon retiring at the adjournment of the court for the day, were instructed that when they agreed upon a verdict, they might seal it up and separate. Upon coming into court the next morning, it appeared that they had agreed upon a verdict and separated during the night, but that through some misunderstanding on their part, the verdict had not been reduced to writing. The judge, thereupon, against the plaintiff's direction, directed them to retire and reduce their verdict to writing and return it as agreed upon the night before and without further deliberation on their part. The jury accordingly retired and soon after brought in a verdict of guilty. It was held that the verdict so rendered was invalid. *Com. v. Dorus*, 108 Mass. 488.

Delivery to Clerk.—Where, by agreement, the jury were to seal and deliver their verdict to John Peyton, a clerk of the court, and the verdict was sealed and delivered at his office in his absence, it was decided that as no personal confidence had been reposed in him, this was a substantial performance of the agreement. *McMurry v. O'Neil*, 1 Call (Va.) 246.

1. In *Com. v. Heller*, 5 Phila. (Pa.) 128, it was said: "The practice of sealing the verdict in this country, seems to have been substituted for the privy verdict in *England*, for both must be rendered in court to be of any effect." *Willard v. Shaffer*, 6 Phila. (Pa.) 520. See also cases cited in preceding note.

In *Willard v. Shaffer*, 6 Phila. (Pa.) 520, it was said, by Sharswood, J., that "A sealed verdict is no verdict of itself. The verdict recorded in court is the

only verdict; the paper returned by the jury is not evidence, nor is it to be filed or preserved." *Dornick v. Reichenback*, 10 S. & R. (Pa.) 84.

Presence of Prisoner.—Unless the right is waived by the prisoner, he should be present in court when the verdict is opened, and where the record did not show that he was so present, judgment was reversed. *Doyle v. U. S.*, 11 Biss. (U. S.) 100. See also *supra*, this title, *Presence of Parties*.

Announcement by Foreman.—Where the jury, on adjournment of the court, were told if they agreed before the court met, they might seal up their verdict and separate, and the sealed verdict was brought in next morning, opened by the judge and handed to the prothonotary, who then asked the jury to listen to their verdict as the court had ordered it recorded, and added as usual "so say you all," it was held that this was sufficient, though the more formal method of taking the verdict, *ore tenus*, from the jury by the mouth of their foreman, was to be preferred. *Willard v. Shaffer*, 6 Phila. (Pa.) 520; *Blum v. Pate*, 20 Cal. 69.

2. *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; 20 Am. Dec. 616; *Bunn v. Hoyt*, 3 Johns. (N. Y.) 255; *Devereux v. Champion Cotton Press Co.*, 14 S. Car. 396; *Perry v. Mays*, 2 Bailey (S. Car. 354.

Birchard, J., delivering the opinion of the court in *State v. Engle*, 13 Ohio 490, held that a sealed verdict could not be changed, when delivered in public, from a verdict of acquittal to a verdict of guilty, but he seemed to be of opinion that the jury were at liberty to dissent from a verdict of guilty and change it to one of acquittal.

3. **Course Upon Disaffirmance.**—Where one or more members of the jury dissent to a verdict agreed upon and sealed before separation, upon the appearance of the jury in court for the delivery and affirmation of their finding, the presiding judge may direct them to retire and reconsider the case.

In *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; 20 Am. Dec. 616, the cause was submitted to the jury in the evening, with the direction that if they

for the presiding judge to send the jury out again to mould it into proper form.¹ In certain particulars this practice varies

could agree they might seal up the verdict and bring it into court the next morning. The jury presented their sealed verdict according to the direction of the court, but when polled one of them refused to agree to it. They were sent out again and finally brought in the same verdict which they had signed and sealed the evening previous, the former dissenting juror signing it with the others. It was held that the verdict could not, under the circumstances, be set aside for this alleged irregularity. In this case, the direction to seal up the verdict was given without the express consent of counsel, but the court held that as there was no objection to this course on the part of the defendant, he must be deemed to have impliedly assented to it.

In *Bunn v. Hoyt*, 3 Johns. (N. Y.) 255, a question arose very similar to the one before the court in *Douglass v. Tousey* above cited. The jury retired and deliberated several hours, sealed up their verdict, separated, and the next morning brought it into court. On being polled, one of them disagreed to it, and the judge, Chief Justice Kent, sent them out again, and the disagreeing juror ultimately assented to the verdict which had first been brought in unsealed, and the verdict was received as finally rendered. *Jessup v. Chicago*, etc., R. Co., 82 Iowa 243.

Increase of Amount.—The jury, having been authorized to bring in a sealed verdict, brought it in for the plaintiff for \$6,000, and it was entered on the clerk's minutes. Upon being polled, they did not agree and were ordered by the court to retire again. They did so, but returning for instructions as to whether they could increase the verdict, the court instructed them that they might render such verdict as they thought proper. They brought in a verdict for \$7,000. It was held no error. *Warner v. New York Cent. R. Co.*, 52 N. Y. 437; 11 Am. Rep. 724.

1. *Tyrrell v. Lockhart*, 3 Blackf. (Ind.) 136; *Hamilton v. Barton*, 20 Iowa 505; *Higley v. Newell*, 28 Iowa 516; *Jessup v. Chicago*, etc., R. Co., 82 Iowa 243; *Lincoln v. Lincoln*, 12 Gray (Mass.) 45; *Bolster v. Cummings*, 6 Me. 85; *Beal v. Cunningham*, 43 Me. 362; *Olcott v. Hanson*, 12 Mich. 452; *Loudy v. Clarke*, 45 Minn. 477; *Scott*

v. Chope, 33 Neb. 42; *Hertzberg v. Murray*, 40 N. Y. Super. Ct. 271; *Warner v. New York Cent. R. Co.*, 52 N. Y. 437; 11 Am. Rep. 724; *Clark v. Lude*, 63 Hun (N. Y.) 363; *McConnell v. Linton*, 4 Watts (Pa.) 357; *Wolfran v. Eyster*, 7 Watts (Pa.) 39; *Walters v. Junkins*, 16 S. & R. (Pa.) 415; 16 Am. Dec. 585; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Smith v. Meldren*, 107 Pa. St. 348; *High v. Johnson*, 28 Wis. 72. Compare *Williams v. People*, 44 Ill. 478.

In trover for certain promissory notes, where the title and not the value was the only subject of controversy, the jury being sent out late in the evening, with permission to separate after agreeing and sealing up their verdict, did so, and returned a verdict the next morning for the plaintiff, with the amount of damages in blank; the foreman observing that they had some doubts as to the time from which interest should be computed, and that some supposed this would be done by the court. By direction of the judge they retired again and returned a new verdict for the amount of the notes and interest. *Mellen, C. J.*, who delivered the opinion of the court, while admitting that in actions sounding damages, and where the amount of damages is the principal subject of consideration for the jury, as in actions of trespass of various kinds, actions for libels or the speaking of defamatory words, or on account, or actions of covenant, the omission to calculate on damages before separation would be fatal; yet here the only subject litigated was the title, there was a tacit acknowledgment of the amount of the note; and as the contested point had been settled the assessment of damages was a mere matter of course. *Bolster v. Cumming*, 6 Me. 85.

More Explicit.—Where, by an agreement of counsel, the jury is permitted to separate after an adjournment of the court, the defendant cannot complain that, after having sealed their verdict as directed by the court, the jurors separated for the night, and that after their verdict was delivered into court the next morning, they were sent out again with the papers in the suit to make the verdict more explicit. *McIntosh v. Smith*, 2 La. Ann. 756.

widely in different states. For instance, in its applicability to criminal cases;¹ as regards the consent of the parties to the

Not as Agreed Upon.—When a jury bringing a verdict into court, after having sealed it up and separated, declare that it is not as agreed upon, it may be submitted to them again for correction. *Loudy v. Clarke*, 45 Minn. 477.

Inadvertent Error.—It is not error to permit a jury, after it has returned a sealed verdict into court, to correct an error in the verdict which has occurred through inadvertence only. *Hamilton v. Barton*, 20 Iowa 505.

Guilty—Not Guilty.—In *Beal v. Cunningham*, 42 Me. 362, the jury returned a sealed verdict in a case which had been submitted to their consideration the night before. On the suggestion of the foreman that there was error in the verdict as read by the clerk, he was permitted by the court to amend the same by inserting the word "not" before the word "guilty," after which amendment by the foreman, the verdict was affirmed and recorded. "This," said the court, "was merely the correction of a verbal error, thereby reducing the verdict to form, and making it indicate truly the result to which the jury had, on deliberation, arrived. No impropriety in the course adopted is perceived."

Defendants—Plaintiff.—In *Loudy v. Clarke*, 45 Minn. 477, the jury, without the consent of the parties, sealed a verdict for the "defendants," separated, and the next morning were permitted to substitute "plaintiff." It was held that such a course afforded no ground for not receiving the altered verdict, unless it was objected to when the sealed verdict was attempted to be read.

Substantial Deficiencies.—It was held, in *Rogers v. Sample*, 28 Neb. 141, that where the verdict as returned into court is insufficient in substance or form, the court has the power to send the jury back to correct it.

1. In *Louisiana*, it has been held that in all criminal cases the separation of the jury, though by leave of court and with the consent of the accused and his counsel, will vitiate the verdict if such separation takes place after the evidence has been closed and the charge of the court given, and before the verdict is rendered. *State v. Populus*, 12 La. Ann. 710; *State v. Hornsby*, 32 La. Ann. 1268.

On the other hand, the *Ohio* courts seem to regard the practice as admissible, in the discretion of the presiding judge, in all cases—in criminal, without regard to the grade of the offense, as well as in civil—and this without regard to the consent of the parties. *Sutliff v. Gilbert*, 8 Ohio 405; *Sargent v. State*, 11 Ohio 472; *State v. Engle*, 13 Ohio 490.

In *California*, in the case of *People v. Kelly*, 46 Cal. 357, it was declared that the jury in a criminal case may render a sealed verdict, provided the proceeding is sanctioned by the consent of the defendant's counsel.

Iowa.—In this state there is a statute prohibiting the practice, on the part of the jury, of sealing the verdict and separating, in all criminal cases, misdemeanors as well as felonies. §§ 4442, 4458, 4460, 4462, 4470. *State v. Fertig*, 84 Iowa 79.

Indiana.—Here the prohibition as to sealed verdicts extends only to felonies. *Farley v. People*, 138 Ill. 97.

In *Maine*, the practice, as declared in an anonymous case, 63 Me. 590, is that in criminal cases, except capital cases and cases where the punishment is imprisonment for life, the presiding judge may, in his discretion, authorize the jury, when they agree during an adjournment of the court, to seal up their verdict and separate, and have it opened, read, and affirmed when the court reconvenes, with the same effect as if pronounced in open court. This seems to be the most generally approved practice on the subject.

It was held in the case of *State v. McCormick*, 84 Me. 566, in which the defendant was tried for the crime of rape, that a sealed verdict consisting merely of the word "guilty," without more, is insufficient; nor can the insufficiency be remedied by confirmation in open court.

In *Pennsylvania*, it has been held that in all cases except those of homicide, the jury may seal up their verdict and separate. *Com. v. Boyle*, 9 Phila. (Pa.) 592.

Washington.—In capital cases, the jury may not seal up their verdict and separate after the case has been finally submitted to them, and before they have rendered their verdict in court. The fact that this has been done with

suit;¹ whether such consent is a waiver of the right to

consent of defendant's counsel is immaterial. *Anderson v. State*, 2 Wash. 183.

In *Com. v. Slattery*, 147 Mass. 423, the defendant was charged with rape and the jury were permitted to render a sealed verdict. On this occasion it was said, by Mr. Justice Allen: "In civil cases, and in criminal cases not capital, the court can permit a jury, after they have agreed upon their verdict, to separate before rendering the verdict in court. In civil cases, the verdict being in writing, is made before the jury separate, and afterwards affirmed by them in court; in criminal cases the verdict must be rendered orally in court, but it must appear to be the verdict which the jury had agreed upon before they separated. The usual practice is to instruct the jury to bring in a sealed verdict, which is opened and read by the clerk in open court, after which in civil cases the written verdict is filed and affirmed by the jury, and in criminal cases an oral verdict is taken in the usual form. The purpose of the written statement in criminal cases is to make it plain that the verdict rendered is the one which the jury had agreed to render before they separated, and the purpose of directing it to be sealed up and delivered unopened to the court is to identify the writing." *Com. v. Carrington*, 116 Mass. 37; *Wharton's Crim. Law*, § 3193. And see *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338.

1. Where this practice has been adopted, it has been generally with the consent or by the agreement of the parties to the suit, *Reins v. People*, 30 Ill. 256; *Tifield v. Adams*, 3 Iowa 487; *Higley v. Newell*, 28 Iowa 516; *Walker v. Dailey* (Iowa, 1893), 54 N. W. Rep. 344; *Wood v. Van Buren County*, *Morr.* (Iowa) 581; *Com. v. Costello*, 128 Mass. 88; *Bolster v. Cummings*, 6 Me. 85; *Beal v. Cunningham*, 42 Me. 362; *Steele v. Etheridge*, 15 Minn. 501; *Perry v. Mays*, 2 Bailey (S. Car.) 354; *Devereux v. Champion Cotton Press Co.*, 14 S. Car. 396; *Hancock v. Winans*, 20 Tex. 320; comparatively few cases holding directly, one way or the other, whether or not the consent of the parties or their counsel is necessary.

In *High v. Johnson*, 28 Wis. 72, the question, whether the court may against the objection of either party, direct the

jury to sign and seal their verdict and bring it into court the next day, is considered, but not answered, and Mr. Graham, in his work on Practice (2d ed.), p. 316, states that it has never been expressly decided whether or not the judge may instruct the jury to resort to this practice without the consent of the parties. In *Iowa*, at least, and perhaps in other states, this doubt has been determined by statute (see *Jessup v. Chicago, etc., R. Co.*, 82 Iowa 243, maintaining that under the *Iowa* code, in order to authorize a sealed verdict, the consent of the parties must first be given), and it has been held in *California* (*People v. Kelly*, 46 Cal. 357) that in a criminal case, the jury may seal their verdict and separate only by the consent of the defendant's counsel.

In *Ohio*, in both civil and criminal cases, the court may in its discretion direct the jury, upon finding a verdict, to seal it up and separate, wholly independent of the consent of the parties. *Sutliff v. Gilbert*, 8 Ohio 405; *Sargeant v. State*, 11 Ohio 472; *State v. Engle*, 13 Ohio 490.

In the case of *Com. v. Carrington*, 116 Mass. 37, the question arose whether, in a criminal case, not capital, the jury may be authorized by the court, without the consent of the defendant, to separate, after agreeing upon and signing and sealing up a paper in the form of a verdict, and afterwards return the verdict in open court in accordance with the result so stated and sealed up. It was held that such a course was proper. In this case, the court said: "The tendency of modern decisions has been to relax the strictness of the ancient practice which required jurors to be kept together from the time they were impaneled until they returned their verdict or were finally discharged by the court." See also *People v. Douglass*, 4 Cow. (N. Y.) 32; 15 Am. Dec. 332.

In *Chicago v. Langlass*, 66 Ill. 361, the court, in the absence of counsel, directed the jury to seal up their verdict and separate, and return it into court the next day. It was held that this was no error.

In *Indiana*, it has been held that where no objection is made, the jury may, by order of court, seal up their verdict and separate. *Jarrell v. State*, 58 Ind. 293.

poll;¹ and even the necessity for a reassembling of the jury and confirmation in open court.²

Contrary to Direction of Court.—In the case of *People v. Douglass*, 4 Cow. (N. Y.) 26; 15 Am. Dec. 332, it was said by the chief justice, that in a civil suit it is clear that the separation of the jury without and even contrary to the direction of the court, will not in itself warrant the court in setting aside the verdict. See also *Smith v. Thompson*, 1 Cow. (N. Y.) 221; *Ex p. Hill*, 3 Cow. (N. Y.) 355.

Without Direction of Court or Agreement of Parties.—In the case of *Sutliff v. Gilbert*, 8 Ohio 405, the jury, without order or leave of court or of the parties, sealed up their verdict and separated, and the next morning came into court and delivered it. The supreme court declined to disturb it for irregularity of procedure.

Several Issues—Agreement on Part—Separation.—The separation of the jury without the permission of the court, before they agreed on all the issues submitted to them, is irregular and improper. But this misconduct does not necessarily impair or affect the validity of their finding on other issues which were submitted to them, nor should it operate to deprive the other party of the benefit of their verdict on the questions upon which the jury had already passed, where it does not appear that the issues on which there was no verdict were so connected with or related to those on which they rendered a verdict as to make it appear that their finding would have been different if they had been obliged to determine all the issues submitted to them. *Vennard v. McConnell*, 11 Allen (Mass.) 555.

Waiver of Exceptions.—The agreement of the parties that the jury, after agreeing upon a verdict, might seal the same and separate, was held to be a waiver of all exceptions because of such separation. *Wood v. Van Buren County, Morr.* (Iowa) 581.

1. See *supra*, this title, *Polling the Jury*.

Waiver of Right to Poll.—In the case of *Miller v. Mabon*, 6 Iowa 456, it was held that when the jury, by consent of parties, seal their verdict and separate before rendering the same, that the jury cannot be polled unless such a course has been agreed upon. See also *Bass v. Hanson*, 9 Iowa 563.

In *Florida*, it has been decided that

where a sealed verdict by consent of parties has been rendered by a jury, neither party has a right to demand that the jury be polled. This may be done, however, at the discretion of the judge, whose duty it is to see that no wrong or injustice is done to the parties, and whose discretion in such case is not matter of review by the appellate court. *Whitner v. Hamlin*, 12 Fla. 18.

In *Koon v. Phoenix Mut. L. Ins. Co.*, 104 U. S. 106, it was held that a stipulation that the jury, when they agree on their verdict, if the court should not then be in session, may sign and seal the same and deliver it to the officer in charge and disperse, is equivalent to an agreement by both parties, that on the retirement of the jury, the court may, when the sealed verdict is handed in by the officer, open it in the absence of the jury and reduce it to proper form if necessary, and that stipulation was also construed as a waiver of the right to poll the jury if the parties were not in court when the verdict was affirmed.

Right to Poll Not Waived.—The agreement of the parties that the jury may seal up their verdict and separate, does not deprive either of the right to poll the jury when the verdict is returned, and the jurors are at liberty to dissent from the verdict to which they had privately agreed. *Root v. Sherwood*, 6 Johns. (N. Y.) 68; 5 Am. Dec. 191. To the same effect, see *Wright v. State*, 11 Ind. 569; *Stewart v. People*, 23 Mich. 63; 9 Am. Rep. 78.

U. S. v. Potter, 6 McLean (U. S.) 186, also supports the view that an agreement between the parties to the effect that the jury may bring in a sealed verdict, does not affect the right to poll the jury when the verdict is returned.

2. When, by consent of parties, the jury is allowed to seal their verdict and separate before rendering the same, such sealing is equivalent to a rendition and recording thereof in open court, and the jury in such case cannot be polled or permitted to disagree thereto, unless such a course has been agreed upon by the parties in open court and entered of record. *Iowa Rev. Stat.*, § 3075; *Miller v. Mabon*, 6 Iowa 456; *Bass v. Hanson*, 9 Iowa 563.

Where the parties stipulated in open court that the jury might seal their

4. Privy Verdict.—The practice of allowing the jury to deliver their finding to the judge privately, when a verdict is reached during an adjournment or absence of the judge from the court, in order that the jury may be delivered from confinement, has never been distinctly recognized in this country, and is rarely resorted to in *England* where it originated. Even on occasions when it has been exercised, the verdict delivered privily is held to be of no inherent force or effect, requiring, as it does, confirmation in open court, at which time the jury are not in the slightest degree bound by their previous declaration.¹

5. Public Verdict.—In a certain sense, all verdicts are public verdicts. In other words, a verdict, to have its legally attributed effect, must be declared in open court,² by which proceeding it is constituted a public verdict.³

verdict, deliver it to the clerk, and then separate, such delivery is equivalent to a delivery in open court, and the power of the court to open and act upon it at a subsequent term is unquestionable. Nor is the authority of the court so to act at all lessened because of an agreement by the parties that such verdict should be opened on a particular day of the term at which it was rendered. The court, nevertheless, may open and act upon it on any other day. *Pierce v. Hasbrouck*, 49 Ill. 23.

1. A privy verdict is when the judge has left or adjourned the court, and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court; which privy verdict is of no force unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from a privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and, therefore, very seldom indulged. 3 Bl. Com. 377.

A privy verdict could not be rendered in a criminal case, "which touched life or member." 4 Bl. Com. 360. The reason of this rule was that it "deprived the prisoner of meeting the jury face to face, and demanding of each his separate verdict." *Birchard, J.*, in *State v. Engle*, 13 Ohio 490. In this case, the same judge observed: "It is laid down by elementary writers that the verdict of a jury in criminal cases, is to be considered and delivered in the same form as in civil cases, except that they cannot give a privy verdict, nor can they

be discharged without giving a verdict but in cases of necessity."

In an anonymous case (63 Me. 590), the reason assigned for the ancient rule prohibiting privy verdicts in certain criminal cases, is "because of the requirement, in cases of felony, that the jurors should look upon the prisoner when the verdict is pronounced."

It is said, in *Hale* 300, that "in a case of felony or treason, the verdict must be given in open court, and no privy verdict can be given."

The old idea of rendering privy verdicts seems to have furnished the foundation for our practice relating to sealed verdicts. Anonymous, 63 Me. 590; *Com. v. Heller*, 5 Phila. (Pa.) 123.

2. See *supra*, this title, *Reception of Verdict*.

A cause was submitted to the jury at four o'clock, and the court adjourned until nine o'clock the next morning, the judge announcing that the court would at all times be open for the purpose of receiving the verdict if they agreed upon it before midnight. At eleven o'clock the judge went to the court room and, in the absence of all the parties to the suit and their counsel, received the finding of the jury, discharged them from further consideration of the case, kept the verdict until the opening of the court next morning, and after having read it aloud, handed it to the clerk for entry upon the record. This was deemed illegal, because it should have been afterwards affirmed publicly in open court. *Young v. Seymour*, 4 Neb. 86; *Kennedy v. Raught*, 6 Minn. 155.

3. Thus it will be seen that an oral verdict by announcement, and a writ-

IV. EFFECT OF VERDICT—1. In General.—A verdict, regularly found and declared, entitles the prevailing party to a judgment in conformity with the facts established by the verdict.¹

2. As a Cure for Irregularities—*a.* AT COMMON LAW.—Where there is a defect, imperfection, or omission in any pleading, whether in substance or form, which would have constituted a fatal objection on demurrer, yet if the issue joined is such as necessarily required on trial, proof of the fact so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would have directed the jury to give, or the jury would have rendered, the verdict found, such defect, imperfection, or omission is cured by the verdict at common law,²

ten, sealed, or privy verdict by affirmation in open court, becomes a public verdict.

In 3 Bl. Com. 377, verdicts are divided into four classes: general and special; public and private. In reference to public verdicts, it is written: "The only effectual and legal verdict is the public verdict, in which the jury openly declare to have found the issue for the plaintiff or for the defendant."

1. "As soon as the facts of the case are ascertained by the trial, the judgment of the court, which is the conclusion of law from the facts, ought in due course to follow." 4 Minor's Inst. (2d ed), p. 836.

2. 1 Saund. 228 note (1); Hall v. Marshall, Cro. Car. 497; Avery v. Hoole, 1 Cowp. 826; Hitchins v. Stevens, Sir T. Raym. 487; Weston v. Mason, 3 Burr. 1725; Frederick v. Lookup, 4 Burr. 2018; Alston v. Buscough, Carth. 304; Blackall v. Eale, Carth. 389; Whitehead v. Greetham, 2 Bing. 464; Wootton v. Hele, 1 Mod. 202; Mannington v. Guillims, 1 Lev. 308; Gostwick's Case, 1 Sid. 423; Crouther v. Oldfield, 1 Salk. 365; May v. King, Com. Rep. 116; Schimshaw v. Westby, 6 Mod. 302; Roe v. Hersey, 2 Ld. Raym. 1060; Rann v. Hughes, 7 Bro. P. C. 555; Rushton v. Aspinall, 2 Dougl. 679; Spieres v. Parker, 1 T. R. 141; Johnstone v. Sutton, 1 T. R. 545; Nerot v. Wallace, 3 T. R. 25; Clark v. King, 3 T. R. 147; Bishop v. Hayward, 4 T. R. 472; Mackmurdo v. Smith, 7 T. R. 518; Jackson v. Pesked, 1 M. & S. 234; Bull v. Steward, 1 Wils. 255; Barron v. Frink, 30 Cal. 487; Magginni v. Pezzoni, 76 Cal. 631; Spencer v. Overton, 1 Day (Conn.) 186; Fuller v. Hampton, 5 Conn. 416; Dale v. Dean, 16 Conn. 579; Rateree v. State, 62 Ga. 245; Dotterer v. Harden, 88 Ga. 145; Warren v. Harris, 7

Ill. 307; Smith v. Curry, 16 Ill. 148; Heiman v. Schroeder, 74 Ill. 158; Peck v. Martin, 17 Ind. 115; Shimer v. Brounenbury, 18 Ind. 363; Indianapolis, etc., R. Co. v. Petty, 30 Ind. 261; Smith v. Freeman, 71 Ind. 89; Smock v. Harrison, 74 Ind. 348; Felger v. Etzell, 75 Ind. 419; Puett v. Beard, 86 Ind. 104; 44 Am. Rep. 280; Ferguson v. State, 90 Ind. 40; Louisville, etc., R. Co. v. Harrington, 92 Ind. 457; Hoke v. Applegate, 92 Ind. 570; Watson v. Crowsore, 93 Ind. 223; Reid v. Mitchell, 95 Ind. 397; Murphy v. Murphy, 95 Ind. 430; Jackson v. Weaver, 98 Ind. 307; Hedrick v. Osborne, 99 Ind. 143; Smith v. Smith, 106 Ind. 43; School Tp. v. Hay, 107 Ind. 351; Laverty v. State, 109 Ind. 217; Bronnerburg v. Rinker, 2 Ind. App. 391; Hatfield v. Miller, 123 Ind. 463; Darnall v. Simpkins (Ind. 1894), 38 N. E. Rep. 219; Vaughn v. Gardner, 7 B. Mon. (Ky.) 328; Coleman v. Croysdale, 3 J. J. Marsh. (Ky.) 541; Brougher v. Black, 83 Ky. 521; Dean v. Dean (Ky. 1886), 1 S. W. Rep. 811; Louisville, etc., R. Co. v. Taylor, 92 Ky. 55; Little v. Thompson, 2 Me. 228; Warren v. Litchfield, 7 Me. 63; Farrington v. Blish, 14 Me. 423; Emerson v. Laken, 23 Me. 384; Vandersmith v. Washmein, 1 Har. & G. (Md.) 4; Merrick v. Bank of Metropolis, 8 Gill (Md.) 59; Read v. Chelmsford, 16 Pick. (Mass.) 128; Worster v. Canal Bridge, 16 Pick. (Mass.) 541; Kingsley v. Bell, 9 Mass. 198; Ingersoll v. Jackson, 9 Mass. 495; Richardson v. Eastman, 12 Mass. 505; Cole v. Harman, 8 Smed. & M. (Miss.) 562; Frazer v. Roberts, 32 Mo. 457; Shaler v. Van Wormer, 33 Mo. 386; Bowie v. Kansas City, 51 Mo. 454; Hurst v. Ash Grove, 96 Mo. 172; Kain v. Kansas City, etc., R. Co., 29 Mo. App. 53; Marvin v. Weider, 31 Neb. 774; Sawyer v. Whittier, 2 N.

H. 316; *Walpole v. Marlow*, 2 N. H. 385; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 180; *Bedell v. Stevens*, 28 N. H. 118; *White v. Concord R. Co.*, 30 N. H. 188; *New Hampshire F. Ins. Co. v. Walker*, 30 N. H. 324; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Bayard v. Malcolm*, 2 Johns. (N. Y.) 569; 3 Am. Dec. 450; *Thomas v. Roosa*, 7 Johns. (N. Y.) 462; *Pangburn v. Ramsey*, 11 Johns. (N. Y.) 141; *Addington v. Allen*, 11 Wend. (N. Y.) 375; *Miles v. Oldfield*, 4 Yeates (Pa.) 423; 2 Am. Dec. 412; *Miltenerberger v. Schlegel*, 7 Pa. St. 241; *Mathias v. Sellers*, 86 Pa. St. 486; 27 Am. Rep. 723; *Simpson v. Vaughan*, 2 Strobb. (S. Car.) 38; *Morgan v. Livingston*, 2 Rich. (S. Car.) 573; *Stanley v. Whipple*, 2 McLean (U. S.) 35; *U. S. v. The Virgin*, Pet. (C. C.) 7; *Gray v. James*, Pet. (C. C.) 476; *DeSobry v. Nicholson*, 3 Wall. (U. S.) 420; *Carroll v. Peake*, 1 Pet. (U. S.) 23; *Palmer v. Arthur*, 131 U. S. 60; *Richardson v. Royalton*, etc., Turnpike Co., 6 Vt. 496; *Haselton v. Wear*, 8 Vt. 483; *Morey v. Homan*, 10 Vt. 565; *Needham v. McAuley*, 13 Vt. 69; *Schuster v. Frendenthal*, 74 Tex. 53; *Western Union Tel. Co. v. Longwill* (N. Mex. 1889), 21 Pac. Rep. 339. See AMENDMENT, vol. 1, p. 553.

Thus, though the plaintiff may have stated his title or ground of action defectively or inaccurately, it is nevertheless a fair presumption after verdict in his favor, that such was proved, because, to entitle him to recover, all circumstances necessary in form or substance to complete the title or cause of action so imperfectly stated, must be proved at the trial. *Rushton v. Aspinall*, 2 Doug. 679.

In *Heymann v. Reg.* L. R., 8 Q. B. 105, it was said, by Lord Blackburn: "It is a general rule of pleading at common law, . . . where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court, after verdict, that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict." *Biedlaugh v. Reg.*, 3 Q. B. Div. 607.

In *Gray v. James*, Pet. (C. C.) 476, it was said by Washington, J.: "It may be laid down as a general rule, that a declaration ought always to show a title in the plaintiff, and that with con-

venient certainty. It ought to state all matters that are of the essence of the action, without which the plaintiff fails to show a right in point of law to ask for the judgment of the court in his favor. If his title depends upon the performance of certain acts, he must affirm the performance of those acts. If enough is stated to show title in the plaintiff, and with sufficient certainty to enable the court to give judgment, but with less certainty than the case admitted of, and which, for the purpose of notice to the adverse party or otherwise, ought to have been stated, the defect is cured by the verdict. The court will presume that all such omissions were supplied, and obscurities explained at the trial by the evidence given to the jury."

Judge Story similarly expressed the doctrine by saying: "The general principle of law is that, where there is a matter so essentially necessary to be proved, to establish the plaintiff's right to recovery, the jury could not be presumed to find a verdict for him unless it had been proved at the trial, there the omission to state the matter in express terms in the declaration is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend it." *Dobson v. Campbell*, 1 Sumn. (U. S.) 326.

Verdict and Issue.—As will be seen from the rule laid down in the text, the intentment to supply the omission or cure the irregularity, must arise not merely from the verdict, but from the verdict taken in connection with the issue upon which such verdict was rendered. 1 Chitty's Pl. 705; *Dale v. Dean*, 16 Conn. 579.

Formal Defects.—All immaterial facts omitted, and all informality in allegations, such as duplicity, for instance, are cured by verdict, and the reason of this rule is not so much that the defects are supposed to be supplied by proof, as that it would be unreasonable to suffer a party to avail himself of such defects after putting the defendant to the expense of a trial by the jury. *Spencer v. Overton*, 1 Day 186; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 180; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409.

—Surplusage.—In the same manner surplusage in pleading does not, in any case, vitiate after verdict. *Adams v. Goose*, Cro. Jac. 96; *Tismond v. Johnson*, Cro. Jac. 428; *Carroll v. Peake*, 1 Pet. (U. S.) 18; *Chapman v. Smith*, 13 Johns. (N. Y.) 78.

Thus, if a plaintiff sues or pleads by a conservator, and the record is in the usual form and judgment is in his favor, it will be good, and those words will be rejected as surplusage. *Woodford v. Webster*, 3 Day (Conn.) 472.

Also, where the plaintiff declared on a promissory note payable in chattels, as under the statute, and assigned for breach that the defendant did not pay the money mentioned in the note, it was ruled that the reference to the statute could be rejected as surplusage, and that the contradiction in assigning the breach was cured by the verdict. *Thomas v. Roosa*, 7 Johns. (N. Y.) 461.

—**Ambiguities.**—Where the terms of a pleading are ambiguous or equivocal, they will be understood in that sense which is most favorable to sustaining the verdict, if equally consistent with the context and the circumstances of the case. *Sheen v. Rickie*, 5 M. & W. 175; *France v. White*, 1 M. & G. 731; *Emmons v. Elderton*, 4 H. L. Cas. 626; *Kempe v. Crews*, Ld. Raym. 167; *Commercial Ins. Co. v. Treasury Bank*, 61 Ill. 482; *Hickman v. Southerland*, 4 Bibb (Ky.) 194; *Manwell v. Manwell*, 14 Vt. 14.

Defects of Substance.—There are some defects of substance as well as form which are aided by verdict. *Hitchins v. Stevens*, 2 Show. 244; *Wright v. Goddard*, 8 Ad. & El. 144; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 180.

—**Omission of Material Allegations.**—Though material facts are entirely omitted, yet if they are necessarily concomitants of the material facts alleged in the declaration, so that, in their finding, the jury must have found the facts omitted, the defect is cured by the verdict. *Spencer v. Overton*, 1 Day (Conn.) 183; *Addington v. Allen*, 11 Wend. (N. Y.) 375.

Thus, a failure to aver a seisin in a writ of entry will be cured after verdict. *Ward v. Bartholomew*, 6 Pick. (Mass.) 409.

Lord Ellenborough, in delivering the judgment of the court in *Jackson v. Pesked*, 1 M. & S. 234, said: "Where a matter is so essentially necessary to be proved that had it not been given in evidence the jury could not have found such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend a fair and reasonable intendment, will be cured by verdict; and where a general allegation must, in fair construction, so

far require to be restricted that no judge or no jury could have properly treated it in an unrestricted sense, it may reasonably be construed after verdict that it was so restrained at trial."

—**Material Facts Imperfectly Stated.**—Where material facts are stated too generally, imperfectly, or with such ambiguity that the declaration would be bad on demurrer, these defects are cured by verdict. *Lane v. Crockett*, 7 Price 566; *Amey v. Long*, 9 East 473; *Jackson v. Pesked*, 1 M. & S. 234; *Dale v. Dean*, 16 Conn. 579; *Spencer v. Overton*, 1 Day (Conn.) 186.

In *McCune v. Norwich Gas. Co.*, 30 Conn. 525; 79 Am. Dec. 278, Sanford, J., said: "If a material fact is stated in such general and indefinite terms that, if demurred to, the pleading would be adjudged bad for want of sufficient certainty, yet if, instead of demurring, the other party takes issue upon it, and the verdict is against him, the defect is cured, because the fact stated could not have been proved at all without proving at the same time those concomitant circumstances attending it, for the omission of which the pleading was demurrable. Thus, if a tender is pleaded without time or place, the pleading is bad on demurrer, for the opposite party has a right to be informed by the plea when and where the tender is claimed to have been made, in order that he may prepare to meet the claim. But if, instead of demurring, he takes issue upon the plea, and the verdict is against him, the plea is cured; because tender could not have been proved at all without proving when and where it was made."

Where a declaration, upon an agreement by way of lease, alleged in substance that the defendant below agreed to rent and to farm-let to the plaintiff, a farm, for one year from the first of January, 1820, and agreed to remove the former tenant, and that the plaintiff should have the possession and occupancy of the farm from the first of January aforesaid, free from all hindrance or disturbance of anyone, and further averred that on the said first day of January, 1820, at the county aforesaid, the plaintiff was ready and willing, and offered to the defendant to take possession of the said land and farm, and to rent and occupy the same, and afterwards assigned breaches in this, that although specially requested so to do on the said first day of January, 1820, the defendant refused and neglected to turn out the said tenant, etc., it was held

sufficient that the averment should state the plaintiff's readiness and offer, and his request on the first day of January generally, and not at the last convenient hour of that day. *Carroll v. Peake*, 1 Pet. (U. S.) 18.

Defects in Declaration.—After verdict a declaration will be good, if enough appears from it to show that the plaintiff had a good cause of action. *English v. Burnell*, 2 Wils. 258; *Crouther v. Oldfield*, 1 Salk. 365; *Weston v. Mason*, 3 Burr. 1725; 1 Saund. 228, note 1; *Bishop v. Hayward*, 4 T. R. 470; *Farnworth v. Bishop of Chester*, 4 B. & C. 555; *Reeves v. State*, 29 Fla. 527; *Dotterer v. Harden*, 88 Ga. 145; *Dickerson v. Hays*, 4 Blackf. (Ind.) 44; *Worster v. Canal Bridge*, 16 Pick. (Mass.) 541; *Hurst v. Ash Grove*, 96 Mo. 172; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Walpole v. Marlow*, 2 N. H. 386; *Elliott v. Heath*, 6 N. H. 428; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 180; *White v. Concord R. Co.*, 30 N. H. 188; *Corey v. Bath*, 35 N. H. 530; *Nelson v. Ford*, 5 Ohio 473; *Cornelius v. Molloy*, 7 Pa. St. 293; *Miles v. Oldfield*, 4 Yeates (Pa.) 423; 2 Am. Dec. 412; *Smith v. Veating*, 6 C. B. 136; *Richardson v. Eastman*, 12 Mass. 505; *Ingersoll v. Jackson*, 9 Mass. 496; *Livermore v. Boswell*, 4 Mass. 437; *Lahiffe v. Hunter*, Harp. (S. Car.) 184; *State v. Freeman*, 63 Vt. 496.

The rule has been stated in *Indiana*, that when a complaint is attacked for the first time after the verdict, every legal intendment will be summoned to its rescue, and if there is enough to bar another suit for the same cause, and no necessary averment is totally absent, the verdict will cure the delinquencies. *Donellan v. Hardy*, 57 Ind. 393; *Louisville, etc., R. Co. v. Spain*, 61 Ind. 460; *Baltimore, etc., R. Co. v. Kreiger*, 90 Ind. 380; *Louisville, etc., R. Co. v. Harrington*, 92 Ind. 457; *Hedrick v. Osborne*, 99 Ind. 143; *Burkett v. Holman*, 104 Ind. 6; *Orton v. Tilden*, 110 Ind. 131; *Du Souchet v. Dutcher*, 113 Ind. 249; *Colchen v. Ninde*, 120 Ind. 88; *Peters v. Banta*, 120 Ind. 416; *Duffy v. Carman*, 3 Ind. App. 207.

—Averment as to Amount of Damage.—It was held, in *Brauns v. Glesige*, 130 Ind. 167, that the omission of an averment as to the amount of damages sustained is cured by the verdict, as it is a matter which may be supplied by proof.

—Averment of Special Demand.—The

omission of an averment of special demand is cured after the verdict. *Bliss v. Arnold*, 8 Vt. 252; 30 Am. Dec. 467. And see *Bowdell v. Parsons*, 10 East 359.

—Averment of Notice.—Though the declaration is defective in not alleging notice to the defendant that the plaintiff has performed the condition which was the consideration of the promise sued on, yet this notice, after the verdict for the plaintiff, must be presumed to have been proved, as it was involved in the issue and necessary to have been established by proof or admission. *Colt v. Root*, 17 Mass. 229.

In *Crocker v. Gilbert*, 9 Cush. (Mass.) 131, it was held that an objection to a declaration on account of its failure to allege notice to the defendant of the non-payment of the note on which he was guarantor, comes too late after the verdict.

The omission in a declaration, in a suit upon a special agreement to allege specifically the breach of the agreement or notice to the plaintiff to perform it, is cured by a verdict. *Weigley v. Weir*, 7 S. & R. (Pa.) 307. See also *Spencer v. Overton*, 1 Day (Conn.) 183.

—Demand and Notice—Mercantile Instrument.—Where suit was brought against the indorser of a bill of exchange, the plaintiff did not allege a demand and refusal by the acceptor on the day when the note was payable, nor was notice to the defendant stated in the declaration. Neither of these defects was considered to be cured by verdict, and the want of either was held to prevent the declaration from containing a cause of action. *Rushton v. Aspinall*, 2 Doug. 679; *Anderson v. Yell*, 15 Ark. 9.

—Averment as to Due Care.—In an action by an employee to recover damages for personal injuries arising from the negligence of the employer, the omission to aver that the defendant had not observed due care in respect to the acts complained of, is cured by a verdict for the plaintiff. *Fox v. Spring Lake Iron Co.*, 89 Mich. 387.

In an action to recover damages for an injury sustained by reason of a defective highway, an averment that at the time of the accident the plaintiff was walking along and across the highway in due prosecution of his business and in a proper manner, was considered, after verdict, as expressing that the plaintiff was at the time in the exercise of ordinary care. *Raymond v. Lowell*, 6 Cush. (Mass.) 524.

—Profane Swearing—Language Used.

—A complaint for profane swearing charged that the defendant "did profanely curse," without setting forth the language used. No objection was made at the trial to the sufficiency of the complaint. The language used was shown by the evidence, and the defendant's counsel informed the jury that they were the judges of the law, and of the profanity of the language used. The court charged what constituted profane cursing, and the charge was not excepted to. It was held that the verdict cured the defect in the complaint. *State v. Freeman*, 63 Vt. 496.

—Condition Precedent.—Failure to allege the performance of a condition precedent will be cured by a verdict at common law. *Happe v. Stout*, 2 Cal. 460; *Bailey v. Clay*, 4 Rand. (Va.) 346.

—Time.—Time, unless it be matter of essential description in the cause of action, will, after verdict, be presumed to have been proved, and the want of it in the count will not be matter in arrest of judgment. *Gould's Pl.* 499; 3 Bl. Com. 394; *Blackwell v. Eales*, 5 Mod. 287; *Acton v. Eels*, 2 Salk. 662; *Stockton v. Bishop*, 4 How. (U. S.) 155; *Hickman v. Southerland*, 4 Bibb (Ky.) 194; *Marsh v. Blythe*, 1 McCord (S. Car.) 360; *Perkins v. State*, 8 Baxt. (Tenn.) 559.

In an action of trespass, unless the declaration alleges trespass to have been committed on a day certain, which day must be before the action was commenced, it is demurrable, but the alleging of a trespass on an impossible day or on a day subsequent to the commencement of the suit, is aided by verdict. *Blackwell v. Eales*, 5 Mod. 286; *Acton v. Eels*, 2 Salk. 662; *Blackhall v. Evans*, 3 Salk. 8; *Sorel v. Lewin*, 3 Keb. 354; *Story v. Barrell*, 2 Conn. 665.

—Place.—Where all material facts are stated, defects as to place will be aided by verdict. *Hickman v. Southerland*, 4 Bibb (Ky.) 194; *Stone v. Van Culer*, 2 Vt. 115.

—Registry of Assignment.—A declaration upon an assignment of a patent right, omitting to state that the assignment was duly entered in the state department, is helped by verdict. *Dobson v. Campbell*, 1 Sumn. (U. S.) 319.

—Attornment.—Where the bargainee of a reversion declared in debt for rent, the omission to state attornment in the declaration was decided to be aided by

verdict. *Hitchins v. Stevens*, 2 Show. 233.

Misjoinder of Counts.—A misjoinder of counts will not be aided by a general verdict. *Vaughn v. Gardner*, 7 B. Mon. (Ky.) 328. To this doctrine, the court, in *Dalson v. Bradbury*, 50 Ill. 82, added, "as for aught we can see, the jury may have found damages under both counts." See also *Clark v. Hannibal*, etc., R. Co., 36 Mo. 202.

Defective Count—Civil Actions.—*Sedgwick, J.*, in *Benson v. Swift*, 2 Mass. 50, said: "There is no doubt that the principle of law is settled, that where there are several counts in a declaration, and one of them is materially defective, or bad, and a general verdict is found upon them all, the judgment must be arrested."

Of like import are the remarks of Mr. Sergeant Williams: "It is a settled rule," he says, "that where there are several counts and a verdict is entered generally on all the counts and entire damages are given, and one count is bad, it is fatal." To this effect, see 1 Chitty's Pl. 714; 2 Wm. Saund. 307; *Onslow v. Horne*, 3 Wils. 185; *Ottawa Gas Light, etc., Co. v. Thompson*, 39 Ill. 598; *McCauley v. Elrod* (Ky. 1894), 27 S. W. Rep. 867; *Stevenson v. Hayden*, 2 Mass. 406; *Kingsley v. Bill*, 9 Mass. 198; *Warren v. Litchfield*, 7 Me. 63; *Clark v. Hannibal*, etc., R. Co., 36 Mo. 202; *Glines v. Smith*, 48 N. H. 259; *Cheetham v. Tillotson*, 5 Johns. (N. Y.) 430; *Haselton v. Weare*, 8 Vt. 480; *Needham v. McAuley*, 13 Vt. 69.

If a general verdict be given in several counts, some of which are for demands not within the jurisdiction of the court, it is bad for the whole. *Kline v. Wood*, 9 S. & R. (Pa.) 294.

This rule invalidating a verdict, if one of the counts in the declaration is faulty, has sometimes been evaded by amending the verdicts by the minutes of the judge, so as to take it only upon such counts as were sufficient. 2 Saund. 171, note; 1 Burrill's N. Y. Pr. 243; *Chitty's Pr.* 922; *Empson v. Griffin*, 11 Ad. & El. 186; *Reg v. Virrier*, 12 Ad. & El. 317; *Grant v. Astle*, 2 Doug. 722; *Eddowes v. Hopkins*, 1 Doug. 377; *Lewin v. Edwards*, 9 M. & W. 720; *Spencer v. Goter*, 1 H. Bl. 78; *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Cornwall v. Gould*, 4 Pick. (Mass.) 446; *Barnard v. Whiting*, 7 Mass. 358; *Glines v. Smith*, 48 N. H. 259; *Sayre v. Jewett*, 12 Wend. (N. Y.) 135; *Baker*

v. Rand, 13 Barb. (N. Y.) 152; *Descamps v. Dutihl*, 4 Yeates (Pa.) 442; and see *Small v. Rogers*, 46 N. H. 177.

Thus, in *Baker v. Sanderson*, 3 Pick. (Mass.) 348, *Wilde, J.*, said: "The rule is, that where there is but one cause of action, and there are several counts, and a general verdict is returned, the court will not arrest the judgment, although one count be bad, but will allow the verdict to be altered so as to refer to the good count. So, if the evidence supports one count and not the others, no new trial will be granted, but judgment will be entered according to the verdict. For as there is but one cause of action, it is immaterial on which count the verdict is taken, or whether it be general or special." And see *Barnard v. Whiting*, 7 Mass. 358.

In *Cornwall v. Gould*, 4 Pick. (Mass.) 446, *Wilde, J.*, again observed: "The rule is, that when there are several counts for the same cause of action, and a general verdict is returned, it may be altered so as to apply to any one count, because such alteration cannot prejudice the defendant on the question of damages." In order, however, that the verdict may be sustained by this practice of amendment, there should be something to show that it was rendered on the good counts alone. *Hemmenway v. Hickes*, 4 Pick. (Mass.) 497; *Dryden v. Dryden*, 9 Pick. (Mass.) 546; *McKee v. Bartley*, 9 Pa. St. 189. And see *Glines v. Smith*, 48 N. H. 529.

However, where a verdict is not entered generally on all the counts, but specially on one count which is good, such verdict will be upheld though all the other counts be faulty. *Dougherty v. St. Louis, etc., R. Co.*, 62 Mo. 554.

In *Bess v. Shepherd*, 2 Bibb (Ky.) 226, there is a dictum to the effect that, "where there are several counts in a declaration, one of which is faulty, and entire damages are given, the verdict is good." This seems to be in conflict with the common-law doctrine as set forth above. The court continued: "But where the finding is distinctly upon a bad count, though there be good ones in the declaration, the court cannot give judgment thereon, but must award a *venire facias de novo*."

But One Cause of Action.—Where there is but one cause of action, although set out in several counts to meet any possible state of facts developed in the evidence, if there be one good count in the petition, the verdict will be upheld. *West v. Platt*, 127 Mass. 367; *Brownell*

v. Pacific R. Co., 47 Mo. 239; *Owens v. Hannibal, etc., R. Co.*, 58 Mo. 394; *McKee v. Calvert*, 80 Mo. 348; *Glines v. Smith*, 48 N. H. 529.

Statutes in some of the states have changed this common-law rule that where there are several counts in a declaration, and one of them be faulty, and the verdict, being for the plaintiff, does not indicate upon which of the counts it was founded, it is necessary to arrest judgment. Thus, in *Alabama*, a statute was enacted in 1824, entitled "an act to regulate pleadings at common law," providing "that no cause shall hereafter be arrested, reversed, or otherwise set aside, after verdict or judgment, for any matter on the face of the pleadings not previously objected to; provided the declaration contains a substantial cause of action, and a material issue be joined thereon." Under this statute, in *Harris v. Purdy*, 1 Stew. (Ala.) 231, it was held that a general verdict on good and bad counts in an action for slander, must be sustained.

By statute in *Illinois*, it is provided that an entire verdict given on several counts shall not be set aside nor reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict. *Bradshaw v. Hubbard*, 6 Ill. 390; *Snyder v. Gaither*, 4 Ill. 91; *Davis v. Taylor*, 41 Ill. 405; *Missouri, etc., Tel. Co. v. Sioux City Bank*, 74 Ill. 217; *Reece v. Smith*, 94 Ill. 362; *James v. Dexter*, 113 Ill. 654; *Gebbie v. Mooney*, 22 Ill. App. 369; *Shreffler v. Nadelhoffer*, 133 Ill. 536.

The *Indiana Rev. Stat.* (1843), p. 732, § 322, provide that, "when a general verdict is given on the trial of any civil action for the plaintiff, in which some of the counts in the declaration are bad, and any one of them is good, judgment on the verdict for that reason shall not be arrested or reversed in the superior court, but that on the trial the court, at the request of the defendant, may instruct the jury to disregard any such faulty count."

In *Newell v. Downes*, 8 Blackf. (Ind.) 523, the court, citing this statute, declined to reverse a judgment rendered by the lower court in an action for slander, on account of a defect in one of the counts contained in the plaintiff's declaration.

In *Virginia*, the legislature have enacted that where there are several counts, one of which is faulty, the defendant, instead of demurring to it as

at common law would be proper, may ask the court to instruct the jury to disregard it; yet, if entire damages be given, the verdict shall be good. *Virginia* Code 1873, ch. 173, § 12.

Defective Count—Criminal Cases.—In criminal cases, it has been held that a single good count in an indictment will be sufficient to sustain a general verdict; the presumption being that the jury were controlled in their action by a reference to the good count or counts. See *INDICTMENT*, vol. 10, p. 599. See also *State v. Coleman*, 5 Port. (Ala.) 40; *Baker v. State*, 30 Ala. 521; *Hornsby v. State*, 94 Ala. 55; *State v. Tuller*, 34 Conn. 280; *Hiner v. People*, 34 Ill. 297; *Mead v. State*, 53 N. J. L. 601; *Arien v. State*, 18 N. H. 563; *Glines v. Smith*, 48 N. H. 259; *Kane v. People*, 8 Wend. (N. Y.) 203; *Guenther v. People*, 24 N. Y. 100; *People v. Curling*, 1 Johns. (N. Y.) 321; *State v. Carter* (N. Car. 1893), 18 S. E. Rep. 517; *State v. Lee* (N. Car. 1894), 19 S. E. Rep. 375; *Brice v. State*, 2 Overt. (Tenn.) 254; *Taylor v. State*, 3 Heisk. (Tenn.) 460. But where there has been a demurrer to the defective counts, which has been improperly overruled, a verdict rendered on all counts will not be sustained, *Avirett v. State*, 76 Md. 510; and in *Virginia* it has been held that this rule of practice in criminal cases, sustaining an indictment if it contains a single good count, is not applicable where the indictment is for a crime punishable by imprisonment in the penitentiary, as in such cases the jury determines the term of imprisonment, and the evidence on the bad count might have aggravated the punishment. *Mowbray v. Com.*, 11 Leigh (Va.) 643; *Clere v. Com.*, 3 Gratt. (Va.) 586.

Duplicity in Indictment.—This may result first: from charging the same offense twice, or second: from charging two distinct offenses in the same or different counts of the same indictment. The first instance mentioned is regarded as a mere formal defect which cannot be taken advantage of after verdict. *State v. Holmes*, 28 Conn. 230; *Lazier v. Com.*, 10 Gratt. (Va.) 708. In this regard, see also the case of *Kilbourn v. State*, 9 Conn. 560. In this case, we think that the duplicity was clearly of the latter variety, for the appeal was from a judgment of the county court upon an indictment containing two counts, acquitting the defendant upon one and declaring him guilty upon the

other. It is so regarded in the argument of the counsel of the plaintiff in error, who contended that the complaint was irregular because it did embrace two distinct offenses. Naturally, in endeavoring to set aside the judgment he does not advert to the fact which we establish below, that under such circumstances a verdict declaring the defendant guilty on one count and innocent on the other, is good. The supreme court, in its opinion, seems to have confounded the two kinds of duplicity which we mention, as it simply disposes of the objection made to the verdict on account of its duplicity by stating that such objection can only be taken advantage of by special demurrer; an observation which would have been true if applied to the sort of duplicity resulting from repetition or reiteration.

In order that a verdict may operate to cure the second sort of duplicity mentioned, it must declare the defendant guilty on one count, or of one offense, and not guilty on or of the other. *State v. Miller*, 24 Conn. 522; *Com. v. Packard*, 5 Gray (Mass.) 101; *Com. v. Holmes*, 103 Mass. 440; *Com. v. Adams*, 127 Mass. 15; *State v. Merrill*, 44 N. H. 624; *People v. Wright*, 9 Wend. (N. Y.) 193.

Action on Award.—In *Kingsley v. Bill*, 9 Mass. 198, it is held that a declaration in an action upon an award, which alleges no promise of the parties to perform the award, may nevertheless be held good after verdict; but that a declaration which contains no allegation that the award was published or made known to the defendant except by bringing the action, must be held to be fatally bad.

Defective Plea.—Where in an action of debt for rent the defendant pleaded entry by the plaintiff, but did not aver expulsion, but after verdict, issue having been taken on *non-intravit* and found for the defendant, the plea was held to be good. *Reynolds v. Buckle*, Hob. 326a. See also *Bacon's Abr.*, Pleas and Pleading I., 2; *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

So a plea of accord and satisfaction, which fails to state that the matter relied upon as an accord was accepted by the plaintiff as a satisfaction, is bad on demurrer, but good after a verdict sustaining it. *Wilkerson v. Bruce*, 37 Mo. App. 156.

Defective Replication.—See *Dignam v. Baily*, L. R., 6 Q. B. 47; *Griffin v. Pratt*, 3 Conn. 513.

independent of statutory provision;¹ this rule, however, being subject to the reasonable qualification that the fact, which is presumed to have been proved, must always be such as can be implied from the averments on the record by fair and reasonable intendment.² Hence, it results that an intendment which is inconsistent with the allegations on the record will never be made by the court.³

Omission of Essential Element.—Where a party totally omits to allege in the pleading, either expressly or impliedly, a matter essential to his action or defense, such defect is irremediable and entirely beyond the salutary effects of a verdict.⁴

Criminal Cases.—In *England*, it is maintained that under the doctrine of intendment after verdict, as recognized at common law, there is no distinction between civil and criminal pleadings, as to the defective allegations which are aided by the verdict. *Heymann v. Reg.*, L. R., 8 Q. B. 105; *Reg. v. Aspinall*, 2 Q. B. Div. 48; *Bradlaugh v. Reg.*, 3 Q. B. Div. 607; *Reg. v. Bowen*, 13 Ad. & El. N. S. 795.

Bradwell, J., in delivering the opinion in *Bradlaugh v. Reg.*, 3 Q. B. Div. 607, said that at common law there was no difference between civil and criminal pleadings, except that, according to the spirit in which the law is administered, if there were a difference, more strictness would be required in criminal than in civil cases.

In the *United States* it has been held that an indictment which is bad on demurrer must be held insufficient upon a motion in arrest of judgment, thus excluding, in such cases, the doctrine of intendment after verdict in a criminal prosecution. *Com. v. Childs*, 13 Pick. (Mass.) 200; *Com. v. Bean*, 14 Gray (Mass.) 54; *State v. Barrett*, 42 N. H. 466.

When Doctrine of Intendment Applicable.—It is clearly obvious that the doctrine of intendment after verdict can have no application, unless the verdict be given for the party in whose favor the intendment is to be made, since it is for the purpose of supporting the verdict that the court indulges the presumption arising upon the averments on the record. 1 *Chitty's Pl.* 705; *Legg v. Dunlevy*, 10 Mo. App. 461.

1. 1 *Saund.* 228, n. 1; 1 *Chitty's Pl.* 712. See also *Hudson v. Nickerson*, 5 M. & W. 437; *Sheen v. Rickie*, 5 M. & W. 175; *Harris v. Goodwyn*, 2 M. & G. 405; *Adams v. Jones*, 12 Ad. & El. 455; *Rex v. Burrell*, 12 Ad. & El. 460.

2. *Tidd's Pr.* 199; 1 *Chitty's Pl.* 705; 1 *Wm. Saund.* 228, n. 1; *Spieries v. Parker*, 1 T. R. 141; *Nerot v. Wallace*, 3 T. R. 25; *Jackson v. Pesked*, 1 M. & S. 237; *Taylor v. Devey*, 7 Ad. & El. 409; 34 E. C. L. 131; *Davis v. Black*, 1 G. & D. 432; *Harris v. Goodwyn*, 2 M. & G. 405; 40 E. C. L. 434; *Griffin v. Pratt*, 3 Conn. 513; *Dale v. Dean*, 16 Conn. 579; *Dobson v. Campbell*, 1 Sumn. (U. S.) 319; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 180; *Smith v. Curry*, 16 Ill. 148; *Farrington v. Blish*, 14 Me. 423; *Little v. Thompson*, 2 Me. 230; *Williams v. Hingham, etc.*, *Turnpike Co.*, 4 Pick. (Mass.) 345; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 438; 8 Am. Dec. 428; *Walpole v. Marlow*, 2 N. H. 386; *Bell v. Stevens*, 28 N. H. 118; *White v. Concord R. Co.*, 30 N. H. 188; *New Hampshire F. Ins. Co. v. Walker*, 30 N. H. 324; *Colebrook v. Merrill*, 46 N. H. 160; *Schuster v. Frendenthal*, 74 Tex. 53; *Vadakin v. Soper*, 1 Aik. (Vt.) 287; *Harding v. Cragie*, 8 Vt. 501; *Chichester v. Vass*, 1 Call (Va.) 83; 1 Am. Dec. 509.

3. 1 *Chitty's Pl.* 712; *Warren v. Harris*, 7 Ill. 311.

Thus, if a declaration expressly shows that a condition precedent was not performed by the plaintiff, and alleges matter which is no excuse for the non-performance, the declaration will be bad after verdict. *Worsley v. Wood*, 6 T. R. 710.

4. 1 *Wm. Saund.* 228 c; *Rushton v. Aspinall*, 2 Doug. 679; *Buxendin v. Sharp*, 2 Salk. 662; *Crouther v. Oldfield*, 1 Salk. 365; *Weston v. Mason*, 3 Burr. 1728; *Spieries v. Parker*, 1 T. R. 141; *Bishop v. Hayward*, 4 T. R. 472; *Farnworth v. Bishop of Chester*, 4 B. & C. 555; *Griffin v. Pratt*, 3 Conn. 513; *Richards v. Travelers' Ins. Co.*, 80 Cal. 505; *Barron v. Frink*, 30 Cal. 487; *Morgan v. Menzies*, 60 Cal. 341; *Newman v.*

Perrill, 73 Ind. 154; Jenkins v. Rice, 84 Ind. 342; Lavery v. State, 109 Ind. 217; Smith v. Smith, 106 Ind. 43; Dean v. Dean (Ky. 1886), 1 S. W. Rep. 811; Worster v. Canal Bridge, 16 Pick. (Mass.) 549; Carlisle v. Weston, 1 Met. (Mass.) 26; Williams v. Hingham, etc., Turnpike Co., 4 Pick. (Mass.) 341; Crocker v. Whitney, 10 Mass. 316; Hurst v. Ash Grove, 96 Mo. 172; Frazer v. Roberts, 32 Mo. 457; Bayard v. Malcolm, 2 Johns. (N. Y.) 569; 3 Am. Dec. 450; White v. Concord R. Co., 30 N. H. 188; Bedell v. Stevens, 28 N. H. 118; Smith v. Eastern R. Co., 35 N. H. 356; Walpole v. Marlow, 2 N. H. 386; Elliott v. Heath, 6 N. H. 428; Sewall's Falls Bridge v. Fisk, 23 N. H. 180; Corey v. Bath, 35 N. H. 530; Cornelius v. Molloy, 7 Pa. St. 295; Schuster v. Frendenthal, 74 Tex. 53; Needham v. McAuley, 13 Vt. 69; Chichester v. Vass, 1 Call (Va.) 83; 1 Am. Dec. 509.

The rule is thus stated by Ld. Ch. B. Gilbert (Hist. C. Pl. 139): "If anything essential to the plaintiff's action be not set forth there, though the verdict be found for him, he cannot have judgment, because, if the general part of the declaration be not put in issue, the verdict can have no relation to it, and if it had been put in issue it might have been found false, and such matter as is the foundation of the action not being alleged, there is no ground for judgment; as if an action of trespass be brought by a master for beating his servant, and it does not show *per quod servitium amisit*. This is ill after verdict. Whatever is essential to the gist of the action cannot be cured by verdict. Such substantial facts must be alleged so that the defendant may traverse them distinctly if he pleases, for where he may traverse the whole so may he traverse each substantial part in order to put the weight of the action upon anything that will put an end to it."

Chancellor Kent, in rendering the opinion in Bartlett v. Crozier, 17 Johns. (N. Y.) 438, said: "The court are never to presume a cause of action after verdict, when none appears."

Distinction Between Defective Statement of Title, and Statement of Defective Title.—The rule, as usually laid down, is, that a verdict will cure the defect where the plaintiff makes a defective statement of title, but not where he either states a defective title or totally omits to state any title or cause of action whatever. Rushton v. Aspinall, 2 Doug. 679; Crouther v. Old-

field, 1 Salk. 365; Spieres v. Parker, 1 T. R. 141; Carlisle v. Weston, 1 Met. (Mass.) 26; Reid v. Chelmsford, 16 Pick. (Mass.) 128; Walpole v. Marlow, 2 N. H. 385; Elliott v. Heath, 6 N. H. 428; Bedell v. Stevens, 28 N. H. 122; Sawyer v. Whittier, 2 N. H. 316; Addington v. Allen, 11 Wend. (N. Y.) 385.

The true distinction between a defective title and a title defectively stated is this: when any particular fact is essential to the validity of the plaintiff's title, if such fact is neither expressly stated in the declaration nor necessarily implied from those facts which are stated, the title must be considered as defective and judgment must be arrested; but if such fact, although not expressly stated, be necessarily implied from what is stated, the title must be considered as only defectively stated, and the defect is cured by verdict. Walpole v. Marlow, 2 N. H. 385; Bedell v. Stevens, 28 N. H. 122.

Statement of Consideration.—A good illustration of the operation of the rule which distinguishes between the statement of a defective or no cause of action, and the defective statement of a cause of action, is furnished by the established practice regarding the averment of a consideration. Thus, though a defective statement of consideration will be cured by verdict, Hendrick v. Seely, 6 Conn. 176; Martin v. Blodgett, 1 Aik. (Vt.) 375; yet a declaration in assumpsit which does not allege any, or which does allege an illegal consideration, is fatally defective, and cannot be cured by verdict. Hitchcock v. Page, 1 Root (Conn.) 293; Russell v. Slade, 12 Conn. 455; Vadakin v. Soper, 1 Aik. (Vt.) 287; Harding v. Cragie, 8 Vt. 501; Mosely v. Jones, 5 Munf. (Va.) 23.

Action on Negotiable Instrument.—Actions of assumpsit on negotiable instruments form an exception to the rule requiring the averment of a consideration, as it is a universal rule of the law that in such obligations the consideration is presumed. Hemmenway v. Hickes, 4 Pick. (Mass.) 499.

Omission of Essential Element.—Where the plaintiff brought an action of trespass on the case, as being entitled to the reversion of a certain inclosure, to which the declaration alleged a certain injury to have been committed, but failed to allege that the reversion was in fact prejudiced, or to show any grievance which in its nature would necessarily prejudice the reversion, the

Collateral Parts of Pleading.—Defects, omissions, or imperfections, though in form only, appearing in some collateral parts of the pleading which were not in issue between the parties, may not be cured by the application of this doctrine of intendment, as there is no room for the presumption that the defect or omission was supplied by proof.¹

court arrested the judgment after a verdict had been given in the plaintiff's favor, and held the fault to be one which the verdict could not cure. *Jackson v. Pesked*, 1 M. & S. 237.

Lack of "Scienter."—In an action for deceit in the sale of a newspaper establishment, it was held that the declaration must expressly aver that the defendant made the affirmation fraudulently, falsely, or knowingly, or it will be bad, and the omission of these words will not be supplied by the concluding part of the count that, by reason of said affirmation, the plaintiff was fraudulently and falsely deceived, etc. The lack of such allegation of fraud or the *scienter* is not aided by verdict. *Bayard v. Malcolm*, 2 Johns. (N. Y.) 569; 3 Am. Dec. 450.

In an action on the case for fraudulent misrepresentation by means of which a loss results, goods having been sold on credit, failure to aver that the representation was made with intent to defraud and deceive was deemed fatal after verdict. *Addington v. Allen*, 11 Wend. (N. Y.) 374.

Identity of Defendant with Injury.—In a suit for damages resulting from the accidental overturning of the plaintiff's carriage, a complaint which failed to set forth the defendant's connection with the mishap, was ruled to be fatal after verdict. *Lee v. Emery*, 10 Minn. 187.

Identity of Plaintiff with Injury.—In an action of libel, judgment was arrested because it was not averred that the libel was of or concerning the plaintiff. *Lowfield v. Bancroft*, Stra. 934.

Averment of Special Damage.—In *Sawyer v. Whittier*, 2 N. H. 315, it was held in an action of trespass on the case, brought against a sheriff for a false return, that the verdict did not remedy the want of an allegation of the particular damage resulting to the plaintiff from the falsity of the return.

Want of Issue.—Where a party to an action wholly omits to plead, there will be no room for intendment and hence no ground for aid by verdict. *Woods Adm. v. Woods*, Minor (Ala.) 45; *Chan-*

ning v. Caskaden, Minor (Ala.) 74; *Herbert v. Wich*, 45 Md. 474; *Pratt v. Phillips*, 4 Yeates (Pa.) 467 (which has been overruled by *Sauerman v. Wick-erly*, 17 S. & R. (Pa.) 116).

Actions Under Statutes.—Where the plaintiff would entitle himself to an action under statute, he must allege all the facts upon which the statute grounds the action, and if he fails to do this in his declaration, he cannot have judgment. *Spieries v. Parker*, 1 T. R. 141; *Williams v. Hingham*, etc., *Turnpike Co.*, 4 Pick. (Mass.) 341; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 456; 8 Am. Dec. 428.

Penal Statutes.—It is a general rule of pleading that in declaring upon a penal statute, the offense must be brought within the statutory description. *Little v. Thompson*, 2 Me. 230.

Criminal Statutes.—It is also a general rule that indictments upon statutes must state all the circumstances in the act which constitute the statutory offense, so as to bring the defendant directly within the operation of the statute. An indictment lacking in this respect will not be aided by verdict. 1 *Chitty's Cr. L.* 232; *Com. v. Morse*, 2 Mass. 127; *Brown v. Com.*, 8 Mass. 65; *Com. v. Collins*, 2 Cush. (Mass.) 556; *State v. Gove*, 34 N. H. 515; *State v. Barrett*, 42 N. H. 466.

Statutory Defense.—To a declaration against a railroad company for money had and received and on accounts stated, the company pleaded that the action was brought after the passing of an Incorporating Act, and that no notice had been given pursuant to the statute. This plea was held bad after verdict because no averment was made that the action fell within the class described in the statute. *Garton v. Great Western R. Co.*, El. Bl. & El. 837; 96 E. C. L. 836.

1. 1 Wm. Saund. 228 b; *Dale v. Dean*, 16 Conn. 579; *Bailey v. Clay*, 4 Rand. (Va.) 346.

As where an administrator brought debt on a bond and did not allege in the declaration by whom administra-

b. BY STATUTE.—In *England* and in the *United States*, many defects in pleading may be disregarded after verdict by operation of the Statutes of Jeofails.¹ These statutes operate to cure all

tion was granted, and the plaintiff pleaded *non est factum*, and there was a verdict for the plaintiff, the verdict was held not to cure this defect by the common law because it was not necessary that it should be proved on the trial by whom administration was granted, the title of the administrator not being in question by the issue. *Gidley v. Williams*, 1 Salk. 37.

1. For English Statutes of Jeofails, see 1 Chitty's Pl. 715; Tidd's Pr. 923.

We do not deem it necessary to set forth in terms the Statutes of Jeofails as they exist in the various states. Suffice it to say that their general import is the curing of all insubstantial errors, or, as it is frequently expressed, "No judgment shall be reversed or arrested by reason of any defect or error in the pleadings which does not affect the substantial rights of the parties." See *Cotes v. Davenport*, 9 Iowa 227; *Smith v. Milburn*, 17 Iowa 30; *Doniphan v. Street*, 17 Iowa 317; *State v. Raymond*, 20 Iowa 582; *Weil v. Martin*, 24 Hun (N. Y.) 645; *Spies v. Roberts*, 50 N. Y. Super. Ct. 305; *Moore v. Edmiston*, 70 N. Car. 510; *Gorham v. Bellamy*, 82 N. Car. 496; *White v. Morris*, 107 N. Car. 92; *State v. Robinson*, 35 N. J. L. 71; *Connors v. State*, 45 N. J. L. 211; *Harkness v. McClain*, 8 Utah 52; *Slaughter v. Com.*, 13 Gratt. (Va.) 769.

Thus, it is maintained to be a rule of civil pleading that an error which is demurrable and amendable is insufficient in arrest of judgment. *Haverhill Loan, etc., Assoc. v. Cronin*, 4 Allen (Mass.) 141; *U. S. v. Smith*, 17 Fed. Rep. 512.

In pursuance of this rule it has been held that where the damages were left blank in the declaration, but were laid in the writ, it was held that the declaration was amendable by the writ, and after verdict the amendment must be considered as made. *Malone v. Donally, Minor (Ala.)* 12; *Stephens v. White*, 2 Wash. (Va.) 203.

Several of the states have statutes providing that a verdict shall cure the omission of the averment of any matter without which the jury ought not to have given such verdict, thus adopting the common law doctrine of in-

tendment. *Gander v. State*, 50 Ind. 539; *Robinett v. Morris*, Hard. (Ky.) 99; *Hamer v. Rigby*, 65 Miss. 41; *Welsh v. Bryan*, 28 Mo. 30; *Addington v. Allen*, 11 Wend. (N. Y.) 387; *Laughlin v. Flood*, 3 Munf. (Va.) 255.

Where a bond made by two is sued upon, but only one of the obligors sued, and two pleas are filed, the first alleging payment by one obligor, and the other alleging payment by the other obligor, and the single replication professing to answer both pleas was filed, on which issue was taken by the defendant, and the verdict was rendered for the plaintiff; it was held that though the replication was defective, yet the mispleading was cured by the verdict by virtue of the Statute of Jeofails. *Barrow v. Wade*, 7 Smed. & M. (Miss.) 49.

England—Criminal Actions.—It seems that the English Statutes of Jeofails were not regarded as applying to criminal actions. See, to this effect, 1 Chitty's Pl. 716; 2 Tidd 956; 2 Hale P. C. 193; *Rex v. Atkins*, 3 Mod. 3; *Rex v. Sparks*, 3 Mod. 78; *Atcheson v. Everitt*, 1 Cowp. 382; *Com. v. Morse*, 2 Mass. 128; *Brown v. Com.*, 8 Mass. 59; *State v. Squire*, 10 N. H. 558; *Com. v. Child*, 13 Pick. (Mass.) 200; *State v. Gove*, 34 N. H. 516; *State v. Barrett*, 42 N. H. 470. See also *Reg. v. Tutchin*, 6 Mod. 268.

United States—Criminal Actions.—In the *United States* the rule, as established by the following adjudications, approves the application of the Statutes of Jeofails to criminal cases: *Gandy v. State*, 81 Ala. 68; *People v. Swenson*, 49 Cal. 388; *People v. Monteith*, 73 Cal. 7; *Stone v. People*, 3 Ill. 326; *State v. Craighead*, 32 Mo. 561; *State v. Sides*, 64 Mo. 383; *Com. v. Walton*, 11 Allen (Mass.) 238; *Gray v. People*, 21 Hun (N. Y.) 140; *People v. Robinson*, 2 Park. Cr. Rep. (N. Y.) 311; *Larison v. State*, 49 N. J. L. 258; *State v. Robinson*, 35 N. J. L. 71; *Connors v. State*, 45 N. J. L. 211; *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Trimble v. Com.*, 2 Va. Cas. 143; *Com. v. Erwin*, 2 Va. Cas. 337; *Aldridge v. Com.*, 2 Va. Cas. 447; *Com. v. Bennet*, 2 Va. Cas. 235.

Thus, it has been held in *Missouri* that the failure of the foreman of the

merely formal errors,¹ even including those which occur in some

grand jury to certify under his hand an indictment to be a true bill, is no cause for the arrest of judgment after the trial and conviction. *State v. Burgess*, 24 Mo. 381; 69 Am. Dec. 433; *State v. Harris*, 73 Mo. 287; *State v. Mertens*, 14 Mo. 95.

And in *Virginia*, it has been held that where an indictment filled the whole sheet of paper and was then folded in another half sheet of the same size, on which half sheet the attorney indorsed "Commonwealth v. Joseph Burgess, indictment," and immediately below, in the handwriting of the foreman of the grand jury, was indorsed, "A true bill, Robert Hamilton, Foreman," although the half sheet of paper was blank except the indorsement, and although it was not otherwise attached to the indictment than being folded around it, yet the indictment enveloped by it must be considered as the indictment which was passed on by the grand jury, and on which verdict was found by the jury. Though the objection was a good one, it would come too late after verdict. *Burgess v. Com.*, 2 Va. Cas. 483.

The objection that an indictment has no caption, or that it does not show in what court it was presented, or found, cannot be raised after verdict by a motion in arrest of judgment. *Gray v. People*, 21 Hun (N. Y.) 140.

Where, in a prosecution for enticing away a servant or a minor child, the complaint is wanting in that certainty of description which is essential to constitute a formal charge of crime, but is demurrable and amendable, the defect is not available in this court, unless duly objected to it in the court below. *Gandy v. State*, 81 Ala. 68.

An indictment, under a statute which makes it a crime to "send or convey" an insulting, indecent, lascivious, disgusting, offensive, or annoying communication to any female, which charges that the prisoner did "send and convey," is technically defective, the words "send" and "convey" importing a different mode of transmission; but this defect is amendable and, therefore, to be available the objection must be taken by demurrer or motion to quash before the jury is sworn. *Larison v. State*, 49 N. J. L. 256.

Where a complaint charged the keeping of a tenement or shop used for

the unlawful keeping and sale of intoxicating liquors, the objection that this charge is bad because made in the alternative, is merely formal within the meaning of the statute which declares any objection to a complaint, indictment, or other criminal process for a formal defect, apparent on its face, shall be taken by demurrer or motion to quash before a judgment has been rendered by a trial justice or a police court, or a jury has been sworn in the superior court. It is within the power of the legislature to pass an act providing that formal objections to complaints and indictments must be made at a particular stage of the proceedings. *Com. v. Walton*, 11 Allen (Mass.) 238.

The following cases hold that where the error in the pleading is demurrable or amendable, it cannot be raised for the first time in arrest of judgment. *U. S. v. Smith*, 17 Fed. Rep. 510; *Maguire v. State*, 47 Md. 485; *State v. Gedicke*, 43 N. J. L. 86; *Com. v. Kressler*, 12 Phila. (Pa.) 628.

Maine.—In this state the same view is taken of the Statutes of Jeofails, with reference to their application to criminal cases, as the English courts have held. In *Webster's Case*, 5 Me. 432, it was declared to be a well established doctrine that none of the Statutes of Jeofails extend to indictments or proceedings in criminal cases. In this instance it was held that a defective indictment is not cured by verdict, if the omitted words a "true bill" are necessary to render the indictment good and legal, and the defendant's objection on this ground is as available to him on a motion in arrest of judgment as it could have been in any earlier stage of the case.

1. *Collins v. Gibbs*, 2 Burr. 899; *Bowdwell v. Parsons*, 10 East 359; *Higgins v. Highfield*, 13 East 407; *Andre v. Chicago*, etc., R. Co., 30 Iowa 107; *State v. Palmer*, 32 La. Ann. 565; *Coffin v. Coffin*, 2 Mass. 364; *Weil v. Martin*, 24 Hun (N. Y.) 645; *Spies v. Roberts*, 50 N. Y. Super. Ct. 305; *White v. Morris*, 107 N. Car. 92; *Moore v. Edmiston*, 70 N. Car. 510; *Gorman v. Bellamy*, 82 N. Car. 496; *Harkness v. McClain*, 8 Utah 52.

In an indictment under the *New Jersey Criminal Act for Burglary*, it was held to be unnecessary to aver that the crime was committed at any particular

collateral part of the pleading;¹ but defects affecting the essential merits of the controversy are not remedied. Thus, where there is a total omission to state matters essential to a cause of action, or defense, or where there is a nonjoinder or want of issue, the error will be fatal.²

hour of the night; the general description "by night" being sufficient. If such description were erroneous, it could not, in consequence of the statute, be taken advantage of on writ of error, as such defect could not have prejudiced the defendant in his defense on the merits. *State v. Robinson*, 35 N. J. L. 71. Where the defendant was convicted upon an indictment under the 78th section of Criminal Act, which charged him with an assault upon Louis Noll, with intent feloniously, willfully, and of malice aforethought to kill and murder, without specifying particularly the manner with which the intent was manifested, it was held that the defect, if it existed, was merely formal and did not prejudice the defendant in maintaining his defense on the merits, and that, therefore, in consequence of the 89th section of the Criminal Procedure Act, judgment against him should be affirmed. *Connors v. State*, 45 N. J. L. 211.

Where, in a presentment, the offense is charged with a sufficient certainty for judgment to be given thereon according to the very right of the case, any defect in the presentment will be aided by verdict. Thus, where an indictment against S. for keeping an office and transacting business as agent of the Protection Insurance Company of Hartford, incorporated and authorized by the State of *Connecticut*, without having a license therefor, did not allege that the said company was an insurance company, the error was held to be cured by verdict. *Slaughter v. Com.*, 13 Gratt. (Va.) 767.

Misjoinder, or Informal Joinder of Issue.—The Statutes of Jeofails, after verdict, operate to cure this defect. *Myn v. Cole*, Cro. Jac. 87; *Hocker v. Davis*, 2 T. B. Mon. (Ky.) 118; *Morrison v. Hart*, Hard. (Ky.) 157; *Chichester v. Daggett*, 2 How. (Miss.) 863; *State v. Smith, Peck* (Tenn.) 165; *Moore v. Mauro*, 4 Rand. (Va.) 488; *White v. Clay*, 7 Leigh (Va.) 68; *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 361.

Want of Similiter.—It was once held that the want of a *similiter* was not

aided by the verdict. *Cooper v. Spencer*, 1 Stra. 641; 2 Wm. Saund. 319. But now, by the operation of the Statutes of Jeofails, the omission of a *similiter* will not vitiate the proceedings, after verdict. *Hall v. Banythan*, Cro. Jac. 550; *Ripley v. Coolidge*, Minor (Ala.) 11; *Babcock v. Huntington*, 2 Day (Conn.) 396; *State v. Smith, Peck* (Tenn.) 165; *Brewer v. Tarpley*, 1 Wash. (Va.) 363; *Stone v. VanCurler*, 2 Vt. 115.

1. Wm. Saund. 228 b; *Gidley v. Williams*, 1 Salk. 37.

2. **Omission of Essential Element.**—*Rushton v. Aspinall*, 2 Doug. 679; *Buxendin v. Sharp*, 2 Salk. 662; *Crouther v. Oldfield*, 1 Salk. 365; *Weston v. Mason*, 3 Burr. 1728; *Spiers v. Parker*, 3 Wils. 275; *Bishop v. Hayward*, 4 T. R. 472; *Decker v. Bishop, Morr.* (Iowa) 87; *Clark v. Whittaker Iron Co.*, 9 Mo. App. 446; *Weil v. Greene County*, 69 Mo. 281; *Boyles v. Overby*, 11 Gratt. (Va.) 202; *Braxton v. Lipscomb*, 2 Munf. (Va.) 282; *Buckner v. Blair*, 2 Munf. (Va.) 336; *Green v. Dulany*, 2 Munf. (Va.) 520. See also *Tompkins v. Branch Bank*, 11 Leigh (Va.) 387; *Mason v. Farmers' Bank*, 12 Leigh (Va.) 90; *Ross v. Milne*, 12 Leigh (Va.) 217; 37 Am. Dec. 646.

Non-joinder or Want of Issue.—*Sayer v. Pocock*, 1 Cowp. 407; *Channing v. Caskaden*, Minor (Ala.) 73; *Hogue v. Lewellen*, 42 Miss. 302; *Stevens v. Taliaferro*, 1 Wash. (Va.) 156; *Totty v. Donald*, 4 Munf. (Va.) 430; *Sydnor v. Burke*, 4 Rand. (Va.) 161; *Lockridge v. Carlisle*, 6 Rand. (Va.) 21; *M'Million v. Dobbins*, 9 Leigh (Va.) 422. **Compare** *Whiting v. Cockran*, 9 Mass. 532.

Upon a declaration containing eight counts, issue was joined as to some, a demurrer filed as to others, one count remaining unanswered. The jury rendered a general verdict and on appeal the objection was made that there had been a trial without issue. The supreme court held that as one count in the declaration was unanswered, if evidence was given on that count that as to it there was a trial without issue, which proceeding was erroneous, and as there

Errors and irregularities in the course of a trial, other than those which occur in the pleadings, are also aided after verdict by the Statutes of Jeofails, provided they are such as do not prejudice the substantial rights of the adverse party.¹ Of such nature have been held to be irregularities in the writ of *venire facias*; or in drawing, summoning, or impaneling jurors;² certain errors in

was nothing to show to which count the evidence was applied, and the finding of the jury in the case was general, that their only course was to reverse the judgment. *Sheil v. Ferriter*, 7 Blackf. (Ind.) 574; *Weirick v. Hoover*, 8 Blackf. (Ind.) 379.

Battle, J., delivering the opinion of the court in *Morehead v. Browne*, 6 Jones (N. Car.) 367, said: "If there be two distinct counts in the declaration, and the plaintiff offers evidence on one of them only, and not on the other, and the court instructs the jury on both, a general verdict on both will be erroneous, for the manifest reason that it does not appear that the verdict was not given, in part at least, upon the count on which there was no evidence. *Jones v. Cooke*, 3 Dev. (N. Car.) 112.

An immaterial issue will not be aided after verdict by the Statutes of Jeofails. *Tidd's Pr.* 920; 2 Wm. Saund. 319 b; *Jones v. Bodimer*, Carth. 371; *Peck v. Hill*, 2 Mod. 137; *Sandback v. Turvey*, Cro. Jac. 585; *Holms v. Broket*, Cro. Jac. 434; *Garland v. Davis*, 4 How. (U. S.) 131; *Magoun v. Lapham*, 19 Pick. (Mass.) 419; *Smith v. Walker*, 1 Wash. (Va.) 135.

1. *Roach v. Hulings*, 16 Pet. (U. S.) 319; *Bancroft v. Stanton*, 7 Ala. 351; *Schlencker v. Risley*, 4 Ill. 483; 38 Am. Dec. 100; *People v. Robinson*, 2 Park. Cr. Rep. (N. Y.) 309. See also *Doniphan v. Street*, 17 Iowa 317; *Weil v. Martin*, 24 Hun (N. Y.) 645; *Spies v. Roberts*, 50 N. Y. Super. Ct. 305; *White v. Morris*, 107 N. Car. 92; *State v. Robinson*, 35 N. J. L. 71; *Harkness v. McClain*, 8 Utah 52; *Slaughter v. Com.*, 13 Gratt. (Va.) 769.

Defective Authentication of Record.—An objection that the authentication of the record was defective, should have been taken advantage of before trial, under the statute declaring that all questions concerning the regularity of proceedings in obtaining changes of venue, and the right of the court to which the change is made to try the cause and execute the judgment, shall be considered as waived after trial and verdict. *Gardner v. People*, 4 Ill. 83.

Defects in the minutes of the court, as to the formal presentation of the indictment in open court by the grand jury, cannot be taken advantage of after verdict. *Jinks v. State*, 5 Tex. App. 68; *Honillion v. State*, 3 Tex. App. 538; *Alderson v. State*, 2 Tex. App. 10.

2. No irregularity in a writ of *venire facias*, or in drawing, summoning, returning, or impaneling the jurors, shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict. *Crawford v. Creagh*, 1 Ala. 592; *State v. Beasley*, 32 La. Ann. 1162; *State v. Watson*, 31 La. Ann. 379; *Com. v. Stowell*, 9 Met. (Mass.) 572; *Amherst v. Hadley*, 1 Pick. (Mass.) 38; *Fowler v. Middlesex County*, 6 Allen (Mass.) 92; *Walker v. Boston*, etc., R. Co., 3 Cush. (Mass.) 20; *Jamieson v. Androscoggin R. Co.*, 52 Me. 413; *State v. Seaborn*, 4 Dev. (N. Car.) 305; *Pittsfield v. Barnstead*, 40 N. H. 477; *Bodge v. Foss*, 39 N. H. 406; *Com. v. Smith*, 2 S. & R. (Pa.) 299; *State v. Jeffcoat*, 26 S. Car. 114.

Grand Jurors.—This rule applies to grand jurors as well as to petit jurors. *State v. Williams*, 3 Stew. (Ala.) 454; *State v. Robinson*, 2 Park. Cr. Rep. (N. Y.) 309; *State v. Ward*, 2 Hawks (N. Car.) 443; *State v. Jeffcoat*, 26 S. Car. 114.

Selection of Jurors.—In *Pressley v. State*, 19 Ga. 192, it was held to be too late to object to a correction of the list of jurors directed by the court in the progress of selecting the jury, if the objection be made after the trial and verdict.

Objections to Competency of Jurors.—It is a well established doctrine that if a party knows of an objection to a juror in season to propose it before trial, and omits to do so, he shall not be allowed to raise the objection after verdict. *Rex v. Sutton*, 8 B. & C. 417; *Hollingsworth v. Duane*, 4 Dall. (U. S.) 353; *Baxter v. People*, 8 Ill. 369; *Presbury v. Com.*, 9 Dana (Ky.) 203; *Hallock v. Franklin County*, 2 Met.

the instructions of the court;¹ and the appearance of an infant party by attorney instead of in person, provided, in this last case, the verdict be in favor of such infant party.²

3. As Evidence.—Where a verdict is sought to be introduced in evidence as proof of the facts upon which it is founded, the general rule is that it is not admissible without judgment, as the judgment may have been arrested or a new trial granted;³ but

(Mass.) 560; *Wassum v. Feeney*, 121 Mass. 93; 23 Am. Rep. 258; *Jeffries v. Randall*, 14 Mass. 205; *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; *Davis v. Allen*, 11 Pick. (Mass.) 468; 22 Am. Dec. 386; *Fox v. Hazelton*, 10 Pick. (Mass.) 277; *Russell v. Quinn*, 114 Mass. 103; *Brown v. Reed*, 81 Me. 158; *Tilton v. Kimball*, 52 Me. 500; *State v. Bowden*, 71 Me. 90; *Stedman v. Batchelor*, 49 Hun (N. Y.) 390; *State v. Ward*, 2 Hawks (N. Car.) 443; *Hayward v. Calhoun*, 2 Ohio St. 165; *Young v. State*, 23 Ohio St. 577; *McCorkle v. Binns*, 5 Binn. (Pa.) 340; 6 Am. Dec. 420; *Poindexter v. Com.*, 33 Gratt. (Va.) 776.

The reason of this rule is clearly expressed by Mr. Justice Shaw, in *Hallock v. Franklin*, 2 Met. (Mass.) 560. He observes: "This rule is founded on good reason. A party litigant, knowing of matter of personal exception to a juror, lies by, taking his chance for a favorable verdict. If when that verdict is against him, he could go back and take the exception, it would work great injustice. By consenting to go on, with a knowledge of the exception, he consents to abide the result whether favorable or unfavorable."

Even though the party to the suit be ignorant of the interest of the juror until after verdict, a new trial will not be granted if the objection was known to his counsel before trial. *Kent v. Charlestown*, 2 Gray (Mass.) 281; *Russell v. Quinn*, 114 Mass. 103.

Similarly, where it was objected that the verdict was insufficient and uncertain because it gave damages for prospective injuries which the defendant would sustain, it was held that the verdict might have been amended, and that it was too late to take advantage of this exception after it had lain by until it was too late for the party defendant to have it corrected in the court below. *State Bank v. Batty*, 5 Ill. 200.

Objection to Form of Verdict.—An objection to the form of a verdict, which might have been remedied by the court

which tried the cause, if it had been made at the time of its rendition, cannot be taken in the appellate court. *Roach v. Hulings*, 16 Pet. (U. S.) 319; *Schlencker v. Risley*, 4 Ill. 483; 38 Am. Dec. 100; *State Bank v. Batty*, 5 Ill. 200; *Pedan v. Hopkins*, 13 S. & R. (Pa.) 45.

1. Thus, the court may refuse to set aside the verdict on account of alleged erroneous instruction, unless it is satisfied that a real substantial injury has been done; as, that but for such erroneous instruction, a different conclusion would have been reached by the jury. *Carruthers v. McMurray*, 75 Iowa 173; *State v. Chase*, 37 La. Ann. 165; *Dunlap v. Edwards*, 29 Miss. 41; *Thornsburch v. Mastin*, 93 N. Car. 259.

2. *Rima v. Rossie Iron Works*, 120 N. Y. 433.

3. 1 Greenl. on Evidence 510; *Peake on Evidence* 49; *Montgomery v. Clark*, Bull. N. P. 234; *Pitton v. Walter*, 1 Stra. 161; *Donaldson v. Jude*, 2 Bibb (Ky.) 60; *Ridgely v. Spencer*, 2 Binn. (Pa.) 70. See also *Schurmeier v. Johnson*, 10 Minn. 319; *Schaeffer v. Kreitzer*, 6 Binn. (Pa.) 430. Compare *Gilbert on Evidence* 36-37.

But see *Kip v. Brigham*, 7 Johns. (N. Y.) 168, where a verdict was recovered against a sheriff for the escape of a prisoner who had given security for the liberties of the jail. It was held that the *postea* was admissible in evidence without judgment, in an action brought by the sheriff against the obligees on the bond of security. In this case the obligees in the bond had been notified of the pendency of the suit against the sheriff, and had actively cooperated in its defense. For this reason the court considered the verdict in effect a verdict against the obligees, holding that there was no reason why it might not be considered as evidence for the amount of the debt or demand against the sheriff. See also *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Crawford v. Turk*, 24 Gratt. (Va.) 176.

Presumption of Judgment.—In the case of *Deloach v. Worke*, 3 Hawks

the verdict alone may be received where its object is merely to establish the fact of trial and verdict.¹

4. As a Bar to Subsequent Suits.—In civil cases, a verdict without judgment cannot operate as a bar to further litigation involving the same subject-matter and between the same parties.² In criminal cases, however, the rule is different, the defendant being allowed to plead a former verdict of acquittal or conviction, upon a subsequent prosecution for the same offense, though no judgment has been pronounced thereon by the court.³

(N. Car.) 36, it was held, on account of an early looseness of practice in making up the record, that a copy of the verdict would be received, with proof of the judgment, as this would be presumed unless the contrary was shown.

It is held, also, that a verdict in a former action of ejectment is evidence against a defendant without proof of judgment, if he has acquiesced in it by payment of costs and delivery of possession. *Schaeffer v. Kreitzer*, 6 Binn. (Pa.) 430.

In *New York*, it has been held unnecessary to produce a copy of the judgment rendered by a justice of the peace, as the justice should render judgment as a matter of course. *Felter v. Mulliner*, 2 Johns. (N. Y.) 181.

1. 1 Greenl. on Evidence, § 510; *Fisher v. Kitchingman*, Willes' Rep. 367; *Barlow v. Dupuy*, 1 Martin N. S. (La.) 442; *Kipp v. Brigham*, 7 Johns. (N. Y.) 168.

2. Buller's N. P. 234; Willes' Rep. 368; *Schurmeier v. Johnson*, 10 Minn. 319; *Saylor v. Hicks*, 36 Pa. St. 392; *State v. Norvell*, 2 Yerg. (Tenn.) 24; 24 Am. Dec. 458. See also *Felter v. Mulliner*, 2 Johns. (N. Y.) 181.

"It is the judgment or decree of the court which concludes," says Strong, J., in *Saylor v. Hicks*, 36 Pa. St. 392, "and not the verdict of the jury." Hence, it was held in this case that the verdict of a jury upon an issue directed by a court of equity, is not conclusive upon the parties, on the trial of an action at law in which the same question is raised.

The reason of the rule which, in a civil case, excludes the plea of a former verdict, without judgment, seems to be that by arrest of judgment or a new trial awarded, the antecedent proceedings, including the verdict, and of which it is the result, may have been invalidated. Consistent with this rationale, it has been held in *New York*, where a justice of the peace has no authority to

arrest a judgment, or award a new trial, that it need not be shown, when a verdict rendered in a trial before such functionary is pleaded in bar for a second suit, that it was in fact followed by the pronouncement of a judgment. This must be taken for granted, as under the law the justice had no discretion to do otherwise. *Felter v. Mulliner*, 2 Johns. (N. Y.) 181.

Where Judgment Should Have Been Pronounced, but Was Not.—In *New York*, it has been held that where there is an omission on the part of the court to render a judgment within four days after the return of the verdict, as required by statute, and there is a consequent loss of jurisdiction of the court so that no valid judgment can be rendered, the verdict may, nevertheless, be pleaded in bar of another action. *Kane v. Dulex*, 3 E. D. Smith (N. Y.) 127.

3. 4 Bl. Com. 336; *State v. Benham*, 7 Conn. 414; *Brennan v. People*, 15 Ill. 517; *Wakefield v. State*, 5 Ind. 195; *People v. Cook*, 10 Mich. 164; *State v. Elden*, 41 Me. 165; *Teat v. State*, 53 Miss. 453; 24 Am. Rep. 708; *State v. Herrick*, 3 Nev. 259; *Hartung v. People*, 26 N. Y. 167; *Ratzky v. People*, 29 N. Y. 124; *Kuckler v. People*, 5 Park. Cr. Rep. (N. Y.) 216; *Mount v. State*, 14 Ohio 295; 14 Am. Dec. 542; *Heikes v. Com.*, 26 Pa. St. 514; *State v. Norvell*, 2 Yerg. (Tenn.) 24; 24 Am. Dec. 458; *State v. Burris*, 3 Tex. 119. Compare 2 Hale's P. C. 248; *People v. Casborus*, 13 Johns. (N. Y.) 351. See JEOPARDY, vol. 11, p. 956.

Federal Constitution.—"No person shall be subject . . . for the same offense, to be put twice in jeopardy of life or limb." *United States Const. Amend.*, art. 5.

State Constitutions.—*South Carolina.*—Most of the state constitutions have provisions substantially similar to that contained in the Constitution of the

5. Verdicts Upon Issues out of Chancery.—Where certain issues of fact arising in a chancery cause are submitted to a jury for determination, under the rules regulating the ancient course of chancery practice, as well as that which prevails in most of the states at the present time, the decision of the jury thereon is held to be advisory merely, and in no wise binding upon the conscience of the chancellor;¹ and this is also the attributed effect of

United States, just set forth. A material diversity, however, is noticed in the fundamental law of *South Carolina* which in terms provides immunity only for those who have "been once acquitted by a jury." *South Carolina Const.*, § 18, art. 1.

The doctrine as to the effect of a verdict in a criminal case, upon a subsequent prosecution for the same offense, is applicable, though the verdict may have been irregular, insufficient, or erroneous (see *Nolan v. State*, 55 Ga. 521; 21 Am. Rep. 281; *Kelley v. People*, 115 Ill. 583; 56 Am. Rep. 184; *State v. Davis*, 4 Blackf. (Ind.) 345; *Croft v. People*, 15 Hun (N. Y.) 484; *Rhoads v. Com.* (Pa. 1886), 4 Cent. Rep. 725), unless it is so defective that no judgment could have been rendered upon it. *Williams v. State*, 45 Ala. 57; *Lawrence v. People*, 2 Ill. 414; *Wright v. State*, 5 Ind. 527; 61 Am. Dec. 90; *State v. Redman*, 17 Iowa 329; *State v. Sutton*, 4 Gill (Md.) 494; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; 1 Am. Dec. 168; *Com. v. Percavil*, 4 Leigh (Va.) 686. Thus, it has been held where the indictment was not sufficient to authorize punishment if conviction had ensued, the verdict of conviction or acquittal cannot operate as a bar. *Rex v. Taylor*, 3 B. & C. 502; 10 E. C. L. 166; 1 Chitty's Crim. Law 462. And, conversely, an acquittal was successfully pleaded in bar to a subsequent prosecution for the same offense, where the indictment, as it read at the time of the trial, was sufficient. *People v. Cook*, 10 Mich. 164; *Heikes v. Com.*, 26 Pa. St. 514.

But where a judgment is improperly arrested upon a good indictment, the verdict may nevertheless be pleaded in bar of subsequent prosecution. *State v. Norvell*, 2 Yerg. (Tenn.) 24; 24 Am. Dec. 458.

Even in a civil action, where the proceedings at the trial were regular and a valid verdict rendered, and judgment was not pronounced merely on account of the lapse of the statutory period within which it should have been done,

the same effect was allowed the verdict, as though judgment had been actually pronounced. *Kane v. Dulex*, 3 E. D. Smith (N. Y.) 127.

Appeal—Motion for New Trial.—Where a defendant in a criminal prosecution, during the trial of which there has been material error, instead of making a motion for new trial, elects to appeal from the judgment, the former conviction is no bar to a new trial, when the judgment is reversed and a new trial ordered. *People v. Barric*, 49 Cal. 342.

Wrong Judgment—Regular Trial.—Where the trial has been regular but a wrong judgment pronounced, the prisoner cannot be subjected to a subsequent prosecution for the same offense. *Shepard v. People*, 25 N. Y. 406.

1. England.—*East India Co. v. Bassett*, Jac. 91; *O'Connor v. Cook*, 8 Ves. 535; *Boote v. Blundell*, 19 Ves. 509; *Morris v. Daves*, 3 C. & P. 427; 14 E. C. L. 380; 3 Bl. Com. 452.

Under the present English chancery practice, the granting of a jury trial in an equitable action, rests in the court's discretion. 2 Daniel's Ch. Pr. (6th Am. ed.) 1071 (n).

There were two classes of cases where a party to a chancery suit is entitled to demand the submission of issues of fact to a jury; the one where a suit is brought to establish a will of real estate against the heir; the other, in a suit involving the right to tithes to which a rector or vicar is a party, where the fact of a *modus* is drawn into the controversy. 2 Daniel's Ch. Pr. (6 Am. ed.) 1074.

Under the Bankruptcy Act, § 72, it is provided that "if in any proceeding in bankruptcy there arises any question of fact which the parties desire to be tried before a jury instead of by the court itself, or which the court thinks ought to be tried by jury, the court may direct such trial to be had and such trial may be had accordingly." In the case of *Ex p. Morgan*, 2 Ch. Div. 72, which was brought under this act, it was held that when a question of fact has been tried by a jury in the

court of bankruptcy, the court cannot set aside or disregard the verdict unless either there was no evidence to go to the jury, or, by reason of some matter of law or of some new fact, the verdict has become immaterial to the decision of the case. It will be seen that the ordinary rules which prevail in a strictly equitable cause, as to the right of the chancellor to disregard, were not applicable to this case. This seems to support Mr. Greenleaf's statement, which appears in section 266, volume 3, of his work on Evidence. He says "In proportion to the duty of directing an issue to the jury, is the obligation of the judge to be governed by their verdict."

California.—Heydenfeldt, J., in *Gray v. Eaton*, 5 Cal. 448, very satisfactorily states the doctrine regarding the effect of the findings of a jury upon issues submitted to them by the chancellor under the regular chancery practice. He says, referring to the case under consideration: "The chancellor directed certain issues to be determined by the jury. This he had a right to do, as it might aid to inform his conscience. By the finding he is not bound any more than, in his sound judgment, it is supported by the evidence; so in his decree he may be governed by it, or he may disregard it. The application, therefore, of the defendants, for a new trial upon the issues, was supererogatory, because the judge had not yet decreed upon the verdict, but if he had, it was a matter in his mere discretion to grant or refuse the application, which is not revisable."

The decision of the supreme court in this case is overruled, in *Duff v. Fisher*, 15 Cal. 376, upon the strength of a statutory provision, to which the court says the attention of the judges in *Gray v. Eaton*, 5 Cal. 448, was not called. The statute referred to provides the manner in which the verdict of a jury, upon an issue submitted to its decision, may be reviewed, which is only by a motion for a new trial. By the construction adopted, this statute was held to apply to equitable as well as legal actions so far as the provisions were consistent with the rights and remedies administered in the courts of equity.

The decision in *Duff v. Fisher*, 15 Cal. 376, above alluded to, changed the effect of a verdict on chancery issues, for, by holding that a verdict so rendered may be reviewed only on motion for a new trial, such verdicts are placed upon the

same foundation as the findings of a jury in the ordinary course of a common-law action. This view of the subject seems to have been adopted for a time by the decisions in that state. See *Gagliardo v. Hoberlin*, 18 Cal. 396; *Allen v. Fenon*, 27 Cal. 69; *Doe v. Vallejo*, 29 Cal. 386. More recently, however, the tendency seems to be toward the earlier position. See *Bates v. Gage*, 49 Cal. 127; *Wakefield v. Bouton*, 55 Cal. 109; *Quinby v. Conlan*, 104 U. S. 420.

Colorado.—*Abbott v. Monti*, 3 Colo. 561.

Illinois.—A verdict upon an issue out of chancery does not necessarily constitute a basis of the adjudication in the suit, as is the case at common law. It is not conclusive of the facts thus found, but the court may, notwithstanding the verdict, find the facts the other way upon an examination of the evidence in the case, and render a decree accordingly. Or the court may adopt a part of the facts as found by the verdict, and upon other points arrive at a different conclusion. *Garrett v. Stevenson*, 8 Ill. 278; *Sibert v. McAvoy*, 15 Ill. 106; *Williams v. Bishop*, 15 Ill. 553; *Austin v. Bainter*, 50 Ill. 308; *Russell v. Fanning*, 2 Ill. App. 632.

In the case of *Smith v. Newton*, 84 Ill. 14, the right of the chancellor to disregard the findings of a jury on issues submitted to them, is also approved. It is said to be the general practice of the court, where the finding of the jury on issues submitted to them, is clearly against evidence, to set the verdict aside and submit the issues to another jury, or render a decree on the evidence heard on the trial of the issue. However, where the evidence is irreconcilably conflicting, the court will not interfere with the finding, unless it can be seen that it is clearly wrong; and in *Titcomb v. Vantyle*, 84 Ill. 371, it is held that the verdict of a jury, on the trial of a feigned issue out of chancery, is merely advisory to the chancellor, who may regard or disregard it, enter a decree conformable or contrary thereto, as in his judgment the weight of evidence may justify. See also *Williams v. Bishop*, 15 Ill. 553.

In the case of *Kelly v. Kelly*, 126 Ill. 550, which was a chancery cause, certain issues of fact were submitted to a jury for their determination. However, upon the rendition of the verdict by the jury, the court set it aside, vacated the order for the submission of the cause to the jury, and proceeded to find

the facts and enter a decree, without evidence other than that which had been heard upon the jury trial, totally disregarding the verdict of the jury. Upon appeal, Mr. Justice Baker, delivering the opinion of the court, said: "In chancery causes, in which the right of a trial by jury is not expressly given by law, the verdict of a jury is advisory merely. In such cases, the chancellor may act as his sound judicial discretion, and his judgment and opinion of the weight of evidence, dictate. He may either predicate his findings and decree upon the verdict, or, if he is not satisfied with it, may set it aside and submit the issues to another jury, or, acting in total disregard of the verdict, may, on the evidence submitted at the jury trial, render a decree that is contrary to the findings returned by the jury."

Indiana.—It is enacted by *Indiana* Rev. Stat. (1881), § 409, that "Issues of law and issues of fact, in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. . . . Provided, that in all cases triable by the court as above directed, the court, in its discretion, for its information, may cause any question of fact to be tried by a jury, or the court may refer any such cause to a master commissioner for hearing and reporting." Under this statute it has been held that any verdict which a jury may return, upon the issues submitted to them, is only for the information of the court and not obligatory upon it; and that the court, therefore, in the exercise of a sound discretion, may disregard such verdict. *Ray v. Doughty*, 4 Blackf. (Ind.) 115; *Lapreese v. Falls*, 7 Ind. 692; *Hendricks v. Frank*, 86 Ind. 278; *Lake Erie, etc., R. Co. v. Griffin*, 92 Ind. 487; *Carmichael v. Adams*, 91 Ind. 526; *Pence v. Garrison*, 93 Ind. 345; *Israel v. Jackson*, 93 Ind. 543; *Jennings v. Durham*, 101 Ind. 391.

In *Maine*, there is a constitutional provision, art. 1, § 20, in these words: "In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has, heretofore, been otherwise practiced," and by the Statutes of 1873, ch. 130, it is made imperative upon the court to order an issue on motion of either party. See *Call v. Perkins*, 65 Me. 439. From the tenor of these provisions, constitutional

and statutory, it might be presumed that the effect of the verdict upon issues out of chancery was designed to be changed. But the courts have held otherwise, asserting that the general rule in chancery is, inasmuch as the responsibility of the whole decision rests upon the court, the findings of the jury must be such as to satisfy the conscience of the court; but it is also maintained that it is the duty of the chancellor to control any disposition, on the part of his conscience, towards unreasonable fastidiousness or caprice. *Larrabee v. Grant*, 70 Me. 79; *Metcalf v. Metcalf*, 85 Me. 473.

Maryland.—*Hoffman v. Smith*, 1 Md. 475.

Michigan.—In *Dunn v. Dunn*, 11 Mich. 284, Justice Campbell, speaking of issues out of chancery, said: "While a verdict fairly given, without improper reception or rejection of evidence, is not to be lightly disregarded, yet it has no binding force on such issues. A new trial will be ordered upon much slighter grounds than in an ordinary action at law. And even without a new trial, the court may entirely disregard the verdict and make a decree against it, although it satisfied the judge who tried the case. The reason for this difference is, that in an action at law the jury are the sole judges of questions of fact, while in a court of equity there is no process by which the chancellor can substitute the conscience or belief of the jury for his own; and he must find the facts on his own responsibility. An issue is not framed to relieve him from the responsibility, but to aid him, by a trial in open court, where witnesses are produced and examined orally more fully than they can be on paper. . . . And there is no authority which I have discovered which renders it incumbent on any court of chancery, or even proper, to follow a verdict which is not calculated to aid the conscience of the court, in solving questions of fact otherwise doubtful." And see *Willard v. Magoon*, 30 Mich. 273.

In *Missouri*, issues out of chancery are submitted to a jury, in the discretion of the chancellor, to inform his conscience and not to control his judgment. The judge presiding in an equity case is not compelled, under any circumstances, to submit special issues to a jury, nor is the finding of the jury upon such issues, when submitted to them, conclusive upon him, or upon an appellate court. The court may set

aside the findings, and submit the issues to another jury, or may disregard the findings altogether, and pronounce its own judgment upon the issues upon the final hearing. *Weeke v. Senden*, 54 Mo. 129; *Lockwood v. Limsford*, 56 Mo. 68; *Durkee v. Chambers*, 57 Mo. 575; *Gay v. Ihm*, 3 Mo. App. 588; *Page v. Dixon*, 59 Mo. 43; *Hambright v. Brockman*, 59 Mo. 52; *Hess v. Miles*, 70 Mo. 203; *Keithley v. Keithley*, 85 Mo. 217; *Bevin v. Powell*, 11 Mo. App. 216; *Hulett v. Stockwell*, 34 Mo. App. 599.

Directing Verdict.—It has been held in this state that when a jury is impaneled to try an issue out of chancery, the chancellor may peremptorily instruct them what verdict to return—so completely under his control is this proceeding. *Hess v. Miles*, 70 Mo. 203.

In the case of *O'Bryan v. O'Bryan*, 13 Mo. 16; 53 Am. Dec. 128, an appeal was taken to the refusal of the chancellor to set aside the verdict of a jury on issues made up and submitted to them. The appellate court, construing a statute regarding the awarding of new trials in chancery issues, said, through Ryland, J., who delivered the opinion on this occasion: "When the chancellor, before whom these issues have been tried, upon motion, refuses to have them tried anew, by setting aside the first finding, I must see a clear and obvious case of improper finding by the triers, or of misdirection by the triers, or of misdirection by the court, before I will interfere." In this case, the findings of the jury, upon the issues made up in a chancery cause and submitted to them, seem to have been regarded in precisely the same light as a verdict in an ordinary common-law cause, but upon what authority it does not appear. It certainly would not be so regarded now. See more recent cases in *Missouri* cited above.

New Jersey.—The office of a jury, in a court of equity, is not definitely and finally, as in a court of law, to settle questions of fact, but simply to inform the conscience of the chancellor where he has doubt. *Freeman v. Staats*, 9 N. J. Eq. 821; *Coryell v. New Hope Delaware Bridge Co.*, 9 N. J. Eq. 457; *Rusling v. Rusling*, 35 N. J. Eq. 120.

New Mexico.—*Huntington v. Moore*, 1 N. Mex. 489.

North Carolina.—*Humphreys v. Ward*, 74 N. Car. 784.

In *Oregon*, the verdict of a jury, on

issues out of chancery submitted to them, is held not to be conclusive, but it is also maintained that it should not be disregarded unless manifestly contrary to the evidence. *De Lashmutt v. Everson*, 7 Oregon 213; *Swegle v. Wells*, 7 Oregon 223.

Pennsylvania.—In the case of *Scheetz's Appeal*, 35 Pa. St. 88, it was held that the granting or refusal of an issue in equity is not the subject of an appeal. It is but a means of informing the conscience of the court as to disputed facts, and the verdict is not even binding if the court think it wrong. *Baltimore v. Pittsburg, etc.*, R. Co., 3 Pittsb. (Pa.) 20; *Baker v. Williamson*, 2 Pa. St. 116.

South Carolina.—*Gadsden v. Whaley*, 9 S. Car. 147; *Charlotte, etc., R. Co. v. Earle*, 12 S. Car. 53; *Ivy v. Clawson*, 14 S. Car. 267; *Small v. Small*, 16 S. Car. 64; *Peake v. Peake*, 17 S. Car. 421; *Brownlee v. Martin*, 21 S. Car. 392.

Tennessee.—The verdict of a jury, on an issue submitted to them by the chancellor, is only advisory and designed to assist the chancellor in determining the facts. He has the right, and it is his duty, to disregard the finding of the jury if the same is not authorized by the rules governing courts of chancery. *Humphreys v. Blevins*, 1 Overt. (Tenn.) 178; *Glass v. Mason*, 4 Sneed (Tenn.) 508; *Orgain v. Ramsey*, 3 Humph. (Tenn.) 580; *Timmons v. Garrison*, 4 Humph. (Tenn.) 148; *Lowe v. Traynor*, 6 Coldw. (Tenn.) 633.

Should Not be Lightly Disregarded.—The finding of an issue of fact in chancery is not as obligatory upon the court as is the finding of a verdict upon an issue at common law, but still it has much weight and should be sustained, unless it appears satisfactorily to be unsupported by proof. *Timmons v. Garrison*, 4 Humph. (Tenn.) 148; *Lowe v. Traynor*, 6 Coldw. (Tenn.) 633.

Utah.—*Smith v. Richardson*, 2 Utah 424.

Vermont.—*Adams v. Soule*, 33 Vt. 538.

In *Virginia*, the practice in the subject does not seem to be altogether settled. Thus, though, it is held in *Grigsby v. Weaver*, 5 Leigh (Va.) 212, that it is matter within the sound discretion of the chancellor whether he shall direct an issue, or decide the question of fact himself, and a like matter of discretion whether he shall set aside the verdict on the issue or not, yet in

a verdict upon issues of fact framed in a chancery cause and submitted to a jury in the federal tribunals.¹

In several of the states, however, statutes, or constitutional provisions respecting the right to trial by jury, have been construed to impart to the finding of a jury upon a chancery issue

Carter v. Campbell, Gilm. (Va.) 159, it is said that in a case proper for an issue, the verdict is conclusive.

In Lee v. Boak, 11 Gratt. (Va.) 182, it is declared that where an issue is directed in a chancery cause, and a verdict is found to which no exception is taken, and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court as established facts of the case.

This practice seems never to have been regarded in this state as resting within the arbitrary discretion of the chancellor.

In Stannard v. Graves, 2 Call (Va.) 369, it was said that the discretion of the chancellor, in disregarding the verdict of a jury upon a chancery issue, is to be exercised on sound principles, of which the appellate court may judge. And see Love v. Braxton, 5 Call (Va.) 542; Reed v. Cline, 9 Gratt. 136; Beverly v. Walden, 20 Gratt. (Va.) 147; Steptoe v. Flood, 31 Gratt. (Va.) 223; Crebs v. Jones, 79 Va. 381.

Regarding this practice, see also Plesants v. Anderson, 1 Wash. (Va.) 156; M'Rae v. Woods, 1 Hen. & M. (Va.) 547; Samuel v. Marshall, 3 Leigh (Va.) 567.

In Wisconsin, the doctrine prevails, under the decision of Callahan v. Judd, 23 Wis. 343, that the finding of a jury upon an issue of fact, in an equitable action, has only this advisory effect. Jackman Will Case, 26 Wis. 104; Chafin Will Case, 32 Wis. 557; Stahl v. Gotzenberger, 45 Wis. 121; Stanley v. Risse, 49 Wis. 219; Powers v. Large, 75 Wis. 494.

Issue out of Chancery Under Statute of Wills.—A verdict upon an issue in chancery, made up, in obedience to the Statute of Wills, to try whether the writing produced was the will of the testator or not, tried by a jury whose verdict should be final between the parties, saving to the court the power of granting a new trial for good cause as in other trials, is not like an ordinary verdict upon an issue in a chancery cause, which must satisfy the conscience of the chancellor, or be disregarded, but like a verdict in a common-law action, and

can be set aside only on grounds which would be fatal to a common-law verdict. Singleton v. Singleton, 8 Dana (Ky.) 315.

1. The verdict of a jury in an issue out of chancery is in no wise binding upon the chancellor. From first to last, the proceeding is within his discretion. He may refer the issue to be tried by a jury or not, as he chooses; and when this has been done, and a verdict rendered, he may have the issue tried again, or disregard it entirely, and pronounce a decree totally variant to the verdict. U. S. v. Samperyac, 1 Hempst. (U. S.) 118.

Mr. Justice Story, in Allen v. Blunt, 3 Story (U. S.) 746, thus delivers himself: "A verdict upon an issue ordered by a court of equity is in no just sense final upon the facts it finds, or binding upon the judgment of the court. The court may, at its pleasure, set it aside and grant a new trial, or, disregarding it, may proceed to hear the cause and decide in contradiction to the verdict; or it may adopt the verdict *sub modo*, and give it a limited effect only."

The case of Kohn v. McNulta, 147 U. S. 238, was an appeal from the circuit court of the United States for the northern district of Ohio. In this case, a switchman brought suit against the receiver of a railroad company to recover damages for injury sustained in the performance of his duty while in the employment of the company. After the testimony had all been received, it was left to a jury to determine the amount which should be awarded, and the jury found for the claimant the sum of ten thousand dollars. The court, upon examination of the testimony, held that no cause of action was made out against the receiver, set aside the verdict of the jury, and dismissed the petition. Mr. Justice Brewer, delivering the opinion of the supreme court, said: "The intervention was a proceeding in a court of equity, and that court may direct a verdict by a jury upon any single fact, or upon all the matter in dispute; but such verdict is not binding upon the judgment of the court. It is advisory simply and the

the same force and effect as a verdict rendered in an action having no connection with proceedings in equity.¹

court may disregard it entirely, or adopt it either partially or *in toto*." He then cites *Barton v. Barbour*, 104 U. S. 126, and *Idaho, etc., Land, etc., Co. v. Bradbury*, 132 U. S. 509.

1. *Delaware*.—The *Delaware* Rev. Stat. (1852), ch. 95, § 1, provides that where matters of fact, proper to be tried by jury, shall arise in any cause depending in chancery, the chancellor shall order such facts to trial by issues at the bar of the superior court.

Iowa.—In the *Iowa* Code (1851), § 1772, it is provided that issues of fact shall be tried by the court, unless one of the parties requires a jury.

It is declared, in the case of *McDaniel v. Marygold*, 2 Iowa 500; 65 Am. Dec. 786, that the court may decide for itself all issues in an equity cause, and refuse an issue to a jury, or in the exercise of a sound discretion, such issue may be directed, and such discretion will not be disturbed by the supreme court unless it is abused; the verdict on such issues may not bind the court to the same extent as in a law action, but every doubt should be solved in favor of it. The court observes: "In many of our state courts the exercise of the discretion by the chancellor in granting the trial of such issues by a jury is, in practice, merely nominal; that is to say, that the trial of such issues has become so frequent, under what has been esteemed a proper regard for the right of trial by jury, that the exercise of such discretion stands much upon the same basis as do all other matters referred by the law to such discretion. We entertain no doubt but that he may decide the question or questions himself, and refuse an issue to a jury. We are equally satisfied that, in the exercise of a sound discretion, he may direct such an issue, and in either event we would not disturb such order, unless such discretion should appear to have been abused and exercised in a manner unwarranted by all the circumstances. After such findings we would not say that the verdict is decisive or binding to the same extent as when rendered in a suit at law. But where the parties have, without objection, submitted such an issue to a jury, and appear to have had a full investigation, and introduced their whole testimony upon issues, which by the sub-

mission they virtually concede raise the real questions in the case, every doubt in the mind of the chancellor on such issues of facts should be solved in favor of such findings."

New Hampshire.—*New Hampshire* Const. (1792), pt. 1, art. 20; *New Hampshire* Rev. Stat. 1842, ch. 171, § 8; *Marston v. Brackett*, 9 N. H. 336; *Dodge v. Griswold*, 12 N. H. 573; *Clark v. First Congregational Soc.*, 45 N. H. 331.

In some states, where the administration of law and equity is not separate, the distinction between the effect of a verdict in an ordinary common-law action, and on issues out of chancery, has been held to be of no practical importance. A mixed system of law and equity exists in *Minnesota*. In *Marvin v. Dutcher*, 26 Minn. 391, it is said that under the existing practice, as all issues in an equitable action directed to be tried by a jury are tried in the presence of the court, under its direction, and in the same manner in every respect, as every other issue of fact in any action is tried, that there is no good reason why such a verdict should not receive the same effect as other verdicts; and that such was the correct rule.

Nevertheless, in *Montana*, although the administration of law and equity is effected through the same court, and though the distinction between the pleadings and modes of procedure in common-law actions and suits in equity is abolished, the essential distinction between law and equity is held not to be changed. The relief which the law affords must be administered through the intervention of a jury, unless a jury be waived. The relief which equity affords must be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury is merely advisory. *Basey v. Gallagher*, 20 Wall. (U. S.) 670.

In *New York*, before the adoption of the code, under the act of 1838 to regulate the trial by jury and the taking of testimony in chancery, it was held that the verdict of a jury upon issues out of chancery was conclusive as to facts found, unless a new trial of the issues was granted by the court of law in which such issues were tried. *Griffith v. Griffith*, 9 Paige (N. Y.) 314.

V. MODES OF AVOIDING EFFECT OF VERDICT—1. **Motion for New Trial**.—See CRIMINAL PROCEDURE, vol. 4, p. 881; NEW TRIAL, vol. 16, p. 500.

2. **Motion in Arrest of Judgment**.—See JUDGMENTS, vol. 12, p. 147^b.

3. **Motion for Repleader**.—See PLEADING, vol. 18, p. 584.

4. **Motion for Judgment Non Obstante Veredicto**.—See JUDGMENT, vol. 12, p. 61.

5. **Motion for Venire Facias De Novo**.—See NEW TRIAL, vol. 16, p. 502.

VERIFY.—The word “verify” sometimes means to confirm or substantiate by oath, sometimes by agreement.¹

VERILY.—(See also AFFIDAVITS, vol. 1, p. 307; BELIEVE, vol. 2, p. 164).—See note 2.

VERMIN.—See BILL OF LADING, vol. 2, p. 240.

VERSUS.—Against. The word is usually abbreviated v. or vs., and is used in legal parlance to separate the names of defendants and plaintiffs.³

1. Webster's Dict. followed in Swift v. Hosmer, 3 How. Pr. (N. Y. Supreme Ct.) 284. The court further said that when used in legal proceedings the term is generally employed in the former sense, and held, that when a statute provides, that an answer should be verified, it must be sworn to.

2. An affidavit is not bad because it states that the affiant “verily believes,” instead of using the statutory form, “has good reason to believe;” the former being the stronger form, and perjury being assignable upon it. Russell v. Ralph, 53 Wis. 328. In this case the court said: “But this court has frequently held affidavits containing such words sufficient. Beck v. Cole, 16 Wis. 95; Oliver v. Town, 28 Wis. 328. Webster defines ‘verily’ as meaning: ‘with great confidence; really; truly.’ ‘In truth; in fact; certainly.’ It seems to be synonymous with ‘verity,’ which he defines to be ‘the quality of being very true or real; consonance of a statement, proposition, or other thing to fact; truth.’ ‘Verily believes,’ therefore includes good reason in fact to believe. If we are correct in this construction, then the words import more than the statutory requirement; for while a person might have ‘good reason to believe,’ and yet disbelieve, he could not ‘verily believe,’ without also having good reason in fact to believe.”

3. **Whether English**.—“It is said in the argument that the plea is not wholly in the English language; that ‘vs.’ stands for ‘versus,’ and that ‘verus,’ is not an English word; that the plea should have been entitled Smith against Butler. But ‘vs.’ and ‘versus’ have been too long used in legal practice, and their meaning is too well understood, to be open to the objection stated. They have, in fact, become ingrafted upon the English language, at least so far as they are used in this country in legal proceedings. Their meaning is well understood, and their use quite as appropriate as the word ‘against’ could be.” Smith v. Butler, 25 N. H. 523.

Ads.—An affidavit of merits on the same paper with the pleas, by a defendant, entitled “C D ads. A B,” is the same in law as “A B v. C D,” and is properly entitled, and it is error to strike the pleas from the files as for want of a sufficient affidavit. The court said: “The objection to the affidavit was that it was not properly entitled in the cause, and the pleas were stricken from the files, and default of defendant entered and judgment in chief. To reverse which this appeal is taken. There is no force in this objection. It is properly entitled. Frank A. Bowen ads. Wilcox & Gibbs Sewing Machine Company is the same, in legal proceedings, as Wilcox & Gibbs Sewing Ma-

VERY.—See note 1.

VESSEL.—(See also MARITIME LIENS, vol. 14 p. 420).—See note 2.

chine Company *v.* Bowen, ads. indicating and meaning *ad sectam*, as *v.* indicates *versus*." Bowen *v.* Wilcox, etc., Sewing Mach. Co., 86 Ill. 12.

1. As to the term "very fast," see *FAST*, vol. 7, p. 813.

2. A steamboat has been held a "vessel," within a statute providing for the collection of claims against "vessels." Pendleton *v.* Franklin, 7 N. Y. 508. So also a steam canal boat. King *v.* Greenway, 71 N. Y. 413.

The provisions of *United States Rev. Stat.*, § 4255, relating to the construction and occupation of berths on vessels carrying passengers from foreign ports to the *United States*, are not deemed applicable to steam vessels. In *The Devonshire*, 8 Sawy. (U. S.) 211, the court said: "Each of these sections uses the word 'vessel' without in any way limiting its application to a sail vessel. Standing alone and without qualification, they would include in their provisions a steam as well as a sail vessel. A vessel is none the less one on account of the manner of her propulsion, whether by oars, sails, or steam. And the Revised Statutes (§ 3) declare that the term 'includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water.'" Nevertheless, the court came to the decision above from reading the statute as a whole.

A **steam dredge** is a vessel within the meaning of the law, and, as such, subject to a maritime lien for supplies. The court, in *Hinsmann v. The Pioneer*, 30 Fed. Rep. 206, said: "As I understand it by the law of the *United States*, the absence from the dredge of a natural power of propulsion; the fact that she is not propelled by oars or sails; that she is flatbottomed; that she is engaged in harbors, rivers, and docks; that she has to be moved to a distance by means of a tug; that she has no power of her own to be moved; that she is not, and cannot be, a sea or lake going vessel—neither of these facts, nor all together, require the conclusion that she is not a vessel. The dredge before the court in this case is adapted to be an instrument of transportation on navigable water, and was

used in naval transportation when she transported from place to place the steam shovel and engine, and maintained the same afloat on navigable water while being used for the purpose of deepening channels. She is within the definition of a vessel given by the Revised Statutes, tit. 1, ch. 1, for she is an artificial contrivance, used, or capable of being used, as a means of transportation on water. In my opinion, her legal status is that of a vessel. In the case of *The Alabama*, 22 Fed. Rep. 449, a dredge similar to the one here under consideration was held to be a vessel, within the meaning of the law."

Lighter.—The proprietors of a bridge were bound by statute to raise their draw for the passage of "vessels;" it was held that a lighter came within the provision. *Hood v. Dighton Bridge*, 3 Mass. 262.

Small Boat—Open Boat.—An open boat was held not to be a "vessel," within the provision of *United States* statutes of 1820 prohibiting commercial intercourse from the British Colonies. *U. S. v. An Open Boat*, 5 Mason (U. S.) 120. The court in this case said: "There can be no doubt that in a general sense a boat is a vessel, for it is a 'vehicle in which men or goods are carried on the water,' which is one of the definitions of a vessel given in our lexicographies; and one of the definitions of a boat, given in like manner, is, that it is 'a vessel to pass the water in,' or 'a ship of a small size.' In a nautical sense, it more usually designates an open vessel, without decks. Whether the word is used in the one sense or the other in a particular statute, must depend upon the context and objects of the statute itself, which may and often do narrow down the general import to specific classes of cases. . . . The term 'vessel' is never, or at least very rarely, used to designate any water craft without a deck; but the term 'boat' is constantly used to designate such small vehicles of this nature as are without a deck. In *Mortimers' Commercial Dictionary*, a boat is defined to be 'a small open vessel, commonly wrought by oars.' He says that the term 'ship' is 'a general name for all

large vessels.' And it appears to me that the general sense in which the word 'vessel' is used in our laws, is in contradistinction to an open boat, and excluding the latter. Such is its meaning in the Act of 1815, ch. 246, where it is declared lawful 'for any collector, etc., to enter on board, search and examine any ship, vessel, boat, or raft,' etc. And when the word is found in our laws, without anything in the context to explain or enlarge its meaning, it appears to me a sound rule of interpretation to construe it as used in that sense, which is its most common sense in maritime usage. Especially ought it to receive such an interpretation, when it interferes with no known policy of the legislature, and a different course would involve general inconvenience."

Setting fire to a small, unfinished boat, still in the builder's shop, and unfit for use, is not within a statute punishing the setting fire to a vessel. *Com. v. Francis*, Thach. Cr. Cas. (Mass.) 240.

A raft is not, in the ordinary contemplation of the maritime law, a vessel; but where it is insured by a "cargo policy," and is in charge of a towboat, the principles of law governing a contract of insurance are applicable to it. The court, in *Moores v. Louisville Underwriters*, 14 Fed. Rep. 236, said: "I have, following the counsel, treated this case as if this raft were a 'vessel,' but I think it is not. The policy is not one on a vessel, but on the cargo of a vessel, and is called by its terms a 'cargo policy.' I have not been able to find any discussions of the subject of insurance of rafts, but in an elaborate case the learned judge of the eastern district of *Michigan*, sitting in this court, held that a raft of logs floating unattached to any vessel, and navigated by men upon it, was not a vessel within the admiralty jurisdiction. *Raft of Logs*, 1 *Flip*. (U. S.) 543. I think it must be treated as the cargo of the towboat having it in charge, and not as a 'vessel.' But so treated, the principles of insurance law applicable to the case are the same, and the distinction is quite immaterial. It is mentioned here merely out of caution, and to explain the method of dealing with the subject."

Canal Boat—Maritime Liens.—See *King v. Greenway*, 71 N. Y. 417; *Crawford v. Collins*, 45 Barb. (N. Y.) 269, where a canal boat was held to be within the provision giving a lien. The court cites with approval, *Mott v. Lansing*, 57 N. Y. 112, and *Crawford v. Col-*

lins, 45 Barb. (N. Y.) 269; and *distinguishes* *Many v. Noyes*, 5 Hill (N. Y.) 34.

A canal boat or scow is not a "vessel of the *United States*," within the meaning of the act of Congress declaring that no bill of sale, mortgage, etc., of any vessel or part of a vessel of the *United States*, shall be valid, unless the same shall be recorded in the office of the collector of the customs where such vessel is registered or enrolled. The court said: "And under the acts of this state authorizing, in certain cases, the attachment and seizure of 'any ship or vessel' within this state, it has been adjudged that a small undecked boat employed within a port, and not performing voyages coastwise from state to state, does not come within the description of a 'ship or vessel,' which terms are to be understood as used in common parlance and applying only to vessels of a larger class. (*Farmers' Delight v. Lawrence*, 5 Wend. (N. Y.) 564)." *Hicks v. Williams*, 17 Barb. (N. Y.) 529.

Foreign Vessel.—Under the *United States Embargo Act* (Jan. 9, 1808), § 5, ch. 8, a foreign vessel means a vessel navigating under the flag of a foreign power, and not a vessel owned in whole or part by foreigners domiciled in the *United States*. The court, in *The Schooner Sally*, 1 Gall. (U. S.) 59, said: "The attorney for the *United States* contends, that the true meaning of foreign 'ship or vessel,' used in the act, is a vessel owned in whole or in part by foreigners domiciled in the *United States*, and he cites the Registry Act to show the effect of transferring a registered vessel to a foreigner, and also the Supplementary Act June 27, 1797, ch. 5, which declares that all registered vessels, which shall be captured and condemned and pass into the ownership of third persons, shall be deemed foreign vessels. This argument applies to registered vessels only, and does not appear to me to carry much weight with it. Undoubtedly the appellation of foreign vessels may sometimes be applied to all vessels not registered or licensed, in reference to the privileges derived from the revenue system; but it is as certain that in a variety of instances our laws also contemplate the use of the words in their appropriate sense, to wit, vessels navigating under the flag and with the papers of a foreign sovereign." See also *FOREIGN ASSIGNMENTS*, vol. 8, p. 281; *MARITIME LIENS*, vol. 14, p. 420.

VEST.—To pass to a person ; to become fixed in a person ; to give an immediate right of present enjoyment ; to give a present fixed right of future enjoyment ; to give a legal or equitable seisin.¹ The word is defined to mean "To give an immediate fixed right of present or future enjoyment."²

VESTED.—(See also DECREE, vol. 5, p. 393 ; PERPETUITIES, vol. 18, p. 348 ; STATUTES, vol. 23, p. 499 ; VEST).—See note 3.

Louisiana Code—Commercial Partnership.—The code declares that commercial partners are those engaged in "carrying personal property for hire in ships or other vessels." In *Chaffe v. Ludeling*, 27 La. Ann. 611, the court said: "In this sense we understand vessel to mean any structure which is made to float upon the water, for purpose of commerce or war, whether impelled by wind, steam or oars. Vide Webster's Dictionary, verbo: vessel." *Chaffe v. Ludeling*, 27 La. Ann. 611.

1. 4 Kent's Com. (13th ed.) 202.

2. Bouvier's L. Dict., followed in *Stewart v. Harriman*, 56 N. H. 29 ; 22 Am. Rep. 408.

In the Language of Conveyancers.—"The word 'to vest' has several senses which it is important to distinguish: Originally the word had reference only to real estate. As applied to estates in land, 'to vest' signifies the acquisition of a portion of the actual ownership or feudal possession of the land ; the acquisition, not of an estate in possession, but of an actual estate. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus 'vested' is nearly equivalent to 'possessed.' In this, its original sense, 'vested' has no reference to the absence of conditionality or contingency. If an estate tail be limited to A, with remainder to B, the estate of B is a 'vested' remainder, not because the failure of issue of A is considered as an event certain at some time or other to happen, but because such a remainder vests in B an actual portion of the fee, though the time of its falling into possession is wholly contingent and uncertain. B is invested with a portion of the ownership of the land. All remainders, not vested, are in fact contingent, not as being necessarily limited to an uncertain event, but because their taking effect depends on the con-

tingency of their happening to vest during the continuance of the particular estate which supports them, and which may terminate at any moment. Thus 'vested' comes to mean the opposite of 'contingent' or conditional. But the word itself refers, as has been said, not to contingency, but to possession. The only definition that can be given of the word 'vested' in English law, as applied to future interests other than remainders, is, that it means 'not subject to a condition precedent ;' what amounts to a condition precedent the cases only can determine. As applied to remainders in land, the word retains its original sense denoting the actual possession of an estate in the land." Stroud's Jud. Dict.

3. **Vested Estate.**—"By a vested estate, in relation to interests of a freehold quality, is to be understood an interest clothed, as to legal estates, with a legal seisin, or, as to equitable estates, with an equitable seisin, which enables the person to whom the interest is limited, to exercise the right of present or future enjoyment immediately, in point of estate. A vested estate is an interest clothed with a present legal and existing right of alienation." 1 Preston on Estates 65, followed in *Hayes v. Goode*, 7 Leigh (Va.) 496.

"Estates are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect, remains uncertain." *Taylor v. Gould*, 10 Barb. (N. Y.) 396.

"An estate is vested when there is a person in being who will take if the precedent estate then terminates." *Sheridan v. House*, 4 Keyes (N. Y.) 587.

Vested in the Sense of Indefeasible.—M, by her will, in pursuance of a power, appointed £1,000, charged on real estate, to trustees, upon trust to invest the same, and to pay the dividends

VESTED AND CONTINGENT LEGACIES.—See WILLS, vol. 29.

thereof to her daughter, A, for life; and from and after the decease of A, to pay, apply, and dispose of the capital and interest unto, between, or amongst all and every child and the children of A, in equal shares; and if but one, the whole to that one child, to be a vested interest, or vested interests, on their respectively attaining the age of thirty years; and if any child or children of A should die under the age of thirty without lawful issue, the share or shares of such child or children, original or accruing, should go to the survivor or survivors of them. It was held that the word "vested" meant indefeasible, so that the share of each child who attained the age of thirty was no longer to be defeasible by the executory bequest. *Taylor v. Frohisher*, 10 Eng. L. & Eq. 121. The court in this case said: "The question in this case depends on the meaning which, upon consideration of this will, is to be attached to the word 'vested,' as used by the testatrix. It is scarcely necessary to say, that in considering this will, the court lays out of sight the circumstance that if one construction be adopted, the disposition in favor of the children of Ann Taylor would be void for remoteness; while, if the other be taken, it would be in a great measure supported. The court in such cases, in the first instance, ascertains what are the provisions of the instrument, and whether they are opposed to the ordinary rules of construction; and then to what extent they are in accordance with the rules of law. In this will the testatrix uses the word 'vested,' not in its ordinary sense, but in the sense of not being subject to be divested, so as to be defeasible. It is only in this way that her intention could have been carried into effect in the form which was in her contemplation. The word 'vested,' though it has a technical or strictly legal meaning, especially when applied to various interests in real estate, is, in effect, used in different senses. In *Barnes v. Allen*, 1 Bro. C. C. 181, Lord Thurlow says: 'Contingent and executory interests may be as completely vested as if they were in possession;' obviously there using the word 'vested' in the sense of 'transmissible.' In *Berkeley v. Swinburne*, 16 Sim. 275, the Lord Commissioners, where the testator directed

the shares to be vested interests, in sons at twenty-one, and in daughters at twenty-one or marriage, construed the word to mean indefeasible, and held that the shares vested, before the ages of twenty-one or marriage, on the death of the tenant for life, subject to be divested on their deaths under that age, and in the case of daughters without having been married. In *Glanville v. Glanville*, 2 Meriv. 38, Sir W. Grant construed the word 'vested' in its ordinary sense, observing, however, that 'there was no evidence from any part of the will that the testator did not affix to the word its precise legal meaning.'

Vested Remainder.—See also *PETUITIES*, vol. 18, p. 335; *REMAINDERS*, vol. 20, p. 828.

"A remainder," says Chancellor Walworth, "is vested in interest where the person is in being and ascertained, who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates, provided the estate limited to him by the remainder shall so long continue. In other words, where the remainder-man's rights to an estate in possession cannot be defeated by third persons or contingent events, or by the failure of condition precedent if he lives, and the estate limited to him by way of remainder continues till all the precedent estates are determined, his remainder is vested in interest. *Hawley v. James*, 5 Paige (N. Y.) 466." Quoted in *Price v. Sisson*, 13 N. J. Eq. 176.

Vested Rights.—See also *CONSTITUTIONAL LAW*, vol. 3, p. 758.

Where an act of Congress speaks of "vested rights," protecting them, it means rights lawfully vested. Hence, it does not protect a location made on public land reserved for sale. *Morton v. Nebraska*, 21 Wall. (U. S.) 660.

In testamentary gifts, referring to death contingently, "the proper legal meaning of the word 'vested' is vested in point of interest, *Richardson v. Power*, 19 C. B. N. S. 780; but its natural and etymological meaning is said to be, vested in possession, *Young v. Robertson*, 4 Macq. H. L. 314; 8 Jur. N. S. 825; and there are many cases of gifts over on the death of the legatee before his legacy has become 'vested,' where, upon the context the word has been held to bear the latter sense." 2

VETERAN.—See note 1.

VETERINARY SURGEONS.—A veterinary surgeon is one who is engaged in the surgical or medical treatment of domestic animals, especially horses and cattle.² The same rules are applicable generally to veterinary surgeons as apply to other physicians and surgeons;³ thus, they may be required to be registered or licensed before holding themselves out to the public as veterinary surgeons,⁴ and are liable for any injuries resulting from their negligence, or want of skill.⁵ They may recover compensation

Jarman on Wills (16th ed.) 1623; *In re Coppard's Estate*, 35 Ch. Div. 350.

1. Veterans in the field. See FIELD, vol. 7, p. 958.

2. See Century Dict.; Webster's Dict.

3. The same rules are applicable to the case of a veterinary surgeon bringing an action to recover for the value of his services, as apply to other physicians and surgeons. *Boom v. Reed*, 69 Hun (N. Y.) 426. And see *PHYSICIANS AND SURGEONS*, vol. 18, p. 427; *MALPRACTICE*, vol. 14, p. 76.

4. The English Veterinary Surgeon's Act of 1881 (44 & 45 Vict., ch. 62), provides that "Whereas it is expedient that provision be made to enable persons requiring the aid of a veterinary surgeon for the cure or prevention of diseases in or injuries to horses and other animals, to distinguish between qualified and unqualified practitioners," it further provides that any person who, without the necessary qualification, "takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon, or a practitioner of veterinary surgery or of any branch thereof, or especially qualified to practice the same," shall be liable to a fine; and under this act it was held that a shoeing smith, who described his place of business as a "veterinary forge," was, when not duly qualified as therein required, liable to a fine. *Royal College of Veterinary Surgeons v. Robinson* (1892), 1 Q. B. Div. 557. "Nothing," said Hawkins, J., in delivering the opinion in this case, "is so likely to produce injury to a horse as unskillful treatment of his feet and improper shoeing."

But it was held that a chemist who published a book dealing with diseases of horses, recommending medicines which he kept and advising people in

some cases to consult a veterinary surgeon, and who described himself in the book as a "Pharmaceutical and Veterinary Chemist," was not unlawfully using a description implying that he was a veterinary surgeon contrary to this act. *Veterinary College v. Groves*, 57 J. P. 505.

In *Ritter v. Rodgers*, 8 Pa. Co. Ct. Rep. 451, it was held that the *Pennsylvania* Act of April 11, 1889, providing that veterinary surgeons of five years standing, who were not entitled to use the degree of veterinary surgeon, should register within six months after the passage of the said act, or be guilty of a misdemeanor in using the title thereafter, was unconstitutional, as depriving a person of property without due process of law.

But in *Veterinary Surgeon's Case*, 8 Pa. Co. Ct. Rep., 185, it was held that a court of common pleas has no jurisdiction to strike from the register names of veterinary surgeons whose names were not registered within the time prescribed by *Pennsylvania* Act of April 11, 1889, and could not pass upon the constitutionality of that act, but that the remedy provided in the quarter sessions for violations of the act is exclusive, under *Pennsylvania* Act of March 31, 1860.

5. A veterinary surgeon impliedly engages and is bound to use, in the performance of his duties in his employment, such reasonable skill, diligence, and attention, as may be ordinarily expected of persons in that profession. He does not contract to use the highest degree of skill nor an extraordinary amount of diligence, nor, in the absence of special contract, to effect a cure, and negligence cannot be implied from his failure to do so. *Barney v. Pinkham*, 29 Neb. 350; 26 Am. St. Rep. 389.

A veterinary surgeon must possess and exercise a reasonable degree of

for attendance and medicines administered;¹ and may be examined as expert witnesses concerning the diseases of horses and cattle.²

VETO.—(See also STATUTES, vol. 23, p. 180.)

I. Definition, 445.

II. Origin and Purpose of the Veto Power, 446.

III. Under Federal and State Constitutions, 446.

IV. Under Municipal Charters, 448.

I. DEFINITION.—The word veto is of Latin extraction, and literally translated, means, "I forbid" or "I deny." By this expression is understood, in public law, the right vested in one department of government to negative the determinations and resolutions of another department; especially, in a constitutional government, the right, under constitutional restrictions, of

learning and skill, and must use reasonable and ordinary care and diligence in the exercise of his skill, and the application of his knowledge; and the fact that a veterinary surgeon, called to attend a horse suffering from an impaction of the colon, treats him for inflammation of the bowels, and, having undertaken to cure him, leaves him in a critical condition promising to call early the next morning, but neglects ever to call again, constitutes a failure to exercise a reasonable degree of skill, and is such evidence of his negligence as will prevent a recovery for his services. *Boom v. Reed*, 69 Hun (N. Y.) 426.

It is the duty of a veterinary surgeon, after performing an operation upon a colt, to give him such continued and further attention as the necessity of the case requires, in the absence of special agreement of reasonable notice to the contrary, and an instruction to this effect is correct, although the declaration only alleges a want of care and skill with reference to the operation itself. *Williams v. Gilman*, 71 Me. 21.

Complaint.—In an action charging a veterinary surgeon with ignorance or want of proper care, the complaint must contain specific allegations, stating such ignorance or want of care, and not leave it to be deduced from mere inference, or the use of vague and indefinite terms. *Barney v. Pinkham*, 29 Neb. 350; 26 Am. St. Rep. 389.

1. *Boom v. Reed*, 69 Hun (N. Y.) 426. In *Sewell v. Corp.*, 1 C. & P. 392; 11 E. C. L. 432, it was held that if there is a general usage applicable

to a particular trade or profession, persons employing one in such trade or profession, will be taken to have dealt with him according to that usage, but that a usage for a veterinary surgeon to charge for his attendance, when there is little medicine required, is too uncertain; and it was left for the jury to say whether he was entitled to charge for his attendance in addition to his charge for medicines furnished, and they found for the plaintiff.

A count for work, labor, and materials will enable a plaintiff to recover for attending as a farrier for medicines administered. *Clark v. Mumford*, 3 Campb. 37.

Negligence a Defense.—But if a veterinary surgeon is guilty of negligence, or fails to exercise reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge, it will prevent a recovery for his services. *Boom v. Reed*, 69 Hun (N. Y.) 426.

2. *Riley v. Sparks*, 52 Mo. App. 572. In this case it was held that a veterinary surgeon might give his opinion as to whether or not a mule, that required two men to catch and hold it after it had been penned up for several days, and which was in good flesh without any physical indication of illness, could be affected with lung fever or pleurisy.

In *Missouri Pacific R. Co. v. Finley*, 38 Kan. 550, it was said that where a person has been educated in a particular profession, as a physician, surgeon, or veterinarian, he is presumed to understand thoroughly questions appertaining to his profession.

the executive, as a king, a president, or a governor, to reject a measure passed by the legislature.¹

The power is either absolute or qualified, according as the effect of its exercise is either to destroy the bill finally, or to prevent its becoming a law unless again passed by a stated proportion of votes or with other formalities. Or the veto may be merely suspensive.²

The term veto is not employed in the constitutions, but seems to be of popular use only.

II. ORIGIN AND PURPOSE OF THE VETO POWER.—This power is traced to the Tribunes of ancient Rome. The salutation, "veto" ("I forbid"), pronounced by a tribune stationed at the door of the senate, meeting a bill, nullified it absolutely. In *England*, the crown has, likewise, an absolute veto, but it has become practically obsolete, the influence of the crown being exerted in a more gentle manner to destroy an obnoxious measure in its progress through the two Houses of Parliament.³

There are, in constitutional governments, two fundamental theories upon which the grant of the power of veto rests: First, to preserve the integrity of that branch of government in which the vetoing power is lodged, and thus maintain an equilibrium of governmental powers; second, to act as a check against the enactment of improper legislation.⁴

III. UNDER FEDERAL AND STATE CONSTITUTIONS.—The veto power of the President is conferred in the following language: "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President. . . . If he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. . . . If any

1. Cent. Dict.; Encyc. Brit. XXIV, 206.

2. Black's Law Dict.

3. 1 Kent's Com. (13 ed.), p. 241. "In practice, the veto power, although very great and exceedingly important in this country, is obsolete in *Great Britain*, and no king now ventures to resort to it. As the ministry must at all times be in accord with the House of Commons—except where the responsibility is taken of dissolving the Parliament and appealing to the people—it must follow that any bill which the two Houses have passed, must be approved by the monarch. The approval

has become a matter of course, and the governing power in *Great Britain* is substantially in the House of Commons." Cooley's Const. Lim. (6th ed.), p. 186.

A notable instance of the exercise of this power in *England* was in 1692, when William III. refused his assent to the bill for triennial Parliaments. This prerogative was last exercised by Queen Anne, in 1707, who refused her assent to a bill for settling the militia in Scotland. 1 Cooley's Bl. (3d ed.), p. 185, notes.

4. The Federalist, No. 73 (by Alex. Hamilton).

bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."¹

Most of the state constitutions have a provision similar to that set forth above. But some of the states withhold the veto power from the executive;² and in others a majority vote of the whole number of members elected to the legislature, constitutes all that is required to override a veto.³

The President may exercise his negative when, in his opinion, the proposed law is unconstitutional, notwithstanding the point which is presented has in other cases been judicially examined and sustained. The President by this act overrules no decision; he merely acts upon his judgment as a legislator.⁴ The executive must treat the bill referred to him as a whole; he may not approve part, and object to part.⁵

If the executive returns a bill, stating that he cannot act upon it because of some supposed informality in its passage, which in his opinion would be fatal to the bill, even if approved, this is, in

1. *United States Const.*, art. 1, § 7, cl.

2. And by the succeeding clause, all orders, resolutions, and votes, to which the assent of both houses may be necessary, except on a question of adjournment, must take the course of bills.

"Pocket" or "Silent" Veto.—This is a mode of veto of a bill by a president, governor, or other executive officer, employed at the end of a legislative session. If the President does not interpose the ordinary veto, a bill becomes a law at the expiration of ten days; but if the bill was passed within ten days of the adjournment of Congress, the President may retain ("pocket") the bill, which is thus killed at the end of the session without the interposition of a direct veto, and without risking the chances of its passage over the veto. *Cent. Dict.*, tit. "Pocket."

The constitution did not contemplate that the President should purposely defeat legislation in this manner, and doubtless it has sometimes occurred through the impossibility of carefully examining the provisions of a bill submitted to him during the close of the session, in the limited time allowed. *Cooley's Const. Law.*, p. 160.

2. *North Carolina, Delaware, Ohio, Rhode Island*, and perhaps others. As to the executive's functions generally in the enactment of laws, and the

passage of laws over his veto, see *STATUTES*, vol. 23, p. 180 *et seq.*

3. In *State v. Mounts*, 36 W. Va. 179, the court, by Lucas, Pres., said: "Under the constitution of this state, the three departments, legislative, executive, and judicial, are required to be 'separate and distinct, so that neither shall exercise the powers properly belonging to either of the others.' See art. 5, § 1. The governor has no legislative functions to perform; his approval of the law passed by the legislature does, it is true, give it vitality as a law, but should he decline to approve, a bare majority in each of the two houses may pass the law over his veto, thus showing that it was not intended that he should have any legislative authority; not even the casting vote. His veto amounts to an appeal for 'reconsideration' by the legislative branch, and not to a defeasance of the passage of the bill."

4. *Cooley's Const. Law*, pp. 162, 163.

5. *Porter v. Hughes* (Arizona, 1893), 32 Pac. Rep. 165. Here the governor signed an appropriation bill, and added after his signature that he approved the same, except a specified subdivision of a specified section, and returned the bill to the house in which it originated, where the veto was sustained. It was held, however, that the bill as a whole was approved, as the governor had no power to veto a single item of it.

effect, an objection to the bill, and it can become a law only by further legislative action, even though the executive may have been mistaken as to the supposed informality.¹

The adjournment referred to, which can prevent an executive from returning a bill with his objections within the time prescribed, must be an adjournment amounting to a termination of the session, and not an adjournment from day to day.²

IV. UNDER MUNICIPAL CHARTERS.—The charters of many of the cities in the *United States* give a qualified negative to the executive head of municipal authority, over the resolutions and ordinances of the common council. Here, the power is given, not as essential to preserve an equilibrium of governmental powers, but for almost the sole purpose of a check upon corrupt, hasty, and ill-considered legislation. But the power must be given in terms or by necessary implication, or it does not exist.³

VI.—See note 4.

1. *Birdsall v. Carrick*, 3 Nev. 154.

2. *Story's Const.*, § 891; *Harpending v. Haight*, 39 Cal. 205; 2 Am. Rep. 432; *Opinion of Justices*, 45 N. H. 610. See generally *STATUTES*, vol. 23, p. 188.

3. Under *New York Act*, April 27, 1892 (*New York Laws* 1892, ch. 379), amending the charter of the city of Buffalo, so as to provide that "commissioners of police shall receive such annual salary as may be fixed by the common council at a joint session thereof," and that "said common council shall immediately determine the amount of such salary," the mayor has no right to veto a resolution so fixing the same, notwithstanding that section 18, of the Act of March 27, 1891 (the Revised Charter of the city of Buffalo), provides that "every ordinance and resolution of the common council," with certain immaterial exceptions, "shall be presented to the mayor before it shall be of force," and that if he does not approve it, but returns it with his objections to the board of aldermen, that board and the board of councilmen shall pass it by the votes of two thirds of all the members elected before it shall be of force. *People v. Board of Councilmen* (Buffalo Super. Ct.), 20 N. Y. Supp. 51.

By the charter of the city of Minneapolis, the making or authorizing of appropriations is exclusively vested in the common council, and the mayor has no veto of the action of the council in making or authorizing the same. *State v. Ames*, 31 Minn. 440; 4 Am. & Eng. Corp. Cas. 649.

Objection to a resolution appropriating money to pay a claim against the city of Newark, interposed by way of veto by the mayor having a veto power, and overcome by the requisite vote, may not be again urged by the mayor to avoid doing a mere ministerial act to effectuate such appropriation. *Ahrens v. Fiedler*, 43 N. J. L. 400.

In New York City, the mayor is not a member of the common council, although an officer of the corporation. The powers conferred by statute over the common council may be exercised by the aldermen and the councilmen without the cooperation of the mayor, and he has no veto power upon their exercise. And action of the mayor upon matters passed by the common council is confined to such resolves, etc., as will take effect as acts or laws of the corporation, and does not extend to resolves, etc., which operate only as acts of the common council. The form of communication adopted by the two boards in exercising powers conferred upon the common council, cannot enlarge the authority of the mayor. *Achley's Case*, 4 Abb. Pr. (N. Y. Supreme Ct.) 35.

4. "Mr. Goddard, in discussing an enjoyment which is not peaceable, defines *vi* in the phrase *vi clam aut precario*, to mean violence or force and strife, or contention of any kind; and the illustration he gives is where the enjoyment has been during a period of litigation about the right claimed, or the user has been continually interrupted by physical obstacles placed

VICE CONSUL—(See also *CONSULS*, vol. 3, p. 764).—" 'Vice consuls' and 'vice commercial agents' shall be deemed to denote consular officers, who shall be substituted temporarily, to fill the places of consuls general, consuls, or commercial agents, when they shall be temporarily absent, or relieved from duty." In other words, the vice consul is not a deputy, but an acting consul.¹

VICE PRINCIPAL.—See *FELLOW SERVANTS*, vol. 7, p. 838.

VICINITY; **VICINAGE**—(See also *LOCAL*, vol. 13, p. 980; *NEIGHBORHOOD*, vol. 16, p. 485; *VENUE*, vol. 28, p. 200).—See note 2.

with a view of rendering user impracticable. *Goddard on Easements* 172." *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 622.

1. *United States* Rev. Stat., § 1674; *In re Herres*, 33 Fed. Rep. 165. In that case, where depositions for the extradition of an alleged fugitive from *Canada*, had been authenticated by the vice consul of the *United States*, it was held that the prisoner's claim that a vice consul is a deputy, and not the principal diplomatic consular officer authorized to authenticate such papers, was unfounded.

2. *In the Vicinity*.—In *Langley v. Barnstead*, 63 N. H. 246, it was held that towns may be "situated in the vicinity" of each other, within the meaning of the phrase as used in *New Hampshire* Gen. Laws, ch. 68, § 10, providing for a division of the expense of highways, although not adjoining. The court said: "Etymologically and by common understanding, the phrase 'in the vicinity' means in the neighborhood, and neighborhood, as applied to place, signifies nearness as opposed to remoteness. Whether a place is in the vicinity or in the neighborhood of another place depends upon no arbitrary rule of distance or topography. One village may be said to be 'in the vicinity' of another village without being joined or incorporated with it, and one house may be said to be near, 'in the vicinity' of, or in the neighborhood of, another house, and not structurally adjoin it. Vicinity admits of a more indefinite and wider latitude in place than proximity or contiguity, and, as applied to territory, may embrace a more extended space than that lying contiguous to the place in question, and as applied to towns and other territorial divisions, may embrace those not adjacent. The chief object of the statute is to distribute with greater equality and uniformity the

public burdens, and relieve those towns where the burdens are excessive and disproportionate to the benefits derived by placing them in part upon other towns more largely benefited by the improvement. Actual proximity of towns is not the statute test of a right to relief, but an 'excessively burdensome' expense upon one town for a public improvement, by which another town or other towns in the vicinity are 'greatly benefited.' A town separated by the territory of another town from that where the new highway is established, might be benefited by it immensely more than the adjacent town lying between; and a reasonable construction of the statute, as well as the requirements of justice, demands that the expense should be apportioned upon the towns in the vicinity 'greatly benefited,' disregarding contiguity of boundary lines of towns. Giving to the term 'vicinity' its natural meaning, and that lying in the common understanding and approved by common usage, and considering the leading object of the statute, the intent of the legislature must have been to apply the act to towns in the neighborhood of that in which the highway is established, and not to confine it to towns adjoining. The question of vicinity being one not fixed by technical and arbitrary rules, but depending upon reasonable nearness as contrasted with remoteness, and upon excess of burden upon one town contrasted with enlarged benefits to the neighboring town, is a question of fact, and the finding of the board of commissioners upon that subject, upon competent evidence, will not be revised here. *Haley v. Dorchester*, etc., *Ins. Co.*, 12 Gray (Mass.) 545."

In *Territory v. Lannon*, 9 Mont. 1, the question was whether the notice of a proposed county road was posted "in the vicinity" of the road. The court

VICIOUS.—See note 1.

said: "The appellant maintains that the posting of the notice upon the depot at Bearmouth was not in the vicinity of the proposed road, and was therefore illegal. The statute designates for this purpose public places in the vicinity of a highway. The meaning of the words 'public place,' which are found in many laws, is modified by the subjects to which they are applied." In *State v. Welch*, 88 Ind. 308, the court says: "The phrase, 'public place,' has received a construction by this court, and has been construed to mean a place where the public has a right to go and be." To the same effect, are *State v. Sowers*, 52 Ind. 311; *State v. Waggoner*, 52 Ind. 481. "The term 'public,' as applied to 'place,' is not an absolute, but a relative term. . . . It is used in contradistinction to the term 'private' and to signify that the notice was to be given in such way as would be likely to have the effect intended." (*Cahoon v. Coe*, 57 N. H. 595.) Viewed from any standpoint, they include a station upon a railroad which has been chartered by an act of Congress. In *Langley v. Barnstead*, 63 N. H. 246, the court says: "Etymologically, and by common understanding, the phrase 'in the vicinity' means 'in the neighborhood,' and 'neighborhood,' as applied to 'place,' signifies 'nearness,' as opposed to 'remoteness.'" Whether a place is in the vicinity or in the neighborhood of another place, depends upon no arbitrary rule of distance or topography." The testimony discloses the fact that the proposed road connected with the main highway about six hundred or seven hundred feet from the depot at Bearmouth, and that there was no suitable place for posting the notice at that point. We conclude from the foregoing authorities that the statute of the territory was complied with in this respect, and that the notice which was defaced and obliterated by the appellant was legally posted."

An agreement between physicians that one would not practice in a specified city and vicinity, was construed as excluding him from all territory within ten miles from the city limits. In *Timmerman v. Dever*, 52 Mich. 36; 50 Am. Rep. 240, the court, by Sherwood, J., said: "A discussion of the testimony is unnecessary, and could serve no useful purpose. It is sufficient to

say the equity of the case is clearly shown to be with complainant, and but one thing requires further notice—the decree restrains the defendant from practicing his profession 'in the city of Hastings and vicinity.' This clause of the decree is somewhat indefinite as to the extent of territory to which it applies, and may give rise to further misunderstanding between the parties. For the purpose of obviating any difficulty of this kind, the decree made by the circuit judge should be so modified as to make certain the limits of its operation. Of course, the extent of territory included in the term 'vicinity of the city' must necessarily depend in a great measure upon the size of the city, its location and particular surroundings: and under all the circumstances, as they appear upon this record, I think the territory surrounding the city for the distance of ten miles from its corporate boundaries, a reasonable limitation, and one which may be safely regarded as within the contemplation of the parties when they made their contract. The decree at the circuit court should be modified accordingly, and thus modified must be affirmed with costs." Campbell and Cooley, JJ., concurred. Graves, C. J. said: "I agree with the court below that the case established by complainant entitled him to relief, and I also agree that the proper mode of relief is by injunction. But I think the decree ought to be more precise. It pursues the wording of the agreement, that defendant should forebear business in the city of Hastings and 'vicinity,' and fails to prescribe what territory the parties understood by this expression. They meant by it to identify the space from which the defendant was to be excluded, but they did not use it as amounting to a definite description. The word itself is entirely indefinite as a term of description of the bounds of the territory, and it fails to fix, in such manner as it should for the purpose of an injunction, the particular limits which the defendant is not to pass. The defendant is entitled to be informed, on the face of the injunction, where he is not to act under peril of attachment, and it ought not to be left as a matter of speculation or conjecture."

1. Vicious Propensity in an Animal.—

"An owner of a domestic animal is

VICTIM.—See note 1.

VICTUALS—(See also **HAWKERS AND PEDDLERS**, vol. 9, p. 310).
—See note 2.

VIDELICET—(See also **INDICTMENT**, vol. 10, p. 450; **PLEADING**, vol. 18, p. 467; **VENUE**.)

I. Definition, 451.

II. Office and Effect, 452.

I. DEFINITION.—The phrases, “to wit,” “that is to say,” and

not, in general, liable for an injury committed by it, unless it be shown that he had notice of its vicious propensity. *Van Leuven v. Dumond*, 1 N. Y. 515, and cases cited. By vicious propensity, is included a propensity to do any act that might endanger the safety of the persons and property of others in a given situation. Not such only as would impair the utility of the animal for the purpose for which it was kept. This appears from the reason of the rule. The owner is not liable, unless he has notice of the vicious propensity. If he has such notice, he is liable. That is, the owner is not liable for permitting his domestic animal to be at large when he has no reason to apprehend that any injury to others will result therefrom. If he has such reason, he is liable. In the present case the defendant had notice that his horse, when at large, was in the habit of running and kicking upon the sidewalk. These acts, he must have known, were dangerous to others.” *Dickson v. McCoy*, 39 N. Y. 403. See also **ANIMALS**, vol. 1, p. 580.

1. **Charge to Jury in Homicide Case.**—“In *People v. Williams*, 17 Cal. 146, the trial judge charged the jury, that ‘the fact that the deceased was a chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another chinaman, or even against his victim, give the defendant any right to take his life. Our laws do not sanction the sacrifice of human life in order to enforce the collection of taxes or licenses.’ In reference to this charge the supreme court said: ‘The word victim, in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the

accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. We are not disposed to criticise language very closely in order to reverse a judgment of this sort, but it is apparent that in the case of conflicting proofs, even an equivocal expression coming from the judge, may be fatal to the prisoner. When the deceased is referred to as a “victim,” the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision from themselves to the court. A word, a look, or a tone may, sometimes, in such cases, be of great or even controlling influence.” *Sharp v. State*, 51 Ark. 156.

2. In construing the term as used in the *Hawkers and Peddlers Act* exempting victuals from the operation of the statute, the court, in *Rex v. Hodgkinson*, 10 B. & C. 76, said: “I think that the word victuals in 50 Geo. III., ch. 41, §. 23, comprises everything which constitutes an ingredient in the food of man, and all articles which mixed with others constitute food. Yeast or barm may not, perhaps, be necessarily used in the making of bread, but it is generally used, and I am, therefore, of the opinion that it is within the exempting clause.”

"namely," sometimes abbreviated to "viz.," so frequently employed in pleadings, both civil and criminal, are technically termed the *videlicet* or *scilicet*, and when any matter alleged in pleading is immediately preceded by this form of statement, it is, in the language of the law, said to be "laid under a *videlicet*."¹

II. OFFICE AND EFFECT.—Lord Chief Justice Hobart, speaking of the *videlicet*, observed, "that its use is to particularize that which was before general, or to explain that which was before doubtful or obscure, that it must not be contrary to the premises and neither increase nor diminish, but that it may work a restriction where the former words were not express and special, but so indifferent that they might receive such a restriction without apparent injury."²

When an averment is material, the intervention of a *videlicet* does not render it immaterial, but it is as much traversable as if the *videlicet* had not been inserted.³ On the other hand, the

1. Brown's Law Dict.; Century Dict. The terms *scilicet* and *videlicet* are synonymous; the latter, however, is more frequently used; the former is sometimes abbreviated "*sc.*" and "*ss.*" Abbott's Law Dict.

2. Stukeley v. Butler, Hobart 172. See also Dakin's Case, 2 Saund. 290a; Buck v. Lewis, 9 Minn. 314.

In Com. v. Hart, 10 Gray (Mass.) 468, it was said that "the precise and legal use of a *videlicet*, in every species of pleading, is to enable the pleader to isolate, to distinguish, and to fix with certainty that which was before general, and which, without such explanation, might, with equal propriety, have been applied to different objects." See also U. S. v. Quincy, 6 Pet. (U. S.) 468.

A *videlicet* relieves the pleader of the necessity of proving a non-essential descriptive averment. State v. Heck, 23 Minn. 550; Brown v. Berry, 47 Ill. 177.

In Mallett v. Stevenson, 26 Conn. 428, the complaint and warrant, under section 12 of the Act for the Suppression of Intemperance, designated for the seizure of "certain intoxicating liquors, to wit, several casks of French brandy, containing twenty-five gallons, more or less; several casks of gin, containing twenty-five gallons, more or less; and several casks of intoxicating wines, containing twenty-five gallons, more or less." It was held that an officer serving the warrant was not justified by it in seizing any "intoxicating liquors" other than "French brandy," "gin," and "intoxicating wines." The court said that "the natural and proper use

of a *videlicet* followed by words of special description is to restrict and limit the meaning of words of general description preceding it."

But in State v. Brennan's Liquors, 25 Conn. 278, where the complaint alleged that a certain quantity of spirituous liquors, to wit, ten gallons of brandy, ten gallons of rum, etc., was kept, etc., in violation of said act, and the officer, by virtue of a warrant which recited the complaint, seized certain vessels containing more than the quantities designated, it was held that the specification of the kinds and quantities of the liquors under the *videlicet* was intended as a description of them, and not to limit their quantities, and that the authority of the officer was not limited to the quantity stated in the complaint.

Where damages are laid subsequent to the commencement of the action in a case for the seduction of a daughter, or previous to the plaintiff's having any right of action, if the matter is laid under a *scilicet*, the court may avail itself of this circumstance to say that it is not to be intended that the jury took the evidence given into consideration. Stiles v. Tilford, 10 Wend. (N. Y.) 340.

3. Whenever a *videlicet* contains matter that is material and necessary to be alleged, it is considered as a direct and positive averment, and as such traversable in the same manner as if no *videlicet* had been employed. Skinner v. Andrews, 1 Saund. 170; Stukeley v. Butler, Hobart 175; Haymon v. Rogers, 1 Str. 232; Bissex v. Bissex, 3 Burr. 1729; Knight v. Preston, 2 Wils. 332;

Grimwood v. Barrit, 6 T. R. 460; Dakin's Case, 2 Saund. 291; Rex v. Stevens, 5 East 254; Marks v. Lahee, 3 Bing. N. Cas. 408; 32 E. C. L. 181; Smith v. Dixon, 7 Ad. & El. 1; 34 E. C. L. 11; Green v. Rennet, 1 T. R. 656; Rex v. York, 5 T. R. 71; U. S. v. Burnham, 1 Mason (U. S.) 57; Jansen v. Ostrander, 1 Cow. (N. Y.) 670; Pulford v. Johnson, 35 Conn. 32; Frank v. Morris, 57 Ill. 139; 11 Am. Rep. 4; Com. v. Lavonsair, 132 Mass. 1; Butterworth v. Western Assur. Co., 132 Mass. 491; State v. Murphy, 55 Vt. 548; Ladue v. Ladue, 16 Vt. 189; Bruguier v. U. S., 1 Dakota 5; Foster v. Pennington, 32 Me. 178. Thus, if the condition of a bond is to perform the award of I. S., to be delivered on or before the 21st of May, and the defendant pleads no award, and the plaintiff replies that, after the making of the bond and before the commencement of the action, to wit, on the 21st of May, the arbitrator made his award, here the *scilicet* is a positive averment that the award was made within the time limited by the condition, and may, therefore, be traversed and issue taken upon it. Gleason v. M'Vickar, 7 Cow. (N. Y.) 44.

Where time is material, stating it under a *videlicet* will not make it immaterial. Edge v. Strafford, 1 C. & J. 394; Partridge v. Coates, R. & M. 153; Schlatter v. Rector, 1 Mo. 286.

In Bissel v. Drake, 19 Johns. (N. Y.) 68, which was a case of trover for a promissory note, the declaration stated the note to be for \$180, and it appeared in evidence to be for the sum of \$300. The court said: "The amount of the note was material, and it being laid under a *videlicet* will not in such case dispense with strict proof of the allegation. . . . Where the party is incapable of stating the date and amount of the note of which he is dispossessed, the law will not require him to make such statement. It will be satisfied by an allegation that the note is of great value, to wit, of the value of a certain sum; but here the plaintiff has undertaken to state the precise amount for which the note was given, and the proof does not correspond with his statement."

In an action of debt to recover penalties for usury, the day of the usurious contract must be stated in the declaration, and must be proved as laid, even though under a *videlicet*, and the plaintiff will be nonsuited if he fails to give

evidence of the day, although he proves that the contract was made within such a time and upon such terms that it must have been usurious. Fox v. Keeling, 2 Ad. & El. 670; 29 E. C. L. 173. See also Grimwood v. Barrit, 6 T. R. 460.

When it is necessary to state the grant of letters of administration to a plaintiff suing as administrator, if the day of the grant, though laid under a *videlicet*, is incorrectly stated to have been on a day subsequent to the alleged date of the promise to the intestate, it will be bad on special demurrer, although preceded by the words, that after the death of the intestate, to wit, on such repugnant day, the letters were granted. Ring v. Roxbrough, 2 Tyr. 468.

An averment in a declaration of the day of a former trial must exactly agree with the record to be produced in evidence to support it, though it be laid under a *videlicet*. Pope v. Foster, 4 T. R. 590.

Where, in an action upon a contract of warranty in the sale of a quantity of oil, the declaration alleged that the defendant undertook that the oil was of a "good and superior quality, to wit, prime quality winter oil," it was held that the words under the *videlicet* were material and traversable. Hastings v. Lovering, 2 Pick. (Mass.) 214; 13 Am. Dec. 420.

In a complaint charging a misdemeanor, the defendant is not precluded from traversing any material allegation, although made under a *videlicet*. State v. Phinney, 32 Me. 439.

Where matter of contract is precluded in answer to an action, and the terms of the contract are material to the defense, those terms, though stated under a *videlicet*, must still be proved. Robson v. Fallon, 3 Bing. N. Cas. 396; 32 E. C. L. 173.

In Paine v. Fox, 16 Mass. 133, Parker, C. J., for the court, said that the words following a *videlicet* in a declaration are not to be taken as an averment and are not traversable. But in Hastings v. Lovering, 2 Pick. (Mass.) 222; 13 Am. Dec. 420, the same judge, in delivering the opinion of the court, referring to this observation, said: "This was undoubtedly a mistake. It is only where the allegation so expressed is immaterial and might have been omitted that it shall not be traversed, and may be rejected as wholly useless."

want of a *videlicet* will, under some circumstances, make an averment material that would otherwise not be so.¹ But Chitty is inclined to the view that the omission of a *videlicet* should not impose upon the pleader the necessity of proving precisely as stated matter which would not require such proof, if averred under a *videlicet*.² And it seems that the rule has no application in criminal pleading.³ If that which comes under a *videlicet* is immaterial, or of mere form, its repugnancy to what precedes does not affect the pleading, but it will be discarded as superfluous and void.⁴ But it will not be rejected, if it can be reconciled and made restrictive.⁵

VIEW.—View by jury generally, see JURY AND JURY TRIAL, vol. 12, p. 367; in condemnation proceedings, see EMINENT DOMAIN, vol. 6, p. 615; in criminal cases, see CRIMINAL PROCEDURE, vol. 4, p. 879; HOMICIDE, vol. 9, p. 725; arrest upon view, see ARREST, vol. 1, p. 732; view of body by a coroner, see CORONER, vol. 4, p. 178; view of property by assessors of taxes, see TAXATION, vol. 25, p. 225; in laying out highway, see EMINENT DOMAIN, vol. 6, p. 615; STREETS, vol. 24, p. 50.

VILLAGE.—(See also MUNICIPAL CORPORATIONS, vol. 15, p. 933; TOWNS AND TOWNSHIPS, vol. 26, p. 98).—In early English law "village" and town seem to have been used synonymously.⁶

1. Dakin's Case, 2 Saund. 291 c; Symmons v. Knox, 3 T. R. 65; Smith v. Dixon, 7 Ad. & El. 1; 34 E. C. L. 11; Crispin v. Williamson, 8 Taunt. 107; 4 E. C. L. 36; Bristow v. Wright, 2 Doug. 668; Deming v. Grand Trunk R. Co., 48 N. H., 463; 2 Am. Rep. 267; Jansen v. Ostrander, 1 Cow. (N.Y.) 670.

Where, in an action for breach of warranty upon the sale of personal chattels, the plaintiff set forth the price paid for the goods, without a *videlicet*, he was held bound to prove the precise sum alleged, it being made material by the form of the allegation. Durstan v. Tuthan, cited in Symmons v. Knox, 3 T. R. 67.

Where the declaration stated that in consideration that the plaintiff would buy forty-five sheep for £54 11s. 6d., the defendant undertook that they were sound, and the plaintiff proved the price to be £54 12s. 6d., the variance was adjudged fatal for want of a *videlicet*. Arnfield v. Bates, 3 M. & S. 173.

2. 1 Chitty's Pl. (16th Am. ed.), p. 326. See also 2 Campb. 307, note; Pulford v. Johnson, 35 Conn. 32.

3. Rex v. Gillham, 6 T. R. 265; 1 Chitty's Pl. (16th Am. ed.), p. 326.

4. Bishop of Lincoln v. Wolferstan, 1 W. Bl. 495; State v. Haney, 1

Hawks (N. Car.) 460; Vail v. Lewis, 4 Johns. (N. Y.) 451; 4 Am. Dec. 300; Gleason v. M'Vickar, 7 Cow. (N. Y.) 45; State v. Brown, 51 Conn. 1; Lewis v. Hitchcock, 10 Fed. Rep. 5; Straight v. Hanchett, 23 Ill. App. 584; Guschnor v. Keith, 9 Ill. App. 416; Blackwell v. Board, etc., 2 Blackf. (Ind.) 143; Block v. O'Hara, 1 Mo. 145.

5. Wilson v. Mount, 3 Ves. Jr. 194.

6. Co. Litt. 115 b; Touchstone 92. See also Rex v. Showler, 3 Burr. 1391; Rex v. Horton, 1 T. R. 374. And see, as to "village" used inadvertently for town, State v. Lake City, 25 Minn. 404.

Enfield v. Jordan, 119 U. S. 684, was a suit against an Illinois town to recover the amount of interest coupons made by the town. The case involved an inquiry into the use of the words "town" and "village" in the Illinois statute. In this case the United States Supreme Court overruled Welch v. Post, 99 Ill. 471, and followed Martin v. People, 87 Ill. 524, and declared, in effect, that in Illinois an incorporated town and an incorporated village were one and the same thing. The court said: "This question depends upon the use of words 'town' and 'village' in the laws of Illinois. The general and popular distinction between them in

English speech will not carry us far towards a solution. The dictionaries tell us that the word 'town' signifies any walled collection of houses. But that is its antique meaning. By modern use, it is said to be applied to an undefined collection of houses, or habitations; also to the inhabitants; emphatically to the metropolis. Again, a town is any collection of houses larger than a village; or any number of houses to which belongs a regular market, and which is not a city. The same authorities define a village as a small collection of houses in the country, less than a town. According to this distinction, the law, in giving power to 'any village, city, county, or township' to make donations and issue bonds to the railroad company, confers the power upon bodies of higher and lower degrees of municipal organization than towns, and leaves them out. This is an incongruity which we can hardly suppose was intended. The supreme court of *Illinois*, in a recent decision against the power, to which we shall presently refer, is obliged to say, 'why incorporated towns were omitted in that act cannot now be known.' In seeking aid from collateral sources, we shall probably derive more light from the political use of the terms 'town' and 'village' in this country, than from general lexicography. In *New England* and *New York*, towns are the political units of territory, into which the county is subdivided, and answer, politically, to parishes and hundreds in *England*, but are vested with greater powers of local government. In *Delaware*, the counties are divided into hundreds, the words 'town' and 'village' being indiscriminately applied to collections of houses. In *Maryland* and most of the Southern States, the political unit of territory is the county, though this is sometimes divided into parishes and election districts for limited purposes. The word 'town' is used in a broad sense to include all collections of houses from a city down to a village. Thus, in *Virginia*, by an act passed in 1778, on the death or removal of 'any one of the trustees and directors of the several towns within this state, not incorporated,' provision is made for filling the vacancy; by act of 1793, 'electors of towns entitled to representation in the House of Delegates' are authorized to vote at their respective court-houses for representatives in Congress; by the Revised Code of 1819, 'trustees of the respective unincorporated towns

of this commonwealth are empowered to make by-laws to prohibit horse racing in the streets of the town; by the Revised Code of 1849, in the chapter entitled 'Of Towns,' the council and board of trustees of any town, heretofore or hereafter established, may cause to be made a survey and plan of the town, showing each lot, public street, etc., to lay out, alter, improve, and light the streets, and to adopt various municipal regulations relating to public grounds, markets, health, nuisances, supply of water, fire departments, etc. Most of these towns were nothing but villages. The close connection between *Virginia* and *Kentucky* and the early settlement of *Illinois* renders this use of the word 'town' in the mother state apposite to the question under consideration. In *New Jersey*, *Pennsylvania*, *Ohio*, *Indiana*, *Michigan*, and *Illinois*, the subdivisions of a county, answering to the towns of *New England* and *New York*, are called townships, though the word 'town' is also applied to them in *Illinois*. In these states the words 'town' and 'village' are indiscriminately applied to large collections of houses less than a city. These results are gathered from an examination of the laws and constitutions of the states named; and we should have no hesitation in saying that in *Illinois*, an incorporated town and an incorporated village were one and the same thing, were it not for the decision of the supreme court of that state to the contrary, in the case of *Welch v. Post*, 99 Ill. 471, already alluded to, which decision was made in relation to the identical bonds in question in this suit. . . . We feel compelled to say that we regard the views expressed in the case of *Martin v. People*, 87 Ill. 524, as the more sound and convincing of the two. It seems to us that the legislature of *Illinois*, in the act for the incorporation of cities and villages, intended to avoid hereafter the use of the ambiguous word 'town,' as applied to the smaller class of incorporated municipalities, and to designate them by the single term of 'village.' This conclusion is, on the whole, so obvious that we do not hesitate to adopt it, and to hold that the town of Enfield is a village within the meaning of the amending act of February 24, 1869. We may add, as a strong corroboration of what has been said, that in the 9th section of that act the word 'town' is used indiscriminately with the word 'village.' The language is: 'It shall be

VINDICTIVE DAMAGES—VIOLATING LAW.

A village is an assemblage of houses in the country, less than a town or city.¹

VINDICTIVE DAMAGES.—See EXEMPLARY DAMAGES, vol. 7, p. 448.

VINOUS LIQUORS.—See INTOXICATING LIQUORS, vol. 11, p. 571.

VINTNER.—A vintner is one who sells wine, and a covenant prohibiting the trade of a "vintner," includes a person selling wines not to be drunk on the premises.²

VIOLATING LAW (INSURANCE).—(See also ACCIDENT INSURANCE, vol. 1, p. 87; LIFE INSURANCE, vol. 13, p. 629.)

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I. IN GENERAL.—A common exception clause, in policies of life and accident insurance in current use, is one which purports to relieve the insurer from liability for death or injury in or while violating law. The object and purpose of this provision are not far to seek. Insurers recognize in lawless and reckless characters an undesirable risk, and hence prefer not to offer them indemnity.

lawful for the incorporate authorities of any incorporate city or village, through which said railroad shall be located, to donate or lease to said railroad company, as a right of way, the right to lay a single or double track through said city or incorporated village, or any portion of the same, or any street or highway, that the said railway company shall elect for that purpose, except at the option of the said railway company and corporate authorities of such towns or cities."

1. *Russel v. Detroit, etc., Ins. Co.,* 80 Mich. 410, following Webster's Dict.

A town or village, within the meaning of the statute requiring railroad corporations to construct fences, may exist, although there is no plat of the same, dedicating streets, etc., in the

manner pointed out by the statute in that regard. The court said: "Any small assemblage of houses, for dwellings, or business, or both, in the country, constitutes a village, whether they are situated upon regularly laid out streets and alleys or not." Illinois Cent. R. Co. v. Williams, 27 Ill. 49; approved in Toledo, etc., R. Co. v. Spangler, 71 Ill. 569, where it was held that a place where there was a station house, a warehouse, a store, a blacksmith shop, a post office, and five or six dwelling houses, was a village.

Village, within the Michigan Homestead Law, does not necessarily mean an incorporated "village." Bouchard v. Boura, 57 Mich. 8.

2. Wells v. Attenborough, 24 L. T. N. S. 312.

And this purpose has met the approval of some courts of high standing. It was said in one of the early cases where the clause was construed: "The company, in protecting themselves against accident or death caused by a violation of law, acted upon a wise and prudent estimate of the dangers to the person generally connected with such violations."¹ So, in a recent decision by the supreme court of *Vermont*,² where the violation of law was of a minor grade, it was observed: "The liability to accident must be greatly enhanced in the case of a person who, like the plaintiff, engages in hunting or traveling about the country on Sunday, in open violation of law, as compared with one who observes the law."

Nevertheless, while the purposes of this provision have received judicial sanction in some quarters, the clause on the whole can hardly be said to have been effectual, in its ordinary form, in relieving the insurer from liability for the excepted acts. The history of litigation concerning it fails to disclose a disposition, on the part of a majority of the courts, to enforce the clause, and the grounds on which enforcement is denied, have given rise to some very peculiar decisions. One explanation of this is probably the fact that the phraseology of the clause is so general and lacks the specific terms which are thought necessary in order to apprise the insured of the limitations in his contract.

The litigation upon this subject, while not so extensive as that concerning certain other clauses, presents some interesting questions, has occasioned some novel departures, and, on the whole, forms a most curious as well as important chapter in the law of insurance.

II. FIRST STAGE: "VIOLATING LAW" NOT MENTIONED.—As in the case of many other clauses of the insurance contract in its various forms, that which constitutes the subject of this treatise acquired its present condition only after passing through a stage during which it does not expressly appear in the policy at all. The existence of an implied exception having an effect substantially like that intended by this clause, seems, however, even at this early period, to have been recognized by the courts and to have received enforcement at their hands. The instances in which the rule was thus applied were exclusively cases of life insurance,

1. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531. The unlawful act in that case was a horse race for money, and Miller, J., further commented upon the policy of inserting the clause as follows: "In the class of cases under consideration we have no question that the sum of money often at stake stimulates to further acts of carelessness, in the way of violence, fraud, and a disregard of the rules of fair racing, which increase largely the dangers always attendant on that sport. The class of men who collect on such occasions, and who

often become the leading parties in the conduct of the affair when large sums of money are wagered, have led to its denunciation by many wise and thoughtful people, and very surely adds to the risk of personal injury to the rider or driver. It was against this general species of danger, attending nearly all infractions of the law, that the company sought to protect itself by the clause of the policy in question."

2. *Duran v. Standard L., etc., Co.*, 63 Vt. 437; 22 Atl. Rep. 530.

but the reasoning upon which they rest is quite as applicable to accident policies, and an historical view of the development of this clause (by which alone its present import can best be understood) would clearly be incomplete without an examination of the early authorities.

In a case which came before the House of Lords in 1830,¹ the insured under a life policy had been executed for forgery, then a capital crime in *England*. The assignees of the policy sought recovery of its proceeds, but their right to do so was emphatically denied upon the sole ground of public policy. The reasoning of the Lord Chancellor, who delivered the opinion, shows that in the view of the eminent tribunal for which he was speaking, not only was "death from violating law" not excepted, but also that it could not lawfully be included. He observes: "Suppose in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that in the event of his committing a capital felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract, if available, take away one of those restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connections. Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went, at least, altogether void?" The conclusion thus reached by the highest authority in *Great Britain* has been confirmed by other expressions from the courts of that country,²

1. *Amicable Soc. v. Bolland*, 4 Bligh. N. S. 194; 2 Dow. & C. 1; 2 Bigelow's Life & Acc. Ins. Rep. 240. This decision in effect overrules (though it does not mention) *Bolland v. Disney*, 3 Russ. 351, arising out of the same circumstances and decided in the court of chancery some three years before. There the Master of the Rolls had said, speaking of the same contract: "Where the policy does not provide that the obligation to pay shall determine, if the event insured against shall happen in a certain specified manner, then, if the event does happen in that manner, the obligation to pay shall not determine, merely because the conduct of the party insured produced the event, even though such conduct was an offense against the crim-

inal law of the country. To avoid the obligation to pay, the act of the party insured, which produced the event, must be done fraudulently, for the very purpose of producing the event."

2. *Horn v. Anglo-Australian, etc., L. Ins. Co.*, 7 Jur. N. S. 673; 2 Bigelow's Life & Acc. Ins. Rep. 602, where Vice Chancellor Wood cites *Amicable Soc. v. Bolland*, 4 Bligh. N. S. 194; 2 Dow. & C. 1, and observes: "Although nothing was said in the policy one way or the other, the law would infer as a condition that the execution of the insured, in consequence of a crime committed by him, was not one of the cases in respect of which the policy would become payable." *Com-*

and the doctrine has received judicial sanction in *America*.¹

III. SECOND STAGE: DEATH IN "VIOLATING LAW" EXPRESSLY EXCEPTED.—It was hardly to be expected, however, that insurers would long rely for immunity from this cause of death, upon the doctrine of public policy which the history of analogous clauses in the policy had shown to be insecure.² Accordingly, from almost the first, accident policies were expressly so written as to relieve the insurer from death in "violating law." The phraseology has varied much, but in all its forms the clause has contained these essential words or their equivalents, and the history of litigation concerning it, is largely one of conflict between strict and liberal theories of interpretation, as applied to the scope of the clause. This is generally true of all the litigated questions which have arisen concerning the clause; it is particularly true of that which arises at the outset, viz.:

1. What Is Meant by the Term "Law"—a. APPLIED TO ALL LAW.—There is some authority for the doctrine that the words "violating law" are comprehensive enough to include any breach of positive law, regardless of whether or not it constitutes a crime. In an *Indiana* case, after an exhaustive discussion of this point, the conclusion was summed up as follows: "A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk."³ And previous to this, it was observed: "Suppose the death occurred from injury received while the assured was attempting to obtain, by force, the possession of a chattel of which another was in peaceable possession, the title to which was claimed by both, but which was really in the assured, the case would come

pare *Moore v. Woolsey*, 4 El. & Bl. 243; 3 *Bigelow's Life & Acc. Ins. Cas.* 138, where the doctrine is again recognized through Lord Campbell, who refused to extend it to policies which have been assigned.

1. Hatch v. Mutual L. Ins. Co., 120 Mass. 550, where the insured died from the effects of an illegal operation voluntarily submitted to for the purpose of producing abortion. While the policy in this case contained the express exception of death "in consequence of . . . the violation of laws," the court does not found its decision upon the clause only, but says: "We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would pre-

clude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this commonwealth."

"It was long ago decided that, in the absence of any provision to that effect, a felonious act resulting in death avoids a policy of life insurance." *Wolff v. Connecticut Mut. L. Ins. Co.*, 5 Mo. App. 243, *citing* *Amicable Soc. v. Bolland*, 2 Dow. & C. 1.

2. E. g., the clause excepting suicide.

3. Bloom v. Franklin L. Ins. Co., 97 Ind. 478; 49 Am. Rep. 469.

within the proviso, for the reason that the risk was increased; and the death caused by the violation of law by the assured, although such law was the civil only, the deceased having committed no breach of the peace or any indictable offense."¹

b. APPLIED TO CRIMINAL LAW ONLY.—A view quite contrary to the above was thus expressed by the supreme court of *Massachusetts*: "The condition that the policy should be null and void, among other grounds, in case the insured should die 'by the hands of justice or in the known violation of any law' of the state or country where he resided or which he was permitted to visit, must be construed to refer to a voluntary criminal act on the part of the assured, known by him at the time to be a crime against the law of such state or country. Applying the maxim *noscitur a sociis*, and remembering that such a clause ought not to be so interpreted as to work a forfeiture unless that intention is apparent, as well as from the natural import of the words 'known violation of law,' we conclude that they do not extend to mere trespasses against property or other infringements of civil laws to which no criminal consequences are attached."² In accordance with this view the clause was held not to apply where the insured was killed while attempting to seize property of the slayer in payment of a debt,³ or in a rencounter with pistols, where the insured fired in self-defense,⁴ or in a quarrel provoked by the insured but which he had abandoned and retreated from when he was slain.⁵

c. NOT LIMITED TO FELONIES.—In an early *Missouri* case,⁶ the view is expressed that the clause excepting, with other clauses, "death in the known violation of any law of the state," should, under the maxim *noscitur a sociis*, "be construed only to extend

1. Grover, J., in delivering the dissenting opinion in *Bradley v. Mutual Ben. L. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115. The majority opinion passes this point without deciding it, *Rapallo, J.*, merely remarking that a difference of opinion thereon existed among the members of the court. Compare *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, where the court mentions the conflict of authority on this point, but expresses no opinion.

2. *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 308; 1 Bigelow's Life & Acc. Ins. Rep. 208.

3. *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 316; 1 Bigelow's Life & Acc. Ins. Rep. 208; 99 Mass. 317; 1 Bigelow's Life & Acc. Ins. Rep. 265. This case arose out of the same circumstances as *Bradley v. Mutual Ben. L. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115, where, in a dissenting opinion, Grover, J., takes the opposite view.

4. In *Overton v. St. Louis Mut. L. Ins. Co.*, 39 Mo. 122; 90 Am. Dec. 455; 1 Bigelow's Life & Acc. Ins. Rep. 313, the court said: "To exonerate Overton from criminal agency, or to preclude a forfeiture of the policy, it must be shown by the evidence that when he fired his pistol he had reasonable cause to apprehend a design on the part of Williams to do him a great personal injury, and also that he apprehended imminent danger of such design being accomplished. A killing under such circumstances, under the statute of this state, would be justifiable homicide, and not a violation of the law within the meaning of the policy."

5. *Harper v. Phoenix Ins. Co.*, 18 Mo. 109; 19 Mo. 506; 1 Bigelow's Life & Acc. Ins. Rep. 300-301.

6. *Harper v. Phoenix Ins. Co.*, 19 Mo. 506; 1 Bigelow's Life & Acc. Ins. Rep. 301 (1854).

to instances in which the party died in the commission of a felony." The reasoning upon which this decision is based is unsatisfactory,¹ and has not only not been followed elsewhere, but has been expressly departed from in the jurisdiction where it was rendered.² There are authorities in which, while the doctrine is not stated *in haec verbis*, death while committing crimes below the grade of felony has been held to avoid the policy. Thus, where the insured was killed while driving in a trotting race for money, which was a misdemeanor, this was declared to be a "breach of law" within the meaning of the exception clause.³ A violation of the Sunday law is usually, if not always, a misdemeanor, yet it has been held sufficient to constitute a breach of the clause.⁴

1. Both because of the sweeping language of the clause, and in view of the fact that one of the other exceptions with which it was connected was "death in consequence of a duel" when dueling might not be a felony.

2. *Wolf v. Connecticut Mut. L. Ins. Co.*, 5 Mo. App. 236, where the insured was killed while committing an unprovoked assault, and the policy was held to be forfeited though the act was not a felony. The court cites the earlier *Mis-souri* cases, especially *Harper v. Phoenix Ins. Co.*, and in effect refuses to follow it, though as an inferior court it could not, of course, overrule the prior decision.

3. *Horse Racing*.—*Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531. This was the view of the circuit court as embodied in an introduction. The supreme court considers the point no further than to notice that no exception was taken to the charge. The ruling, it should be observed, is directly contrary to the *dictum* in *Harper v. Phoenix Ins. Co.*, 19 Mo. 506, that if the insured "is riding a race in a public highway, which is forbidden, and his horse falls, and he is thrown, and his neck broken, he does not die in the known violation of a law of the land, within the meaning of the terms of the condition."

4. *Violating Sunday Law*.—*Duran v. Standard L., etc., Ins. Co.*, 63 Vt. 437; *New York Accident Ins. Co. v. Clayton*, 59 Fed. Rep. 559. In the first named case, Duncan, the insured, started off one Sunday morning, gun in hand, for a hunt. After spending part of the day in that sport, he turned homeward across a plowed and frozen field, upon whose surface he slipped and fell and his knee was injured. Solely on the ground that he had been hunting on Sunday, it was held that he

could not recover on his accident policy. In the course of its opinion the court said: "At the time of the accident the plaintiff was engaged in hunting. He had his gun with him, and was ready to shoot any game he might see, whether in the field or on the highway on his way home. He started out to secure game wherever he might find it, and it does not appear that at the time of the accident, had abandoned this purpose. In hunting he was violating the law of this state. The traveling of the plaintiff was as much a part of his act of hunting as carrying his gun and ammunition, or shooting or capturing game when the opportunity occurred in the course of the hunt. Without walking the plaintiff could not have engaged in his hunt."

... Every step he took in making that trip was in and of itself a violation of law. In taking one of these steps he slipped and was injured. ... The liability to accident must be greatly enhanced in the case of a person who, like the plaintiff, engages in hunting or traveling about the country on Sunday, in open violation of law, as compared with one who observes the law. The defendant had a right to say that it would not assume such increased risks. The defendant, not having contracted to indemnify the plaintiff for the injury which he received, he cannot recover."

There is a *dictum* of Judge Elliott, in *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469, which is opposed to the above. He said: "It is not every violation of law which would absolve the company, even though the law be a criminal one. Suppose a man violates our law against profanity, and he is shot while doing it, should that absolve the company from liability?"

d. DOES NOT INCLUDE SUICIDE.—In the primitive stage of the history of this clause it seems to have been taken for granted that suicide of the insured, inasmuch as it was a crime, would, like other crimes, prevent recovery even without an express provision therefor. In one of the early English authorities,¹ Vice Chancellor Wood, after speaking of the implied exception of death from unlawful acts, observes: "So the argument might be pursued, although I do not know that any case has so decided, to the same extent, in the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby." But the doctrine thus indicated has passed away and the almost universal rule now is that suicide will not avoid a policy without an express provision of that import.² And in considering the effect of the particular clause before us, the courts have been practically unanimous in denying to it any application to cases of suicide. At common law self-murder was not only an offense against the law; it was a high grade felony, punishable by forfeiture of the offender's possessions.³ Yet, in the first accident insurance case where the question seems to have been presented, the court held, in effect, that death in the mode characterized with such unsparing severity by Blackstone was not "in the known violation of the law of any state."⁴ In a later *New York* decision, the court reasons that since the penal code of that state makes a felony of attempted suicide, and fails to specify the completed act, the insured's death from self-administered poison cannot be shown in a suit on a policy which excepts death "in violation of or attempt to violate any criminal law of the *United States*, or of any state or country in which the member herein named may be."⁵ And even

Again, suppose a man violates our Sunday law by fishing, and while committing the offense is shot and killed, would that relieve the company?"

1. *Horn v. Anglo-Australian, etc., L. Ins. Co.*, 7 Jur. N. S. 673; 2 Bigelow's *Life & Acc. Ins. Rep.* 602.

2. See Cooke on *Life Ins.*, § 41.

3. 4 Bl. Com., 189-190*, where the author also says: "The law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self; and this admits of accessories before the fact, as well as other felonies."

4. *Patrick v. Excelsior L. Ins. Co.*, 4 Hun (N. Y.) 263; 67 Barb. (N. Y.) 202. There is no discussion of the question upon principle in the opinion. Judge Learned merely observed: "I do not think that the expression 'in the known violation of the law of any state' can be

construed to include suicide, although suicide has been called a felony."

5. *Darrow v. Family Fund Soc.*, 116 N. Y. 537; 15 Am. St. Rep. 430, *affirming* 42 Hun (N. Y.) 245. The court's discussion of this point was as follows: "While the attempt to commit suicide is a crime, the accomplishment of the purpose to do so is not. It is with much force urged on the part of the defendant that the criminally unlawful attempt preceded the death, and that it was no less a violation of law because such was the result or consequence of it; that, whether successful or unsuccessful, there was an attempt, within the statute. Although that may be so in some sense in common parlance, an attempt to commit crime imports a purpose, not fully accomplished, to commit it. It is the attempt to commit suicide that is the crime, while the taking one's life is no violation of the criminal law.

where the crime, as defined by statute, is not confined to attempted suicide, and there is no room for this distinction, it still seems that the act will not avoid the policy under a clause similar to the foregoing.¹

e. SCIENTER.—In some of the policies, especially those construed in the earlier cases, the exception clause read “in the known violation of law,”² but the presence of the additional member in the clause apparently had little significance. No case appears to have been determined by virtue of any peculiar force

The attempt, in such case, to commit crime would be merely an unaccomplished purpose to attempt suicide, and, therefore, the peculiarity of the offense referred to is such that it cannot come within the provision of the statute that ‘a person may be convicted of an attempt to commit crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself.’ As the attempt to commit suicide is the only crime involved in the purpose and act of the party having in view the taking his own life, it is not seen how there can, in the law, be recognized an attempt to commit the crime; for whatever may be done with the intent and purpose of suicide is involved in the attempt to do it, and thus constitutes an ingredient of the main and only offense. It must, for the purpose of question here, be assumed that Darrow had the purpose of taking his own life, and that he fully accomplished such purpose. The result of his act, influenced by such intent, then, was his death. By the act of taking his own life he violated no criminal law, unless the attempt to do it may be distinguished from the act accomplished. An act is characterized by the purpose, when ascertained, of the party doing it, or by its result. If the act fail to accomplish its purpose, it constitutes an attempt; but, if the result of it is the consummation of the purpose, the act is not commonly designated as an attempt. The common acceptance of terms used, and which do not necessarily have a technical meaning, is entitled to some consideration in the construction of contracts, where the intention of the parties is sought for, as it must be, in the language employed. For the purpose of upholding the contract of insurance, its provisions will be strictly construed as against the insurer.”

See, to the same effect, *Meacham v. New York State Mut. Ben. Assoc.*, 120 N. Y. 237; *Freeman v. New York Nat. Ben. Soc.*, 42 Hun (N. Y.) 252.

1. *Kerr v. Minnesota Mut. Ben. Assoc.*, 39 Minn. 174; 12 Am. St. Rep. 631. The exception clause contained the words “in consequence of the violation.” The court observed: “The defendant offered to prove on the trial that Kerr, in order to escape arrest for the crime of forgery in this state, fled to *Canada*, where he was discovered and apprehended by detectives, and thereupon, to avoid being brought back to *Minnesota* for trial, shot and killed himself; that the Criminal Code of *Canada* forbade self-murder; and that his suicide was a violation thereof. We think this evidence was properly rejected. His death in *Canada* cannot be treated as the proximate result of his crime in *Minnesota*. *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 319. In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, or for forfeiture of a policy issued for the benefit of a third person, unless it is expressly so provided in the policy. *Mills v. Rebstock*, 29 Minn. 383. And under the general language here used, which must be construed favorably to the assured and strictly as against the company, the violation of law referred to in the policy ought not, we think, be construed to mean or include suicide. Suicide, though strictly a crime, is not reckoned among offenses or violations of law, such as the language of the policy would commonly be understood to refer to.”

2. *Harper v. Phoenix Ins. Co.*, 18 Mo. 109; 19 Mo. 506; *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 308; 99 Mass. 317; *Bradley v. Mutual Ben. L. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115; *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469.

given to the word "known," and in most of the cases, knowledge of the law alleged to have been violated was legally imputable to the insured. As was said in construing this clause: "There are many things of which no man can be ignorant, and among the things of which no man can be ignorant is, that it is against the law to commit murder, to steal, or to violently beat another."¹

2. Closeness of Connection Between Prohibited Act and Death or Injury—*a. MUST BE CAUSAL.*—Probably the most difficult question with which the courts have been called upon to deal, in the construction of this clause, is the determination of whether the insured's death was so sufficiently connected with the alleged unlawful act as to be within the exceptions of the policy. And at the threshold of a discussion of this question, there arises the subsidiary question whether the unlawful act and the death must stand in the relation to each other of cause and effect.

The language used in some of the policies appears to leave little room for question on this point. Such qualifying phrases, *e. g.*, as "caused by"² or "in consequence of,"³ plainly require that the prohibited act should be causal. And so strong is the influence of the latter of these two phrases that the same causal relation has been held necessary even where death or injury "while engaged in" any criminal⁴ or unlawful⁵ act was also excepted.

In policies where the exception clause is not qualified by the phrase "in consequence of" or its equivalent, no different rule seems to have been recognized. "There must, in all cases, whether the law violated be a criminal or a civil one, be some causative connection between the act which constituted the violation of law and the death of the insured."⁶ Even where only

1. Elliott, C. J., in *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469. Compare *Cluff v. Mutual Ben. L. Ins. Co.*, 99 Mass. 317; 1 Bigelow's Life & Acc. Ins. Rep. 265.

2. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531.

3. See cases in the two following notes.

4. *National Ben. Assoc. v. Bowman*, 110 Ind. 355, where the insured was injured while intoxicated in a public place contrary to the statutes of *Indiana*, the court saying: "It is not shown how the fact of intoxication contributed to the accident or injury."

5. *Utter v. Travelers' Ins. Co.*, 65 Mich. 545. In this case the insured, who was a deserter from the army, was shot by an arresting officer in a house of ill fame. The court observed: "Nor can it be held, as a matter of law, that Utter was engaged in an unlawful act, within the meaning of this policy. If

he had been shot in the act of deserting, this claim might be made with some reason and propriety, but such was not the case here. Neither was he shot because he was a deserter, nor because he was in a house of ill fame."

6. **Causal Relation Required.**—*Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469. Here the exception was of death merely "in the known violation of law." See, to the same effect, *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 308; 1 Bigelow's Life & Acc. Ins. Co. 208. In *Bradley v. Mut. Ben. L. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115, the court said: "Whatever be the nature of the violation of law urged by the insurance company, as avoiding the policy, it seems to be clear that a relation must exist between the violation of law and the death, to make good the defense; that the death must have been caused by the violation of law, to exempt the com-

a remote connection is required, the doctrine of a necessary causal relation seems to be preserved at least in theory.¹

b. APPLICATIONS OF RULE.—But while the rule seems to have been generally adopted that the prohibited act must cause the death or injury, in order to constitute a breach of the provision, there is much uncertainty, not to say confusion, in the cases where the rule is applied. When does death or injury occur in or while the insured is violating law? How great must be the degree of proximity between the unlawful act and the result? These are the questions which have most perplexed the courts, and the answers to them vary according as the minds of judges incline to a strict or liberal construction of the clause.

(1) *Instances of Liberal Construction.*—In some quarters the exception clause has been given a wide application, and has been extended to a great variety of acts whose connection in time or otherwise was but remote. The federal supreme court² held that an insured's death had been "caused by a breach of the law," for the reason that he had been engaged in an illegal horse race, although the jury found that he had alighted from the racing sulky "upright and uninjured" and was killed while attempting to stop his horse by once more grasping the reins. The justice who delivered the opinion, while recognizing the rule that the unlawful act must have been proximate, said: "The leap from the sulky and securing the reins, and the subsequent fall and injury to Seaver, are so close and immediate in their relation to his racing, and all so manifestly part of one continuous transaction, that we cannot, as this finding presents it, say there was a new and controlling influence to which the disaster should be attributed." So an injury incurred while the insured was walking home from a hunting expedition on Sunday, was held to have been "caused directly by plaintiff's violation of the law,"³ *i. e.*, the Sunday statute, although the accident was one which would as naturally have taken place on any other day. Death of the insured from an assault which he wrongfully provoked,⁴ or while,⁵

pany from liability. It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that, at the time of the death, the assured was violating the law, if the death occurred from some cause other than such violation." Compare *National Ben. Assoc. v. Bowman*, 110 Ind. 355; *Murray v. New York L. Ins. Co.*, 96 N. Y. 614; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545.

1. *Causal Connection Remote.*—See *Duran v. Standard L., etc., Ins. Co.*, 63 Vt. 437, where the insured, while returning from a hunt on Sunday, slipped on the frozen ground and was injured. The court found the causal

connection as follows: "Without walking the plaintiff could not have engaged in his hunt. Thus the accident was caused directly by plaintiff's violation of the law in hunting."

2. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531.

3. *Duran v. Standard L., etc., Ins. Co.*, 63 Vt. 437.

4. *Wolff v. Connecticut Mut. L. Ins. Co.*, 5 Mo. App. 236, *overruling*, in effect, the *dicta* in *Harper v. Phoenix Ins. Co.*, 19 Mo. 506; 1 *Bigelow's Life & Acc. Ins. Rep.* 301.

5. *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 *Am. Rep.* 469; *Wolff v. Connecticut Mut. L. Ins. Co.*, 5 Mo. App. 236.

or immediately after,¹ he was assaulting another without justification, has been adjudged to be "in violation of the law," though the insured was intoxicated,² and though the slayer did not intend to kill him.³

(2) *Instances of Strict Construction.*—On the other hand, there are cases, hardly reconcilable with the foregoing, in which the clause has received only the most restricted and literal interpretation. One of the most notable examples is a decision of the supreme court of *Nebraska*. There the insured, in pursuance of a prearranged plot to rob the state treasury, entered that institution, drew a revolver upon the treasurer and demanded and received money from that official. The insured then started to effect his escape, and while passing through the hallway, with his ill-gotten gains yet in his possession, was shot and killed by a watchman who was lying in wait. The court held that this was not death "while violating any law," because the act of the insured, "in obtaining money from the treasury, had been completed and he was then endeavoring to make his escape."⁴ In *Missouri*, at an early day, it was considered that though the insured had provoked an assault during which he was killed, the fact that he had desisted and retreated when slain precluded the idea that he died in the commission of a felony.⁵ So, in *Massachusetts*, the court took the view that there could be a recovery if the insured, though he had committed an assault upon his slayer, was killed when he had in fact desisted from the affray.⁶ Where the

1. *Murray v. New York L. Ins. Co.*, 96 N. Y. 614, *affirming* 30 Hun (N. Y.) 428.

2. *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469.

3. *Murray v. New York L. Ins. Co.*, 96 N. Y. 614.

4. *Griffin v. Western Mut. Ben. Assoc.*, 20 Neb. 620; 57 Am. Rep. 848. Maxwell, C. J., in delivering the opinion, said: "It will be observed that the condition named is 'if a member shall die while violating any law,' etc. that is, in the actual violation of law. Now suppose Griffin had robbed the state treasury, and had left it, and was about to emerge from the building when he was killed, can it be said that at the time of his death he was violating any law of the state? We think not. Suppose that instead of robbing the treasury he had made an assault upon the treasurer in his office, or committed a battery upon him and had left the treasury department and nearly reached the outer door of the capitol when he was killed, it will not be contended that at the time of his death he was violating the law." In this opinion

no authorities are cited, and the decision seems difficult to harmonize with *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469; 14 Ins. L. J. 17, which was decided only a couple of years previous, or with *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531, though it is hardly more unlike them than other cases discussed below. It will be observed, also, that while the act of receiving the money had been completed, the act of deportation and detention had not, and it may well be questioned if these were not links in a single chain of crime, or were at least not a "violation of law." Compare the language of Thompson, J., in *Duran v. Standard L., etc., Ins. Co.*, 63 Vt. 437, used of one who had been hunting on Sunday: "Every step he took in making that trip was in and of itself a violation of law."

5. *Harper v. Phoenix Ins. Co.*, 19 Mo. 506; 1 *Bigelow's Life & Acc. Ins. Rep.* 301.

6. *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 308; 1 *Bigelow's Life & Acc. Ins. Rep.* 208. The exception clause was death "in the known viola-

insured was killed just after having committed adultery with his slayer's wife, this was held not to be death "in consequence of his violation of any law."¹ And the same conclusion was reached where death took place while the insured was living in a state of fornication.²

tion of any law." The court said: "Assuming that Cluff did commit a criminal assault, it may not necessarily follow that he died in the known violation of law. If he was shot while the assault continued, such would be the case. But if it had ceased, and Cluff was not threatening to renew it, and Cox had withdrawn out of his reach and then shot him, not in the course of the affray, but merely to revenge himself for what had been done, or to prevent the seizure of the horses, then at the time he was killed Cluff was not engaged in a known violation of the law, within the meaning of the policy; for he must have received the mortal wound during and while engaged in the commission of a crime, not merely in the consequence of it afterwards. But the jury, upon all the evidence, should consider whether, if he is proved to their satisfaction to have once engaged in a criminal assault, he can be deemed to have desisted from it, while persisting continuously in the very act in the course of which the affray occurred. Their attention should be called distinctly to the question whether, if Cluff had committed a criminal assault, it was so far ended when he was fired upon that the fatal shot is to be regarded as a new and independent event, rather than a mere continuation of the original affray. If Cluff committed a criminal assault upon Cox, which the latter immediately returned by a fatal blow, then the death would have been occasioned in a known violation of law, although the jury might believe that Cluff was not at the moment intending to commit any further assault. The question to be considered is, were the two acts—the assault by Cluff and the firing of the pistol by Cox—a part of one conflict for the possession of the horses, or had Cox abandoned his attempt to retain the custody of the horses, and had Cluff desisted from his assault? Was the fight over or had Cox merely retired to a more advantageous position." See also *Bradley v. Mutual Ben. L. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115.

1. *Goetzmann v. Connecticut Mut. L.*

Ins. Co., 3 Hun (N. Y.) 515; 5 *Thomp. & C. (N. Y.)* 572; 5 *Bigelow's Life & Acc. Ins. Rep.* 328. The court said: "Assuming that the act of adultery was a violation of law, within the meaning of the parties to the contract of insurance, we are of opinion that the assured did not die in consequence of it. The undisputed facts show that he was killed, not in the act of adultery, nor in the defense of person or property. The offense had been completed, and the assured was about to go away. He was not, therefore, at the time he was killed, violating any law, or even committing a trespass, for he was in the house by the license of the wife, from whom the husband had separated. Our law plainly denounces an act like that perpetrated by Hesler as a crime, and we can conceive of no principle upon which it could be properly treated in courts of justice as a natural or legitimate effect of the cause stated. It would be more reasonable to conclude from the evidence that Hesler assassinated the assured in cold blood, lying in wait for that purpose, and that he was actuated by jealousy, or a wish for revenge. The fact that the interval between the injury and the killing is short was not, in this instance material. If the assured had been killed a week or a year after the injury for the same cause, it would have been quite as direct a result thereof as when it was done. In short, the proposition that a man who has been thus wantonly killed by another, without necessity or lawful excuse, died in consequence of his own act, is logically contradictory, unless it be admitted that the killing of an adulterer follows his offense in the ordinary sequence of events. That admission we are not prepared to make."

2. In *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, the court discusses the question as follows: "It is averred in the assignment that fornication is an unlawful act, and the policy is correctly stated to provide that no recovery can be had upon it when the injury may have happened while the insured was engaged in, or in consequence of,

IV. THIRD STAGE: SPECIFIC VIOLATIONS OF LAW PROHIBITED.—

The use of language enumerating, by name, certain illegal acts which, as causes of death or injury, are not insured against, may, perhaps, be regarded as an advanced stage in the development of the clause excepting results of the violation of law. This form of the clause has not, as yet, been the subject of extensive litigation, but has proved proportionately more effective than the phraseology previously in use.

A common provision in accident policies is that which excepts death or injury "caused, directly or indirectly, wholly or in part, by fighting." This language was held sufficiently explicit to include an injury received by one of the parties to an altercation, who, even though after it had terminated, fell and caught his thumb in a chair;¹ likewise death from shooting after the close of a personal encounter.² It was also said to apply, though the insured was not the aggressor,³ but the doctrine has been qualified so as to exclude "a faultless and unwilling conflict by the insured—one which he neither provoked nor invited; one which he did not accept when formally or informally tendered; one in which he was forced to engage for self-defense alone, and from which he withdrew, or endeavored in good faith to withdraw, when his defense was accomplished."⁴ And under these circumstances whether

some unlawful act. A complete answer to this is that it states no legal proposition. Fornication or 'being in a state of fornication,' however immoral and wrong, must be accompanied with circumstances of notoriety or publicity to make it an unlawful act. The law takes no cognizance of the offense until it becomes open and notorious lewdness. *Brooks v. State*, 2 Yerg. (Tenn.) 482; *State v. Moore*, 1 Swan (Tenn.) 136; *Mynatt v. State*, 8 Lea (Tenn.) 47. Such a cohabitation, therefore, only becomes a recognized unlawful act, when it is open and notorious, and of this there is no assumption in the request, or proof in the record. But again, passing this question, if it were true that such association *per se* was an unlawful act, it would not follow that plaintiff could not recover. In order to defeat a recovery because of such provision, there must appear a connecting link between the unlawful act and the death. It is not sufficient that there was an unlawful act committed by the insured, and that death occurred during the time he was engaged in its commission."

1. *U. S. Mut. Accident Assoc. v. Millard*, 43 Ill. App. 148.

2. *Gresham v. Equitable Accident Ins. Co.*, 87 Ga. 497.

3. In *U. S. Mut. Accident Assoc. v. Millard*, 43 Ill. App. 148, the court said: "The fact that the insured engaged in a fight, though he himself was not the assaulting party, is clearly within the meaning of the terms of the policy as excluding injuries so received from its operation and insurance, as being caused by fighting." See also *Gresham v. Equitable Accident Ins. Co.*, 87 Ga. 497, where the insured took up an insulting challenge and was killed by the challenger. No recovery was allowed.

4. *Bleckley, C. J.*, in *Gresham v. Equitable Accident Ins. Co.*, 87 Ga. 497. Continuing, the learned judge observes: "To protect his life from destruction or his person from injury, might be as much a matter of duty to the insurance company as of interest to himself. Means of resistance which it would be reasonable for him to employ for his own safety, he could not be excused for neglecting, if an efficient use of them were shown to be within his power. It would be no objection to their use that they involved 'fighting back' in order to repel the violence of an assailant. The stipulation against liability for injuries caused by fighting, refers to voluntary fighting by the insured, or involuntary fighting brought on wholly or partially by his fault or

the insured's antagonist was sane or insane has been held to be immaterial.¹

Another exception, which has now found its way into most of the policies, relates to death "in violating the rules of a corporation." A clause very similar to this was construed by the supreme court of *Iowa*,² and it was held that the insured, "a passenger on a railway car, who was injured by being thrown from the steps of the car, where he stood while the train was approaching a station, in violation of a known rule of the company, was not entitled to recover." But in a later adjudication by one of the federal courts, recovery was permitted under substantially the same circumstances, on the ground that the alleged rule of the company was generally disregarded, and doubt is further expressed as to whether the clause could be enforced at all.³

V. QUESTIONS OF EVIDENCE AND PLEADING.—In establishing the violation of law as a defense to a suit on the policy, it is not necessary to prove the alleged act beyond a reasonable doubt; a preponderance of the evidence is sufficient.⁴ The burden of

temerity—fighting for which he is partly responsible, either as a volunteer or a rash speaker or wrongdoer. It could not be the purpose of the stipulation to cut off the right of self-defense by the use of force—the right to repel violence with violence of like nature. The exercise of this right might be mutually beneficial to both of the contracting parties, and that either of them had any purpose to restrict a fair and reasonable exercise of it is in the highest degree improbable."

1. *Gresham v. Equitable Accident Ins. Co.*, 87 Ga. 497.

2. In *Bon v. Railway Passenger Assur. Co.*, 56 Iowa 664; 41 Am. Rep. 127, the policy provided for insurance while "riding on a public conveyance," only "in compliance with all rules and regulations of such carriers."

3. In *Marx v. Travelers' Ins. Co.*, 39 Fed. Rep. 321, the rule of the railroad company, as in the preceding case, forbade passengers to stand on the platform. Judge Hallett, in delivering the opinion, said: "All passengers on the road who were so inclined, and often by the invitation of the trainmen, rode on the platforms of the cars as freely and as commonly as elsewhere. Under such circumstances, it cannot be said that there was any rule of the railroad company as to riding on the platform. The cases cited to show that the consent of a conductor of a train or others in authority shall not be effectual to set aside such a rule, in

so far as it may affect the liability of the railroad company for any injuries received while in that position, are not controlling. An insurance company offering indemnity for injury or death in case of accident, as to its policyholders, is not at all in the position of a carrier for hire as to its passengers. The latter is engaged in a special service of peculiar danger, as to which some rules of conduct on the part of its patrons are highly necessary. The former assumes a guardianship of its patrons in respect to the casualties of life which beset men everywhere, and as to which it is not practicable to impose limitations which shall be constantly borne in mind by the insured. Will anyone say that on sea and on land, at home and abroad, a policy-holder must constantly consider whether he is within all the rules of all the corporations, public and private, which he may in any way encounter? Whatever the answer may be to any such question, it is plain enough that a rule of a corporation, within the meaning of this policy, must be one which is known to the policy-holder, and of force at the time of the alleged violation."

4. In *New York Accident Ins. Co. v. Clayton*, 59 Fed. Rep. 559, Sanborn, J., said: "This is so well settled by the authorities in this country that it does not permit discussion. *U. S. v. Shapleigh*, 4 C. C. A. 237; 54 Fed. Rep. 134; 1 Greenl. on Ev., § 13a note; *Kane v. Hibernia Ins. Co.*, 17 Am. Law Reg.

proving the defense rests, of course, upon the insurer.¹ Where the insured was killed by a debtor while attempting to seize the latter's property, the record of a court showing the slayer's acquittal is not admissible in support of the company's defense.² But evidence of threats uttered by the insured against another, with whom he afterward engaged in a fight and lost his life, should be received.³ And where the alleged breach consists in crossing certain railroad tracks in order to reach a station, it may be shown that this is the custom, though the crossing is not a public one.⁴ In pleading the violation of law as a defense, the plea or answer "need not be framed with the same precision as would be necessary in an indictment." The language of a statute defining the offense need not be strictly followed, nor is it necessary to anticipate defenses that may be pleaded in avoidance in a replication or reply.⁵ An allegation by the plaintiff that death was not caused by a breach of the policy is not essential, and need not be supported by proof in order to entitle him to a recovery. The company must still affirmatively establish its defense.⁶

VIOLENCE.—This is a general term and includes all sorts of force.⁷

N. S. 297; *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. Mechanics' Mut. Ins. Co.*, 37 Wis. 31; 19 Am. St. Rep. 747; *Knowles v. Scribner*, 57 Me. 495; *Hoffman v. Western Marine, etc., Ins. Co.*, 1 La. Ann. 216; *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529; *Young v. Edwards*, 72 Pa. St. 257, 267; *Aetna Ins. Co. v. Johnston*, 11 Bush (Ky.) 587; 21 Am. Rep. 223; *Rothschild v. American Cent. Ins. Co.*, 62 Mo. 356; *Bradish v. Bliss*, 35 Vt. 326; *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Folsom v. Brawn*, 25 N. H. 114; *Mathews v. Huntley*, 9 N. H. 146; *Welch v. Jugenheimer*, 56 Iowa 11; 41 Am. Rep. 77."

1. *Murray v. New York L. Ins. Co.*, 85 N. Y. 236, *reversing*, on a question of pleading, 19 Hun (N. Y.) 350.

2. In *Cluff v. Mutual Ben. L. Ins. Co.*, 99 Mass. 317; 1 *Bigelow's Life & Acc. Ins. Rep.* 265, the court said: "The record of the provost court, showing the acquittal of Cox, was not competent for this defense. There is no privy of parties, nor identity of issues. The acquittal of Cox could not establish the fact that Cluff was guilty of a crime; but only that the offense of Cox was excused by the circumstances of provocation. Cluff's conduct was incidentally involved. It was not the subject of the judgment that was rendered. The law applicable to the conduct of Cluff, as it would affect

him, could not be judicially determined in the trial of Cox."

3. *Yale v. Travelers' Ins. Co.*, 2 *Thomp. & C. (N. Y.)* 221.

4. *Duncan v. Preferred Mut. Accident Assoc.*, 59 N. Y. Supér. Ct. 145.

5. *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469.

6. *Murray v. New York L. Ins. Co.*, 85 N. Y. 236.

7. *State v. Weaver*, Busb. (N. Car.) 13. This case was upon the construction of a statute directed against the kidnapping of free negroes and selling them into slavery.

In *State v. Wells*, 31 Conn. 212, *Butler, J.*, said: "The term 'violence' is synonymous with physical force, and the two are used interchangeably, in relation to assaults, by elementary writers on criminal law. 2 *Bishop's Crim. Law*, §§ 32-34."

Robbery.—In *People v. McGinty*, 24 Hun (N. Y.) 64, the court said: "It is not easy, nor perhaps is it best, to attempt to make an exhaustive definition of violence as used in the statute; but we may say that it generally implies the overcoming, or attempting to overcome, an actual resistance, or the preventing such resistance through fear. It may include restraint by the person, as in *Mahoney v. People*, 3 Hun (N. Y.) 202, where the complainant was held around his neck and by his arms. And it generally implies that the acts tend to pro-

VIOLENT.—See note 1.

VIOLENTLY.—See note 2.

duce terror and alarm in the person on whom the violence is committed. And it ought not to be held that every assault and battery, even the most trivial, which results in the taking of property from the assaulted person, constitutes that element of violence which is mentioned in the statute." See also *ROBBERY*, vol. 21, p. 418.

Mistreating with Violence.—Texas Penal Code.—In *High v. State*, 26 Tex. App. 573, the court said: "In cases of maiming it is provided that the killing will be justifiable if done in its prevention, and 'the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense.' *Texas Penal Code*, art. 570. Was the deceased mistreating the defendant with violence when the latter fired the fatal shot? This was a matter of fact to be found by the jury under appropriate instructions from the court. We have already stated the facts in another connection. The tooth had already been knocked out, if at all, when defendant fired. The maiming was therefore complete. If deceased had his fist doubled and arm drawn back to again strike, was attempting to strike, and had an immediate intention coupled with the ability to strike, he was committing an assault, the test being, was there in fact a present purpose of doing an injury? To commit an assault upon a party is certainly to 'mistreat' him. But an assault merely is not 'violence,' and, as we have said, there must be 'mistreating with violence.' Under the facts of this case the question was, had there been any cessation of violence by the deceased? The blow, the injury, the fall, the recovery, the doubling of the fist and drawing back to strike, the drawing and the firing of the pistol, all appear to have been instantaneous acts of the transaction, with scarcely a pause even or let up in the continuity of the acts. In such a state of case it was for the jury to determine from the facts whether there was any cessation of active hostilities and violence."

1. **In Insurance Policy.**—For a discussion of the meaning of the term "violent," as used in an accident insurance policy, and for the facts sufficient to

establish a "violent" death within the meaning of the policy, see *Bacon v. U. S. Mut. Accident Assoc.*, 44 Hun (N. Y.) 599.

In *Paul v. Travelers' Ins. Co.*, 112 N. Y. 479, it was held that death by accidentally inhaling gas in a room at a hotel, was a death by "external and violent means" within the meaning of the policy. The court said: "As to the point raised by the appellant that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death."

2. **Whether Word Imports Purposed Wrong.**—In *Summers v. Farney*, 123 Ind. 562, the court said: "The word 'violently' indicates violence, and in the connection here under consideration means outrage; unjust force; attack; assault. The word 'force,' in the connection in which it is employed, is defined as 'Unlawful violence offered to persons or things.' *Worcester's Dictionary*. Webster's definitions are substantially the same. He says that the word 'force,' as used in the law, means 'Strength or power exercised without law, or contrary to law, upon persons or things.' To allege in a pleading that a person committed an injurious act 'violently and with great force,' is equivalent to charging such person with a purposed wrong in the doing of the act."

Rape—Whether Equivalent to by Force.—In *Com. v. Fogerty*, 8 Gray (Mass.) 490; 69 Am. Dec. 264, the court, by Bigelow, J., said: "The indictment in the present case is in conformity with well established precedents. It sufficiently sets forth all the elements necessary to constitute the offense of rape. It alleges that the carnal knowledge was had 'violently,' which means by violence, and was against the consent of the prosecutrix. The word ravished—'*rapuit*'—of itself imports the use of force, and, when coupled with the allegation that the act was done against the consent of the woman, technically charges the crime of rape, which is the carnal knowledge of a woman by force and

VISIBLE.—See note 1.

against her will. Co. Litt. 137; 2 Inst. 180; 1 Hawk., ch. 16, § 2; 2 Hawk., ch. 23, § 79; 2 Stark. Crim. Pl. (2d ed.) 431; Archbold's Crim. Pl. (10th ed.) 480." And in that case it was held that an indictment for rape sufficiently alleges "force" in alleging that the defendant "violently and against her will feloniously did ravish and carnally know" the woman. But in *State v. Blake*, 39 Me. 322, it was held that where the defendant is found guilty of an intent to commit a rape, but the indictment alleged the design was to be accomplished "violently," instead of "by force," judgment must be arrested. The court said: "The indictment does not follow the language of the statute; but for the words 'by force' is substituted the adverb 'violently,' which the attorney general insists in argument is, in all respects, equivalent to the words omitted. In looking into the most approved and accurate dictionaries of the English language, it is found that the definition of the word 'force' is 'strength, vigor, might, energy, power, violence, validity, armament necessity,' and the signification of the term 'violently' is 'with violence, forcibly, vehemently.'—Worcester. According to Webster, 'force' means 'strength, active power, vigor, might, momentum, violence, virtue, efficacy, validity.' 'Violently,' by the same author, signifies 'with force, forcibly, vehemently.' It is very obvious that by the substitution, in an indictment for a rape, or an assault with intent to commit a rape, many of the definitions of the word 'force,' for that term, would make the charge for such offenses little less than absurd. And because the word 'violently,' may have a meaning somewhat similar, by some of the definitions, to the words 'by force,' it does not follow that the indiscriminate use of one for the other, in an indictment like the one before us, would be at all proper. The term 'by force,' when applied to the acts of a man, in illicit sexual intercourse with a female, it is believed, has a peculiar and technical meaning, which lexicographers have not always defined with precision. The definition nearest to its exact meaning, of the word 'force,' is 'violence; power exerted against will or consent.'—Webster. But it will be seen that this signification is less restricted than that

obviously intended by the statute, which we are considering, although the true meaning in the statute may be embraced. One signification of the active verb 'to force,' is 'to ravish, to violate by force, as a female,' and conveys to the mind ideas similar to those which are imparted by the words 'by force,' which give to the acts of a person, the character essential to constitute a rape. The adverb 'violently' has a more general meaning ordinarily, and is not believed to be an appropriate word to be used in a charge for an offense of this kind, and is not understood to be common with experienced and accurate criminal pleaders, in indictments under this or the like statutes. If used by a man in application to acts of sexual intercourse, without any of the accompanying language of this indictment, indicating compulsion, it would hardly, of necessity, import a crime against the person of the female, who was the subject of the acts; whereas, if the words 'by force' were used, unaffected by the language denoting the assault, such as 'against her will,' and to 'ravish and carnally know,' it would be quite otherwise. The acts necessary to constitute the crime of rape, must be done 'by force,' and these words, or something equally significant, in addition to the other language used in the statute, cannot be dispensed with, in an indictment founded thereon. We think it very clear that the word substituted in this case does not fulfill the demand of the statute." See also *RAPE*, vol. 19, p. 957; *State v. Daly*, 16 Oregon 240.

1. Visible Means of Support.—In *People v. Herrick*, 59 Mich. 564, Campbell, C. J., said: "The statute, like the common law, includes among disorderly persons those who have no visible calling or means of support; and while something more may be necessary to convict them, so long as they behave themselves, yet the use of the word 'visible' indicates that appearances must to some extent be relied on. 'Visible' and 'apparent' are words of similar meaning." See generally *VAGRANCY*, vol. 28, p. 36.

Visible Means—Costs.—An English statute provided that the defendant, in an action of tort, might make affidavit that plaintiff had no "visible means" of paying his costs, and that the judge upon such affidavit

VOID AND VOIDABLE.

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1. DEFINITIONS; GENERAL DISTINCTIONS.—Strictly speaking, "void" means without legal efficacy; ineffectual to bind parties, or to convey or support a right. But it is frequently used in the sense of voidable. "Voidable" is appropriate for that which has some force or effect, but which, by reason of some inherent vice or defect, may be annulled or avoided.¹

might require security from plaintiff. In *Lea v. Parker*, 13 Q. B. Div. 835, the court, by Fry, L. J., said: "The phrase is not (as was laid down by Whiteside, C. J., in *Counsel v. Garvie*, Ir. Rep., 5 C. L. 77) to be narrowed so as to be synonymous with "tangible means;" but, at the same time, effect is to be given to the word "visible," and, therefore, "the words refer to means of paying which are visible to the bodily or mental eye of an attentive observer—means of payment which the person who makes the affidavit can fairly ascertain."

1. *Van Shaack v. Robbins*, 36 Iowa 201; *Inskeep v. Lecony*, 1 N. J. L. 111; *Somes v. Brewer*, 2 Pick. (Mass.) 191; Cent. Dict.; 1 *Bouvier's Inst.* Nos. 1321, 1322.

In *Cummings v. Powell*, 8 Tex. 85, it was said: "A void act, as defined in the later cases and by approved authorities, is one which is entirely null, not binding on either party, and not susceptible of ratification; and a voidable act is one which is obligatory upon others until disaffirmed by the party with whom it originated, and which may be subsequently ratified and confirmed."

Absolutely Void; Relatively Void.—That is absolutely void which the law, or the nature of things, forbids to be enforced at all; and that is relatively void which the law condemns as a wrong to individuals and refuses to enforce as against them. It is void because absolute or relatively invalid or not binding. *Pearsoll v. Chapin*, 44 Pa. St. 15; *Seylar v. Carson*, 69 Pa. St. 87.

"Void and of No Effect."—"These words are often used in the sense of voidable merely; that is, capable of being avoided, and not as meaning that

the act or transaction is absolutely a nullity as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances." *Matthews, J., in Ewell v. Daggs*, 108 U. S. 148.

Erroneous—Void.—In *Ex p. Lange*, 18 Wall. (U. S.) 163, Miller, J., said: "A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes."

In *Pearsoll v. Chapin*, 44 Pa. St. 15, Lowrie, C. J., said: "Acts tainted with an infirmity may very well, and in very correct language, be called by some void, and by others voidable, because, regarded in different aspects, they are both. A contract may for a time be voidable as against one, and void as against the others whom it was intended to affect; voidable as against the parties doing the wrong, and void as against the persons wronged; or *vice versa*, voidable in favor of the persons wronged, and void in favor of the wrongdoer; void as not binding to fulfill, and voidable after fulfillment; voidable in fact, because void or not binding in right, and when the party wronged elects to avoid the act, it becomes binding on neither, or rescinded as to both. Voidable because one party is bound, and the other or some other person is not."

In *Kearney v. Vaughan*, 50 Mo. 287, it is said that "it is perhaps unfortunate that we are not supplied with a term of more precision than the word 'void,' a word more often used to point out what may be avoided by those interested in doing so, than to indicate an

Probably no two words are more inaccurately used in the books than void and voidable, and much confusion has been occasioned thereby. Statutes not infrequently in terms declare void, acts which the tenor of their provisions and the objects sought to be accomplished, necessarily make voidable only.¹

And the term void, as applicable to conveyances or other agreements, has not, at all times, been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from voidable. But the distinction between the terms in their application to contracts, is often of great practical importance, and whenever entire legal accuracy is required, the term void can be properly applied only to those contracts that are of no effect whatsoever; such as are mere nullities and incapable of confirmation or ratification.² That which is void, is incapable of ratification; that which is simply voidable, may be confirmed.³

Nothing can be founded upon an act or transaction that is absolutely void, but from such as are merely voidable, good titles may spring.⁴ And every stranger may take advantage of a void act, but not so of a voidable one.⁵

absolute nullity a proceeding or act to be disregarded on all occasions."

And in *Bennett v. Mattingly*, 110 Ind. 202, it was said that "much confusion has been produced, and is persistently perpetuated, by the use of the word 'void,' both in the statutes and in the decided cases, where the word voidable would have been more appropriate, and, hence, the word 'void' has often to be construed as in effect meaning voidable only." See also *Long v. Dixon*, 55 Ind. 352; *Burk v. Hill*, 55 Ind. 419; *Emmett v. Yandes*, 60 Ind. 548; *Gall v. Tryberger*, 75 Ind. 98; *Wright v. Wright*, 97 Ind. 444.

In *Brown v. Brown*, 50 N. H. 542, Foster, J., said: "The term 'void' is perhaps seldom, unless in a very clear case, to be regarded as implying a complete nullity, but is to be taken in a legal sense, subject to large qualifications in view of all the circumstances calling for its application, and the rights and interests to be affected in a given case."

In *Anderson v. Roberts*, 18 Johns. (N. Y.) 527; 9 Am. Dec. 235, Spencer, C. J., said: "A thing is void which is done against law at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done."

"This distinction may not be complete, but is sufficient to show that the

term 'void' does not necessarily mean an absolute nullity." Bliss, J., in *Kearney v. Vaughan*, 50 Mo. 288.

Perhaps the best excuse made for such inaccuracy in the use of these terms is that of Parker, C. J., in *Somes v. Brewer*, 2 Pick. (Mass.) 184. He says: "Whatever may be avoided, may, in good sense, to this purpose, be called void, and this use of the term 'void' is not uncommon in the language of statutes and of courts. But in regard to the consequences to third persons, the distinction is highly important, because nothing can be founded on what is absolutely void, whereas, from those which are only voidable, fair titles may flow. These terms have not always been used with nice discrimination; indeed, in some books, there is great want of precision in the use of them." Quoted approvingly in *Bromley v. Goodrich*, 40 Wis. 140; 22 Am. Rep. 685; *Crocker v. Bellangee*, 6 Wis. 645.

1. See *infra*, this title, *When Void Construed as Voidable—In Statutes*. See generally *STATUTES*, vol. 23, p. 140.

2. *Allis v. Billings*, 6 Met. (Mass.) 417; 39 Am. Dec. 744.

3. See the cases cited throughout this section.

4. *Somes v. Brewer*, 2 Pick. (Mass.) 184; *Bromley v. Goodrich*, 40 Wis. 140; 22 Am. Rep. 685; *Crocker v. Bellangee*, 6 Wis. 645.

5. *Anderson v. Roberts*, 18 Johns.

And courts of chancery have drawn this distinction between void and voidable instruments: The latter will be decreed to be delivered up, as otherwise they might be applied to improper purposes, such as future litigation where, by lapse of time, the means of defense may have been weakened or destroyed; or, since their existence, uncanceled, might cast a cloud upon a title or diminish its value and security. But, as to void instruments, the illegality of which appears upon their face, equity does not interpose, as their production at any time will plainly establish their nullity.¹

II. WHEN VOID CONSTRUED AS VOIDABLE—1. In Statutes.—The true meaning of the word void in a statute is always to be determined from the whole of the language employed, and the intent thereby manifested. The general rule is that where the word is introduced for the benefit of the parties only, it will be construed to mean voidable; but if used to secure a right to, or confer a benefit upon, the public, it will receive its full force and effect, and be held to mean null and incapable of confirmation.²

Expressions in statutes declaring conveyances made to defraud or delay creditors void, are generally construed to mean voidable only, at the instance of the parties aggrieved.³

An act declaring that all indentures for binding apprentices for a period shorter than that specified, should be "void to all intents and purposes, and not available in any court or place for any

(N. Y.) 527; 9 Am. Dec. 235; *Terrill v. Auchauer*, 14 Ohio St. 89.

In *Alexander v. Nelson*, 42 Ala. 462, it is said that the true distinction between "void" and "voidable" acts, orders, and judgments, is that the former can always be assailed in any proceeding, and the latter in a direct proceeding only.

1. See *TAX TITLES*, vol. 25, p. 674; *BILL TO REMOVE CLOUD FROM TITLE*, vol. 2, p. 298.

2. *Rex v. Hipswell*, 8 B. & C. 466; 15 E. C. L. 267; *Pearse v. Morrice*, 2 Ad. & El. 84; 29 E. C. L. 42; *Terrill v. Auchauer*, 14 Ohio St. 88; *Van Shaack v. Robbins*, 36 Iowa 205; *Com. v. Weiher*, 3 Met. (Mass.) 448; *Boynton v. Hubbard*, 7 Mass. 112; *Fletcher v. Stone*, 3 Pick. (Mass.) 250; *Smith v. Saxton*, 6 Pick. (Mass.) 483.

Just as the word "may" will be construed to mean "must" when that appears to be the intent of the statute, and generally, where the public interests and rights are concerned, it will be interpreted to mean "must" or imperative; but if private rights only are spoken of, it will be interpreted as "may" or permissive. See *STATUTES*, vol. 23, p. 469.

In *Wildes v. Vanvoorhis*, 15 Gray (Mass.) 143, *Shaw, C. J.*, said: "In many cases where a transaction is declared void in terms by a rule of the common law, or even expressly by statute, where the obvious interest of the rule is to secure and protect the rights of another party, the construction of law is that it is voidable so far that it shall not operate to defeat or impair those rights. Such deed is not a dead letter, but can be avoided by such persons only, and at such time, and in such manner, as may be necessary to secure those rights. In other respects it has its natural effect."

3. *Anderson v. Roberts*, 18 Johns. (N. Y.) 515; 9 Am. Dec. 235; *Bromley v. Goodrich*, 40 Wis. 141; 22 Am. Rep. 685; *Merrill v. Englesby*, 28 Vt. 150; *Gutzwiller v. Lackman*, 23 Mo. 168; *Ridler v. Punter*, Cro. Eliz. 291; *Bessey v. Windham*, 6 Q. B. 166. See generally *FRAUDULENT CONVEYANCES*, vol. 8, p. 748; *FRAUDULENT SALES*, vol. 8, p. 786; *GIFTS*, vol. 8, p. 1308; *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 1, p. 845, where the principles governing the subject are discussed at length and many authorities collected.

purpose whatever," was held to mean only voidable at the option of the master or apprentice.¹

And where the statute enacted that if the purchaser at an auction sale refused to pay the auction duty, when this constituted a condition of sale, his bidding should be "null and void to all intents and purposes," it was held that the bidding was voidable only, at the option of the seller.² The term void, in statutes relating to usurious contracts, is ordinarily construed to mean voidable at the option of the debtor.³

Other illustrations of these principles will be found in the notes.⁴

2. In Contracts.—In contracts where the stipulations avoiding the same are inserted for the sole benefit of one of the parties, the word void is to be construed as though the contract read voidable. Thus, provisions in leases, that if the tenant shall not with due promptness perform his covenants to build, repair, insure, pay rent, and the like, the lease shall be "void," or "utterly null and void, to all intents and purposes," etc., are held to mean voidable, at the instance of the lessor.⁵

And where an insurance policy provides that it shall be void on the breach of any of its conditions, the legal effect is simply to make it voidable, at the instance of the insurer, who may waive the forfeiture and continue the policy in full force.⁶

1. *Rex v. St. Nicholas*, 2 Stra. 1016.

2. *Malins v. Freeman*, 4 Bing. N. Cas. 295; 33 E. C. L. 388.

3. See *USURY*, vol. 27, p. 917.

A mortgage or assurance given on an usurious consideration has been held voidable only, notwithstanding the statute declared it to be "utterly void." *Green v. Kemp*, 13 Mass. 515; 7 Am. Dec. 169; *Ewell v. Daggs*, 108 U. S. 143.

4. The statute, 9 Anne, ch. 14, provided that bills and notes given for money lost in gaming should be "utterly frustrate, void, and of none effect, to all intents and purposes whatsoever." The statute was so construed as to leave such instruments unaffected in the hands of an innocent indorsee suing the drawer. In other words, the statute was construed as if the words were voidable as against certain persons only, but were valid as regarded others. *Edwards v. Dick*, 4 B. & Ald. 212; 6 E. C. L. 455.

In *Terrill v. Auchauer*, 14 Ohio St. 80, the statute provided that "no sheriff or other officer making the sale . . . shall purchase the same, and every purchase so made shall be considered fraudulent and void;" the provision was construed as making a purchase voidable by a direct proceeding at the

instance of a party in interest. See also *Van Shaack v. Robbins*, 36 Iowa 201; *Ellis v. Peck*, 45 Iowa 112. See generally *TAXATION*, vol. 25, p. 140.

The word void when used in a statute in reference to the solemn judgments and acts of superior courts, may mean no more than voidable. *Inskip v. Lecony*, 1 N. J. L. 111.

As to judicial proceedings generally, see *DECREE*, vol. 5, p. 371; *JUDGMENTS*, vol. 12, p. 58; *JURISDICTION*, vol. 12, p. 244; *JUDICIAL SALES*, vol. 12, p. 208; *SHERIFF'S SALES*, vol. 22, p. 570; *REVOCATION (PROBATE AND ADMINISTRATION)*, vol. 21, p. 350.

5. *Roberts v. Davey*, 4 B. & Ad. 664; 24 E. C. L. 136; *Arnsby v. Woodward*, 6 B. & C. 519; 13 E. C. L. 241; *Doe v. Bancks*, 4 B. & Ald. 401; 6 E. C. L. 535. See also *Pearsoll v. Chapin*, 44 Pa. St. 13; *Kearney v. Vaughan*, 50 Mo. 288; *Ewell v. Daggs*, 108 U. S. 149. See generally *LANDLORD AND TENANT*, vol. 12, p. 658; *LEASE*, vol. 12, p. 974; *FORFEITURE*, vol. 8, p. 443; *WAIVER*, vol. 28.

6. *Turner v. Meridian F. Ins. Co.*, 16 Fed. Rep. 454; *Masonic Mut. Ben. Soc. v. Beck* (Ind. 1882), 11 Ins. L. J. 755. See also *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116; *Hinckley v. Germania Ins. Co.*, 140 Mass.

III. WHAT CONTRACTS ARE VOID AND WHAT VOIDABLE.—No attempt will be here made to enumerate all the transactions that are void, or voidable, or to treat minutely the principles governing the same. This has been done in other parts of this work; but it is thought that the statement of a few general rules will not be out of place. Contracts to do acts that are illegal, criminal, or contrary to public policy, or to refrain from doing what the law requires, are absolutely void; such are contracts to obstruct justice, to protect officers of the law against the consequences of their own malfeasance, contracts the object of which is to induce immorality, lobbying contracts, marriage brokerage contracts, contracts to prohibit marriage, and contracts in general or total restraint of trade.¹ Contracts which cannot be performed, either because of the nature of the obligation undertaken, or because of some supervening event which renders the performance of the obligation either physically or legally impossible, are likewise void.² At common law, the general rule was that the contracts, covenants and promises of married women were utterly void. There were, however, certain well recognized exceptions to the rule. The whole subject, including the capacity of married women to contract, as conferred by recent statutes, has been already treated.³ The rule in regard to contracts of infants is this: Such contracts as are clearly beneficial to the infant are valid; those of which it cannot be predicated with certainty whether they are advantageous or prejudicial, are voidable; those which are necessarily prejudicial, are absolutely void.⁴ An act done, or a contract made, under a

47. And see generally INSURANCE, vol. 11, p. 278; ACCIDENT INSURANCE, vol. 1, p. 87; FIRE INSURANCE, vol. 7, p. 1002; LIFE INSURANCE, vol. 13, p. 629; FORFEITURE, vol. 8, p. 443; WAIVER, vol. 28.

1. ILLEGAL CONTRACTS, vol. 9, p. 879; ILLEGAL SALES, vol. 9, p. 923; INDEMNITY CONTRACTS, vol. 10, p. 402; BRIBERY, vol. 2, p. 533; COMPOUNDING OFFENSES, vol. 3, p. 402; CONTRACT, vol. 3, p. 823; GAMBLING CONTRACTS, vol. 8, p. 992; REVENUE LAWS, vol. 21, p. 337; RESCISSION, vol. 21, p. 24; REWARDS, vol. 21, p. 403; SUPPRESSION OF EVIDENCE, vol. 24, p. 707; OBSTRUCTING JUSTICE, vol. 17, p. 13; ULTRA VIRES, vol. 27, p. 351.

In *Pearsoll v. Chapin*, 44 Pa. St. 14, it was said: "Contracts and acts that are absolutely void are contracts to do an illegal act, or omit a legal public duty; usually bonds of married women; contracts in a form forbidden by law; official acts of persons having no recognized (*de facto* or *de jure*) title to an office; contracts to do an impossible

thing or that leave uncertain the thing to be done."

In *Ewell v. Daggs*, 108 U. S. 150, it was said: "Acts *mala in se* are generally regarded as absolutely void, in the sense that no claim or right can be derived from them; acts *mala prohibita* are void or voidable according to the nature and effect of the act prohibited." See also *Forsythe v. State*, 6 Ohio 21; *Badger v. Williams*, 1 D. Chip. (Vt.) 137; *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 389; *Nobles v. Bates*, 7 Cow. (N. Y.) 307; *Jones v. Caswell*, 3 Johns. Cas. (N. Y.) 29; 2 Am. Dec. 134; *Thompson v. Davies*, 13 Johns. (N. Y.) 112; *Hall v. Mullin*, 5 Har. & J. (Md.) 193.

2. IMPOSSIBLE CONTRACTS, vol. 10, p. 176. See also ACT OF GOD, vol. 1, p. 173.

3. MARRIED WOMEN, vol. 14, p. 604; HUSBAND AND WIFE, vol. 9, p. 789; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 22, p. 1. As to the construction of statutes empowering married women to make certain contracts, see STATUTES, vol. 23, p. 389.

4. INFANTS, vol. 10, p. 613.

mistake, or in ignorance of a material fact, is voidable.¹ Contracts of insane persons immediately connected with and growing out of their insanity, are voidable;² but where it is provided by statute that after a finding of an inquisition of insanity, the insane person shall be deemed incapable of making a contract or performing any civil act, any agreement entered into by such a person is absolutely void.³ Contracts made when the obligor is in a state of intoxication, so as to deprive him of the exercise of his understanding, are voidable.⁴ Where the consent of one party to a contract is obtained by the other under such circumstances that the consent is not free, the contract is voidable at the option of the party coerced. If, however, there was no consent whatever, as if the party's hand was forcibly guided to sign his name, or, perhaps, if he was so prostrated by fear as not to know what he was doing, the contract is absolutely null and void.⁵ Fraud does not render a contract void, but merely voidable at the option of the defrauded party.⁶ Undue influence is a species of fraud, and renders all transactions *inter vivos* tainted by it voidable.⁷

VOIR DIRE.—See JURY AND JURY TRIAL, vol. 12, p. 318; WITNESSES, vol. 29.

VOLUNTARY.—(See also DURESS, vol. 6, p. 85).—Willing; done with one's consent.⁸

1. IGNORANCE, vol. 9, p. 870; MISTAKE, vol. 15, p. 645.

2. INSANITY, vol. 11, p. 132; *Beverley's Case*, 4 Co. Rep. 124; *Wait v. Maxwell*, 5 Pick. (Mass.) 217; 16 Am. Dec. 391; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 439; *Allis v. Billings*, 6 Met. (Mass.) 415; 39 Am. Dec. 744; 2 Bl. Com. 291; 2 Kent's Com. (4th ed.) 451.

3. INSANITY, vol. 11, p. 134 *et seq.*; *Rannells v. Gerner*, 80 Mo. 474; *Copenhath v. Kienby*, 83 Ind. 18; *Lilly v. Waggoner*, 27 Ill. 395.

4. INTOXICATION AS A DEFENSE TO CONTRACTS, vol. 11, p. 773. See also *Barrett v. Buxton*, 2 Aik. (Vt.) 167; 16 Am. Dec. 691.

5. DURESS, vol. 6, p. 57; THREATS AND THREATENING LETTERS, vol. 25, p. 1060; *Wald's Pollock on Contracts* (2d Am. ed.), p. 553.

6. *Price v. Junkin*, 4 Watts (Pa.) 88; 28 Am. Dec. 684; *Pearsoll v. Chapin*, 44 Pa. St. 14; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; *Somes v. Brewer*, 2 Pick. (Mass.) 191; *Williams v. Given*, 6 Gratt. (Va.) 268; *Foreman v. Bigelow*, 4 Cliff. (U. S.) 541. See also FRAUD, vol. 8, p. 635; FRAUDULENT SALES, vol. 8, p. 786; FRAUDULENT CONVEYANCES, vol. 8, p. 748.

7. UNDUE INFLUENCE, vol. 27, p. 452.

8. Voluntary Standing.—See GENERAL AVERAGE, vol. 8, p. 1301.

Voluntary Appearance.—The English courts refuse to enforce a foreign judgment unless the appearance is voluntary. In this sense it has been held that if one, without duress of person or of goods, does a thing, *e. g.*, appears before a foreign tribunal, he does that thing "voluntarily." *Voinet v. Barrett*, 55 L. J. Q. B. 39.

Acknowledgments.—(See also ACKNOWLEDGMENT, vol. 1, p. 143).—In acknowledgments, "voluntary" means without fear or coercion. *Brown v. Farran*, 3 Ohio 153.

In *Alabama*, a statute required that a wife should acknowledge having signed a conveyance "of her own free will and accord, without fear, constraint or persuasion of her husband;" it was held that "voluntarily" was not equivalent to this acknowledgment. The court, in *Scott v. Simons*, 70 Ala. 357, said: "A comparison of the certificate of the wife's acknowledgment to the mortgage offered in evidence, with the certificate made indispensable by the act referred to, shows that there was not a substantial compliance with the act. The only word found in the

VOLUNTARY ASSIGNMENT.—(See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 1, p. 845 ; FRAUDULENT SALES, vol. 8, p. 875-7 ; FOREIGN ASSIGNMENTS, vol. 8, p. 286 ; IMPLIED TRUSTS, vol. 10, p. 57 ; FRAUDULENT CONVEYANCES, vol. 8, p. 748 ; FRAUDULENT DEBTOR, vol. 8, p. 780.)

"A transfer, without compulsion of law, by debtors, of some or all of their property to an assignee or assignees, in trust, to apply the same, or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor. Assignments, in this restricted sense, are distinguished with reference to their subject-matter, as being of all or part of the debtor's property. The former are known as general assignments, in distinction from partial assignments, by which term the latter are defined. Such assignments are termed voluntary, to distinguish them from such as are made by compulsion of law, as under the statutes of bankruptcy and insolvency (the latter being sometimes termed statutory assignments), or by order of some competent court. Assignments, in the sense in which they are here employed, are usually resorted to by debtors who find themselves unable to pay their debtors in full, or the embarrassed state of

certificate, expressing that the signature and assent of the wife was voluntary—the only word excluding fear, constraint, or persuasion of the husband—is the word voluntarily. If, under any circumstances, the acknowledgment of the wife that she executed a conveyance voluntarily, could be deemed the equivalent of an acknowledgment that she executed it 'of her own free will and accord, and without fear, constraint, or persuasion of her husband,' it cannot, without a violation of the legislative intention, be deemed the equivalent under the act referred to. If it should be so taken and construed, the result would be that a certificate of acknowledgment conforming to the former statutes, which were superseded, if made on a privy examination of the wife, would be sufficient. The word voluntarily, under the forms prescribed by those statutes, express that husband or wife, in the execution of a conveyance, was acting freely. The act of April 23, 1873, required that the certificate of acknowledgment should express more than was comprehended under the word voluntarily, as found in the preëxisting statutes,—the word in such statutes applying alike to husband or wife. The act intended the exclusion of the influence of the husband in producing assent of the wife to the alienation of the homestead. The protection of the

wife from being tortured by fear, constrained by the domination of a stronger will, or seduced by the flattery, importunity, solicitation, or suasion of the husband, was the purpose of the act. And it was intended that, on the privy examination, it should be made manifest to the officer taking it, that it was of her own volition, unmoved by the influence of the husband, she signed and assented to the alienation. The certificate of the examination indorsed on the alienation, it was intended, should manifest clearly, not only that the wife was acting from her own volition, but should negative the influence of the husband in producing the determination. Certificates of the probate or acknowledgment of conveyances have been liberally construed by this court. A literal compliance with statutory forms has not been, and should not be, exacted. But the court cannot disregard the plain intention and injunction of a statute, and dispense with substantial requirements of a certificate required by statute. *Sharpe v. Orme*, 61 Ala. 263. Whether the certificate is not in other respects fatally defective, we do not decide. It is enough that it does not conform to the statute in the respect pointed out, and which was the ground of objection in the circuit court." See also *Dundas v. Hitchcock*, 12 How. (U. S.) 256.

whose affairs has compelled them to discontinue the transaction of business, and, in some instances, the provisions of the statutes which have been passed by the state legislature regulating and restricting the operation of such assignments, are confined exclusively to assignments made by insolvents or by persons in contemplation of insolvency. But the insolvency of the debtor, in his own estimation, or in fact, will not, apart from statutory provisions, unless connected with other evidences of fraud, invalidate the assignment."¹

VOLUNTARY CONVEYANCE.—See FRAUDULENT CONVEYANCE, vol. 8, p. 748; FRAUDULENT DEBTOR, vol. 8, p. 780; MARRIAGE SETTLEMENTS, vol. 14, p. 538.

VOLUNTARY EXPOSURE (LIFE AND ACCIDENT INSURANCE).—(See also ACCIDENT INSURANCE, vol. 1, p. 87; LIFE INSURANCE, vol. 13, p. 629.)

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I. IN GENERAL.—It is apparent, from the very nature of the contract of life and accident insurance, that the risk contemplated shall not be due to the intention or design of the insured; hence the clause excepting the results of "voluntary exposure to unnecessary danger," this being but an expression of the underlying principle of the contract of indemnity. This clause does not appear in the earliest policies, and it was urged that its insertion was superfluous, but the courts were not agreed on the question of its existence by implication, as is shown below.

II. FIRST STAGE: POLICY SILENT AS TO "VOLUNTARY EXPOSURE"—1. **Earlier and Minority View.**—There is some authority for the doctrine that under a policy not containing this exception, the

1. Burrill on Assignments, p. 3, § 2, followed in *Bonus v. Carter*, 22 Neb. 514.

insurer would not be liable for injuries occurring through the fault of the policy holder. Thus, in one of the early cases involving the question,¹ it was held, where a railway passenger injured his finger as a result of "inadvertently" thrusting it out of the car window, that, as the injury "was produced by his own fault, he thereby deprived himself of all right to compensation" under an accident policy, though the policy seems to have contained no clause excepting voluntary exposure or even negligence. A *dictum* shortly afterward by the *Missouri* court,² is in the same direction. It was there said, regarding the rights of one who should purchase a "travelers' risk" ticket: "A passenger would have no right to go upon an engine, and if he was so indiscreet as to venture on such a place, and injury ensued, he would not be protected." Earlier than either of these was an English case,³ in which, though the insurer was held liable, great stress was laid upon the fact that the injury occurred without negligence on the part of the insured; the implication being that had there been such negligence, the determination of the suit would have been different, though no reference was made to any express clause in the policy as a ground for the intimation.

2. Later and Prevailing Doctrine.—But whatever weight may once have attached to the decision and *dicta* last above discussed, the preponderance of authority now certainly is to the effect that mere negligence on the part of the insured will not prevent a recovery on the contract, in the absence of a specific provision of that import.⁴ Of the *Kentucky* decision above mentioned,⁵ a leading text writer says that it "stands alone, without the support of any authority, and is based upon a mistaken application in an action upon contract of the doctrine of contributory negligence as it is applied in actions upon tort."⁶

Among the reasons upon which this later doctrine is based, is

1. *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush (Ky.) 535; 1 *Bigelow's Life & Acc. Ins. Rep.* 116 (1868).

2. *Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221; 1 *Bigelow's Life & Acc. Ins. Rep.* 321 (1870). The court, however, decided that the contract in the case before it was broader than a "travelers' risk."

3. *Theobald v. Railway Pass. Assur. Co.*, 10 Exch. 44; 26 Eng. L. & Eq. 432; 2 *Bigelow's Life & Acc. Ins. Rep.* 393 (1854).

4. **Mere Negligence Not a Ground of Forfeiture.**—*Schneider v. Provident L. Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157; 1 *Bigelow's Life & Acc. Ins. Rep.* 731; *Provident L. Ins. etc., Co. v. Martin*, 32 Md. 310; 2 *Bigelow's Life & Acc. Ins. Rep.* 40; *Champlin v. Railway Pass. Assur. Co.*, 6 Lans. (N. Y.) 71; 3 *Big-*

elow's Life & Acc. Ins. Rep. 736; *Keene v. New England Mut. Accident Assoc.*, 161 Mass. 149. Compare *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; 16 Ins. L. J. 822; *Wilson v. Northwestern Mut. Accident Assoc.*, 53 Minn. 470; *Spruill v. North Carolina Mut. L. Ins. Co.*, 1 Jones (N. Car.) 126; *Hoffman v. Travelers' Ins. Co.* (N. Y. Supreme Ct. 1871), reported in *Baltimore Underwriter*, Jan. 30, 1873; 7 Am. Law Rev. 594.

5. *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush (Ky.) 535.

6. 2 May on Insurance (3d ed.), p. 1221. A writer in 7 Am. Law Rev., p. 594, says of the same case: "The decision is against the weight of authority and is entitled to little consideration, for it stands unsupported either by reasoning or precedent."

that "this contract is one of indemnity, and that one object which the assured has in view in effecting an insurance is protection against casualties occurring from this cause"¹—viz., his own lack of care. Argument in support of this view is also based upon the analogy of decisions in other branches of insurance, where the companies have been held liable for losses occurring through the negligence of the policy holder.²

III. SECOND STAGE: "VOLUNTARY EXPOSURE" EXPRESSLY PROHIBITED—1. **Meaning of the Phrase**—*a. ITS LANGUAGE ANALYZED.*—A new stage in the development of this clause is attained when the insurer begins to stipulate in express terms for exemption from liability for the results attending "voluntary exposure to unnecessary danger." The form of the clause varies but slightly, in any of the policies, from the above, though in *England*, the words "obvious risk" are frequently employed instead of "unnecessary danger."³ In construing this provision, the courts have not only followed the usual rule of interpreting all stipulations in the policy most strongly against the insurer, but have also been particular to give literal effect to each member of it. The "exposure" itself must be voluntary; not merely the act which constitutes the exposure. For it has been judicially declared that "a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist; yet the exposure thereto, without any knowledge of the danger, does not constitute voluntary exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary."⁴ Again, in construing the word "exposure," the *United States* court of appeals for the fifth circuit approved a charge of the trial court by which the jury was told that "it is not such exposure as men usually are going to take;—such as is incident to the ordinary habits and customs of

1. *Champlin v. Railway Pass. Assur. Co.*, 6 Lans. (N. Y.) 71; 3 *Bigelow's Life & Acc. Ins. Rep.* 736. In *Keene v. New England Mut. Accident Assc.*, 161 Mass. 149, the court said: "By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence."

2. **Analogies in Fire Insurance, etc.**—*Champlin v. Railway Pass. Assur. Co.*, 6 Lans. (N. Y.) 71; 3 *Bigelow's Life & Acc. Ins. Rep.* 736, citing *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 478; 55 Am. Dec. 360; *Breasted v. Farmers' L. & T. Co.*, 8 N. Y. 299; 59 Am. Dec. 482; *Mathews v. Howard Ins. Co.*, 11 N. Y. 9. See, to the same

effect, *Keene v. New England Mut. Accident Assc.*, 161 Mass. 149, citing *Johnson v. Berkshire Mut. F. Ins. Co.*, 4 Allen (Mass.) 388. Compare *Shaw v. Robberds*, 6 Ad. & El. 75; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; 41 Am. Dec. 661; *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35; 35 Am. Rep. 389.

3. **Phraseology of English Policies.**—See *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453; *Lovell v. Acc. Assur. Co.* (Eng. N. P.), 3 Ins. L. J. 877; *Lovell v. Accident Ins. Co.* (Q. B.), 5 Ins. L. J. 559.

4. *Mercur, J.*, in *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205. See also this language approved in *Equitable Accident Ins. Co. v. Osborn*, 90 Ala. 201.

life. Such an exposure as that does not come within the range of a defense. An exposure, in order to have been a contributing cause, . . . must be something beyond the ordinary, or a wanton—a piece of gross carelessness.”¹ So the word “voluntary,” as used in this clause, has received quite an extended construction. For one to be guilty of such exposure “he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous.”² “A degree of consciousness of danger is necessary.”³ And it has been said that an act is not voluntary, as the term is here used, if it be such as a man of ordinary prudence would be induced to do by the circumstances.⁴

Finally, the danger itself must be wholly unnecessary. “A voluntary exposure to necessary danger is not forbidden,” and “the policy recognizes that there are some dangers which it is necessary to encounter.”⁵ It seems also that the injury or death must follow as the natural consequence, reasonably to be expected, of the exposure.⁶

b. WHETHER IT IS THE EQUIVALENT OF THE TERM “NEG-
LIGENCE.”—It was shown above that there had been some difference of opinion among the courts as to whether, previous to the embodiment of the “voluntary exposure” clause in the policy, it would be forfeited by mere negligence on the part of the insured. A somewhat similar question has arisen since the clause has been thus embodied, viz., whether its meaning is to be measured by the ordinary tests of negligence.

It was expressly declared in one case that “negligence and voluntary exposure to unnecessary danger are equivalent terms.”⁷ And in other cases, the courts, while not so declaring, *in ipsissimis verbis*, have practically treated the terms as equivalent, and have applied such tests to “voluntary exposure.”⁸ But the supreme

1. *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

2. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205; *Equitable Accident Ins. Co. v. Osborn*, 90 Ala. 201; *Bean v. Employers' Liability Assur. Corp.*, 50 Mo. App. 459; *Jones v. U. S. Mut. Accident Assoc.* (Iowa, 1894), 61 N. W. Rep. 485; *Williams v. U. S. Mut. Accident Assoc.* (Supreme Ct.), 31 N. Y. Supp. 343.

3. *Lurton, C. J.*, in *Miller v. American Mut. Accident Ins. Co.*, 92 Tenn. 167. Compare *Keene v. New England Mut. Accident Assoc.*, 161 Mass. 149, where the court says, “that the phrase implies a conscious intentional exposure—something which one is consciously willing to take the risk of.”

4. *Duncan v. Preferred Mut. Acci-*

dent Assoc. (Super. Ct.), 13 N. Y. Supp. 620.

5. *Keene v. New England Mut. Accident Assoc.*, 161 Mass. 149, citing *Tucker v. Mutual Ben. Life Co.*, 50 Hun (N. Y.) 50; 4 N. Y. Supp. 505.

6. *Jones v. U. S. Mut. Accident Assoc.* (Iowa, 1894), 61 N. W. Rep. 485.

7. *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216; 18 Ins. L. J. 892.

8. “Voluntary Exposure” Treated as Synonymous with Negligence.—*Theobald v. Railway Pass. Assur. Co.*, 10 Exch. 44; 2 *Bigelow's Life & Acc. Ins. Rep.* 393; *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453; *Hoffman v. Travelers' Ins. Co.* (N. Y. Supreme Ct. 1871), not officially reported, but found in the *Baltimore Underwriter*, (Jan. 30, 1873); also discussed in 7 Am. Law Rev., p. 594.

court of *Tennessee* recently stated regarding the clause that it did "not think these words the entire equivalent of ordinary negligence."¹ And a majority of the courts which have passed upon the question, adopt the same view by holding that contributory negligence on the part of the insured will not defeat recovery, even under the "voluntary exposure" clause.²

2. Applications—*a.* DOES NOT INCLUDE CONTEMPLATED RISKS

—(1) *Risks Impliedly Assumed*.—Among the canons of construction, which the courts have generally adopted, applying this clause, is one which denies its extension to dangers, which, in view of the surrounding circumstances and the situation of the parties, would naturally have been contemplated by them when the contract was formed. The most frequent applications of this principle have been in cases where the insured's occupation was of an extra hazardous character, and in which accidents were rather to be expected. "When such accident happens, and injuries result, a recovery cannot be defeated on the ground of voluntary exposure to a danger contemplated by the parties, because pertaining to the business of the assured."³ Accordingly, recovery has been permitted in the case of a brick mason killed while working upon an insecure swinging scaffold,⁴ a railroad employé, shoveling snow on the track, who was run over by a train, there being evidence that he was not exercising due care,⁵ a yard switchman, killed while handling broken cars,⁶ one insured as a "cattle dealer or broker," who was injured while attempting to board a moving cattle train, having in his hand a prod pole which he had just used in lifting cattle in one of the cars, though he had also described his occupation as "not tender or drover;"⁷ and a railway passenger conductor

1. Lurton, C. J., in *Miller v. American Mut. Accident Ins. Co.*, 92 Tenn. 167. See also *Hull v. Equitable Accident Assoc.*, 41 Minn. 231; 18 Ins. L. J. 778.

2. *Contributory Negligence Not a Defense*.—*Schneider v. Provident L. Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157; 1 *Bigelow's Life & Acc. Ins. Rep.* 731; *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 310; 2 *Bigelow's Life & Acc. Ins. Rep.* 40; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; 16 Ins. L. J. 822; *Wilson v. Northwestern Mut. Accident Assoc.*, 53 Minn. 626; *Keene v. Northeastern Mut. Accident Assoc.*, 161 Mass. 149. And see *May on Insurance*, vol. 2, p. 1221; *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205.

3. *Collins, J.*, in *Wilson v. Northwestern Mut. Accident Assoc.*, 53 Minn. 470.

4. *Brick Mason*.—*Wilson v. Northwestern Mut. Accident Assoc.*, 53 Minn. 470.

5. *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572.

6. *National Ben. Assoc. v. Jackson*, 114 Ill. 533; 15 Ins. L. J. 229. The facts are not sufficiently stated in the opinion to disclose whether or not the insured was guilty of negligence, the court placing its decision upon the ground that death resulted "from an accident for which the contracting parties intended the association should be liable."

7. *Cattle Dealer Boarding Moving Car*.—*Pacific Mut. L. Ins. Co. v. Snowden*, 58 Fed. Rep. 342. *Caldwell, J.*, in delivering the opinion of the court, said: "In the matter of accompanying his cattle to market, and caring for them while in the course of transportation, the plaintiff could rightfully do whatever was customary with other cattle dealers under like circumstances and

who met with his death while attempting to alight from the train which he was in charge of, while it was in motion.¹

(2) *Risks Expressly Contemplated*.—In many of the policies, liability for such dangers as are incidental to certain callings is expressly assumed. The question becomes, then, no longer whether the insurer is bound for such risks, but whether the insured has brought himself within the terms of the extended protection. Where the policy expressly covered "accidents while in the discharge of duty and in the service of a railroad company," recovery was permitted though the insured, a railroad employé, was killed while returning home after he had quit work for the day.² It has been held in effect that a "cattle dealer" is entitled to the privileges extended by the policy to a "cattle shipper and tender,"

conditions. The plaintiff had a right, if it was not his duty, to incur all the risk and danger incident to caring for, and looking after his cattle in the cars, while en route to their destination, in the time and manner customary among reasonably prudent and careful shippers, and such risks and dangers, no matter how great they are, do not constitute any violation of the provisions of the policy requiring the plaintiff to use due diligence for his personal safety and protection. Nor is the incurring of such risks and dangers a voluntary exposure to unnecessary danger, within the meaning of that clause in the policy." *Compare* *Travelers' Ins. Co. v. Snowden* (Neb. 1895), N. W. Rep. It is worthy of note here that acts almost precisely like those committed by the insured in this case, have been held in personal injury cases to be contributory negligence *per se* defeating recovery. See *McCorkle v. Chicago, etc., R. Co.*, 61 Iowa 555; *Player v. Burlington, etc., R. Co.*, 62 Iowa 723.

1. *Railway Conductor*.—*Dailey v. Preferred Masonic Mut. Accident Assoc.* (Mich. 1894), 57 N. W. Rep. 184. The policy or certificate in this case expressly excepted the hazard of "attempting to enter or leave moving conveyances using steam . . . as a motive power." But the court said: "We are also satisfied, from the application and the information which that gave to the defendant company, that accidents of this kind are of the risks intended to be insured against. The sole business of the deceased was in running passenger trains, and this was plainly stated in the application. It is common knowledge that conductors of passenger trains on all railroads must, in the

very nature of their business, not only enter, but leave, their trains before they come to a full stop. It is common knowledge that conductors of passenger trains have full charge of their trains. They give the signal to start, and, after the train starts, they get on board. At stations when the train pulls up, and before it stops, the conductor alights upon the platform. This may be a dangerous practice, but it is among the risks which the passenger conductor assumes when he enters upon such employment; and so general is this knowledge that the defendant company, when it took and approved the application, must have had knowledge of it." But see a modification of the opinion of this case on rehearing (though not affecting the point above referred to), 60 N. W. Rep. 694.

2. *Railway Employees*.—*Kinney v. Baltimore, etc., Emp. Relief Assoc.*, 35 W. Va. 385; 21 Ins. L. J. 176. The court, in this case, grounds its decision on the fact that the insured's going to and from work was indispensable to his service, and asks: "Was he not, while passing over the railroad tracks in going to and returning from his home in the course of his labors, as much in the discharge of his duties, and in the service of the company, as when he had tools, with which he worked, in his hands, for the purpose of the question in hand? It does seem to me that to say that he was not in the discharge of his duties in the service of the company, within the spirit and meaning and purposes of this organization and its constitution, would be very technical and refined." *Contra* *Hull v. Equitable Accident Assoc.*, 41 Minn. 231; 18 Ins. L. J. 778.

and may recover for injuries while tending cattle in transit.¹ So the exemption promised to a "railroad employé" has been declared applicable to a baggage checker, though not employed by the railroad company at all, "the words of exception," as the court reasoned, having reference to the character of employment rather than to who is the employer.² But the exception of "a railroad employé in the performance of his duty," was held not to include the case of a workman in a railway company's car shops who was killed while riding home from work on one of his employer's trains.³ And a banker was denied the right to recover any portion of the insurance, under a policy which excepted railway employés, and also promised the insured that "if injured in any occupation or exposure classed by this company as more hazardous than that here given, his insurance and weekly indemnity shall be whatever the premiums paid by him will purchase at the rates fixed for such increased hazard."⁴

1. *Pacific Mut. L. Ins. Co. v. Snowden*, 58 Fed. Rep. 342.

2. *Baggage Checker*.—*Cotten v. Fidelity, etc., Co.*, 41 Fed. Rep. 506. The insured's duties required him to board incoming trains and to check baggage to other lines and to the destination of passengers.

3. "In the Performance of Duty."—*In Hull v. Equitable Accident Assoc.*, 41 Minn. 231; 18 Ins. L. J. 778, the court said: "Even if the assured can be deemed to have been, in any proper sense, an employee of the railroad company at this particular time, his acts here in question were not done, nor the consequent injury suffered, 'in the performance of his duty' as an employee of the railroad company. What he did was wholly for his own purpose, for his own convenience, and in no sense a part of his service to the company." See, for a contrary view, *Kinney v. Baltimore, etc., Emp. Relief Assoc.*, 35 W. Va. 385; 21 Ins. L. J. 176.

4. *Miller v. Travelers' Ins. Co.*, 39 Minn. 548. The question presented here was somewhat novel, and can perhaps best be understood by the following excerpt from the opinion: "It is certain that the insured was killed in an attempt to enter or get upon a moving steam vehicle, and that the accident and death are referable directly to that as the cause. It is distinctly expressed in the policy that the insurance shall not cover such a case (this condition being, however, inapplicable to railway employees). There can be no question that such an agreed condition in

respect to a specified danger of that kind was valid, and was a part of the contract. The danger, whatever may have been the extent of it, was voluntarily incurred, and upon the plainest construction of the policy the resulting accident was not within this contract of insurance. The appellants claim that by force of the language of the policy first above recited, limiting the liability of the company if the assured should be injured in any occupation or exposure more hazardous than that in which he was classed in the policy, a recovery should be allowed of such sum as the premium paid by this assured, twenty dollars, would have purchased as insurance as to one whose proper business it would be to get on or off moving railroad trains; for example, a railroad conductor, as to whom, under a policy like that in question, the condition respecting accidents from that cause would not be applicable. This is not a reasonable construction of this contract. The terms 'occupation or exposure classed by this company as more hazardous,' etc., refer, as we understand, to distinct classified occupations or employments such as railroad conductors, railroad brakemen, railroad engineers, blacksmiths, carpenters, etc. To bring a case within the provision limiting the liability of the company to a less amount than that named in the policy, the assured must be within one of such classes; that is, engaged in one of the more hazardous occupations. Such a case would, perhaps, be presented, if one insured as belonging to a

b. INJURIES CONNECTED WITH RAILWAYS—(1) Generally.—The introduction of steam and electrical transit, while greatly promoting the speed and efficiency of travel, has likewise increased its dangers. We might naturally expect to find, therefore, that in a large proportion of suits upon accident policies, injuries received from, or in the course of, railway operation, have constituted the causes of action. A writer in the *American Law Review*¹ in 1873, however, declares it to be then “well settled that in general accident insurance hardly more than seven per cent. of claims arise from accidents in travel by rail or water, while those growing out of horse or carriage injuries exceed in number those arising from all other causes combined.” This statement is also adopted and set forth in a recently published text book treating in part of accident insurance.² But the magazine writer above quoted, upon whose authority alone this declaration is made, also states in the same connection that “No accident tables have yet been published, and the statistics are as yet insufficient to generalize with accuracy.”³

But whatever the facts may have been a quarter of a century ago (and the statements above quoted certainly marshal no ultimate facts), or whatever they may be, even now, as regards accidents in general, it certainly is true, as will appear from the following pages, that so far as the particular clause now under discussion is concerned, a very large percentage of the litigation involving it arises from what may be fairly termed “railway accidents.” And it is desirable that this class of cases may be classified and treated separately, for it is important to the holders of accident policies, that they should be able to find in some one place a complete statement of the rules which the law through

nonhazardous class, as a banker, were to become, during the term of the policy, engaged in a more dangerous class of employment, as that of a railroad conductor, and were to suffer injury in the course of that employment. This is not such a case. The assured was not a railway conductor or employee, with the skill, judgment, and experience which one in that occupation may be presumed to have acquired, and which might enable him to get upon a moving train with safety, when one unaccustomed to such things might incur great danger in doing so. The construction which the appellants would have us put upon this provision would render of no effect the more plain condition of this contract, that ‘this insurance does not cover accident, nor death or injury, resulting . . . from . . . entering, or trying to enter, or leaving, a moving steam vehicle.’ Only as to ‘railway employees’ is this condition inapplicable.

The effect of this condition is to wholly exclude from the contract of insurance risks of that kind, except as to railroad employees. That risk the assured voluntarily subjected himself to, being still a banker, and attempting to get upon the train as a passenger. He was not a railway employee. Under this condition, and upon the facts shown, there could be no recovery.”

1. Vol. 7, p. 585. In another place (p. 586) the same writer asserts that “in fact, accidents from travel are only a small part of the losses for which compensation is paid.”

2. Niblack on Voluntary Societies, Mutual Benefit Insurance and Accident Insurance (2d ed. 1894), p. 699.

3. 7 Am. Law Rev., p. 585. The writer also prophesies that “a great advance will be made in accident insurance when accident statistics have been accumulated and tabulated.”

judicial construction, has prescribed for their conduct while traveling by rail. Equally important is it, from the standpoint of the insurers, that the authorities may be thus compositely collated, in order that they may be enabled to ascertain the exact force which the courts have so far given to the language employed in insurance policies, with a view of excepting such accidents. And this leads to the further observation, regarding this class of injuries, that their frequency and importance have exerted a marked influence upon the form of the insurance contract, as well as upon the character of the litigation concerning it. Insurers recognizing in the railway system a productive source of accidents, have persistently sought to relieve themselves from liability from all the more aggravated cases of injuries thus arising. The "voluntary exposure" clause is one example of such efforts, and it was long relied upon to secure exemption from this class of accidents. Experience, however, has caused the introduction of clauses more specifically excepting them.¹

(2) *Accidents Upon Trains.*—As regards accidents arising upon moving cars, the clause has generally proved insufficient. It was held, indeed, that the policy was avoided where the insured was killed by falling from the platform while attempting at night to pass from one car to another of a moving train at full speed.² And a passenger who "put his arm out of the window of the car,

1. See *infra*, this title, *Third Stage*.

2. *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216; 18 Ins. L. J. 892. Wallace, J., in delivering the opinion, declared that: "Negligence and 'voluntary exposure to unnecessary danger' are equivalent terms," and then proceeds, "Negligence is the absence of that care which a reasonable and prudent man would exercise under the circumstances of the case; and can it be doubted that a prudent man would understand that he was acting at his peril, if he attempted, in the night time, and while the train was under full headway, to pass from one car to another? Such are the undulations of a railway car, when the train is in rapid motion, that locomotion within the car is a task of some difficulty. The passenger moves with uncertain step, and seeks assistance by grasping the seats as the car sways to and fro. But, the passage from car to car is attended with greater difficulty. The din and clamor of the train, the rushing of the wind and dust and smoke, the consciousness that a misstep or miscalculation of distances may be fatal, tend to confuse or excite the faculties and disturb the judgment; and, although it is a common practice

thus to pass from car to car, it is rarely accomplished without experiencing a sense of relief when it has been safely done. When darkness adds another condition of uncertainty to the attempt, there can be no justification of the act in the mind of any prudent man."

See, however, to the contrary, *Pratt v. Travelers' Ins. Co.* (N. Y. Supreme Ct. 1871), not officially reported, but discussed in 7 Am. Law Rev. 595. The policy excepted "willful exposure," and the plaintiff's contention was that the insured had been killed while passing from one car to another, but the defendant claimed that he had fallen from the rear platform, where he had stood while smoking. The court instructed the jury that: If he was not standing on the platform, but was passing from one car to another, the last being the ladies' car, where no smoking was permitted, and was smoking previous to going upon the cars, and was passing from the ladies' car into the next car forward, the smoking car, for the purpose of smoking, then it was for the jury to say whether he was careless or in due care, when in the darkness he was passing from one car to another, situated as these cars were.

while the train was moving with its usual velocity, without the slightest necessity for doing so," and whose finger was injured in consequence, was denied the right to a recovery upon an accident policy.¹ But it has been declared not to be "voluntary exposure" for a passenger to leave the interior of the car in order to ride on the platform, because he is overcome by heat or is suffering from nausea,² or to alight from a car while in motion,³ or to board a moving train, especially if its rate of speed is less than that of a man walking,⁴ or to ride on the platform of an electric motor car,⁵ or for a cattle dealer, accompanying his stock to market, to ride on the iron ladder of a freight car.⁶

Where the insured alleges that while traveling by rail "and while he was in a dazed and unconscious condition of mind, and not knowing or realizing what he was doing," he "involuntarily arose from his

1. *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush (Ky.) 535; 1 *Bigelow's Life & Acc. Ins. Rep.* 116.

2. *Marx v. Travelers' Ins. Co.*, 39 Fed. Rep. 321. The court here observed: "That deceased was in a dangerous position on the platform, as distinguished from the body of the car, in which, as a passenger, he was entitled to ride, is clear enough; but whether in going on the platform there was voluntary exposure to unnecessary danger, cannot be ascertained except with knowledge of all the circumstances which influenced his conduct. If he was overcome by the heat of the car, or affected with nausea, which impelled him to seek the open air, it cannot be said that there was voluntary exposure to unnecessary danger, or that the danger was unnecessarily incurred."

3. *Badenfield v. Massachusetts Mut. Accident Assoc.*, 154 Mass. 77. The language of the court in this case is perhaps no more than a *dictum*. The court said: "The defendant asked for instructions upon the hypothesis that deceased fell while leaving the car when it was in motion. There was no evidence that he so fell, but if it could be inferred, it would not be conclusive of his negligence." Compare *Dailey v. Preferred Masonic Mut. Accident Assoc.* (Mich. 1894), 57 N. W. Rep. 184, which was decided on the ground that the risk was one contemplated, the insured being a railway conductor.

4. *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157; 1 *Bigelow's Life & Acc. Ins. Rep.* 731. The policy provided against liability for the insured's "willfully and wantonly exposing himself." The court said in

this case: "The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company, had there been any. But it does not seem to have contained those elements which could be justly characterized as willful or wanton." See also *Tooley v. Railway Pass. Assur. Co.*, 3 Biss. (U. S.) 399; 4 *Bigelow's Life & Acc. Ins. Rep.* 34 (1873), where the insured was required by his policy to "use due diligence for self-protection," and he attempted, while the train was moving slowly, and while he was walking quite fast, to get on board, either on the forward platform of the rear car or between two cars, and was crushed beneath the wheels. Judge Drummond left it to the jury to say whether the insured had used "that degree of caution and diligence which a prudent man would use under the circumstances." There was a verdict for the plaintiff in the full amount claimed.

5. *Sutherland v. Standard Life, etc., Ins. Co.* (Iowa, 1893), 54 N. W. Rep. 453; 22 Ins. L. J. 353, *distinguishing* *Bon v. Railway Pass Assur. Co.*, 56 Iowa 667; 41 Am. Rep. 127. In the first named case the insured was killed while riding on the rear platform of one of a train of electric cars running between Omaha and Council Bluffs. It was not a mere street car and there was evidence moreover that the insured was intoxicated, but the court accepted the finding of the jury to the effect both that the insured was "using due care" and that his death was not the result of intoxication.

6. *Pacific Mut. L. Ins. Co. v. Snowden*, 58 Fed. Rep. 342.

seat and walked unconsciously to the platform of the car, and, without fault on his part fell therefrom to the ground" and was injured, the complaint was held sufficient, as against a demurrer, to show that the injury was not due to "voluntary exposure to unnecessary danger."¹

A contract to indemnify one against a "railway accident" includes an injury happening to the insured by slipping on a wet car platform without negligence while he was in the act of stepping off, the train having reached its destination and stopped.² In *Pennsylvania*, it was finally held that for a passenger to step from the train upon a drawbridge where it had stopped for a few moments at night, and where he fell through an obscured hole, was not "voluntary exposure."³ So, in *Maryland*, in one of the early decisions upon this subject, the court, while holding that the question was one of fact for the jury, declared that there had been no breach of the clause by a locomotive engineer, who, while backing his engine down grade at a speed of about eight miles an hour, attempted to pass from the tender to a car attached in front, for the purpose of checking speed, and in such attempt slipped between the car and tender and was crushed beneath the latter.⁴

1. In *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; 46 Am. Rep. 618; 12 Ins. L. J. 691. Orton, J., delivering the opinion of the court, said: "It is not necessary to wander away and get lost in 'that wilderness more dark than groves of fir on Huron's shore' the wilderness of mind, to ascertain the precise condition of the mind of the plaintiff as stated in the complaint when the accident occurred, and it is useless to speculate as to the remote causes of that condition—whether drunkenness, utter prostration, somnambulism, brain disease, or derangement of the faculties—beyond, aside, or in contradiction of, what is stated in the complaint. The allegations of the complaint must be taken as true on demurrer, and it must be accepted as true that while he was in a dazed and unconscious condition of mind, and not knowing or realizing what he was doing, the plaintiff involuntarily arose from his seat and walked unconsciously to the platform of said car, and, without fault on his part, fell therefrom to the ground. All this occurred while he was unconscious, and involuntarily, without knowing or realizing what he was doing. These are the strongest words that could be used to negative self-infliction, design, or voluntary exposure, which are the only conditions material to this case which exempt the

company from liability. In respect to the causes of this mental condition of the plaintiff, it must also be accepted as true that he went to sleep from weariness, and the motion of the cars, and never awoke to consciousness or volition until the injury had happened. From these allegations it is evident that the plaintiff was as irresponsible for his actions and conduct as a human being could be from any possible cause, and that is sufficient."

2. *Theobald v. Railway Pass. Assur. Co.*, 10 Exch. 44; 2 Bigelow's Life & Acc. Ins. Rep. 393.

3. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205 (1883). Considerable stress is laid upon the fact that other passengers had first alighted and were standing on the bridge, and that the brakeman's lantern cast a shadow over the hole. The decision reverses that of the common pleas reported in 12 Ins. L. J. 233, where Hare, J., delivering the opinion said: "To leave a railway train in the obscurity of the night while it is standing on a railway track over a river, is certainly an exposure to danger, which, if not uncommon among the traveling community, is clearly 'voluntarily' within the meaning of the policy."

4. *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 310; 2 Bigelow's Life & Acc. Ins. Rep. 40. Here the court, after

(3) *Accidents Upon Tracks and Crossings*.—A “railway accident” need not, of course, occur upon, or in connection with, a train. Indeed, to quote the language of Baron Alderson,¹ “it does not depend upon any accident to the railway or machinery connected with it.” A large percentage of the cases where the “voluntary exposure” clause has been invoked, arose from accidents happening upon the roadbed, apart from cars. And it is important to note that the clause itself has proved far more effectual in relieving the insurer from liability for such accidents, than in cases where the injuries were incurred upon trains.

Recovery was denied where the insured, while running along the tracks to meet and board a train, was struck by an engine approaching from the rear.² And a nonsuit was ordered in a suit on a policy requiring the use of “all due diligence for personal safety and protection,” where the insured was killed by an engine at whose signal he had first stepped off the track, and then deliberately stepped on when the locomotive had almost reached him.³

citing *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157; 1 *Bigelow's Life & Acc. Ins. Rep.* 731, which had been decided only a couple of months before, and declaring that the case in judgment was not distinguishable from it, observed: “It is a common practice with persons employed on railroads and engaged in the management of trains to pass from car to car while the train is in motion, and although the duty of the engineer is more particularly confined to the locomotive and its management, yet, if he does not do so himself, he sees others almost constantly passing from one car to another without injury. If in this case he thought it necessary that the brakes of the attached car should be put on, in order to check the speed on the descending grade, and there was no brakeman there to do it, we cannot suppose he thought, or that a prudent man under the same circumstances would have thought, he was placing himself in the way of almost inevitable death by attempting to pass from the tender of the engine to the car for that purpose, whilst the train was moving at the slow rate of eight miles per hour. It is impossible to characterize this act as a willful exposure to unnecessary danger or peril. The fact that he slipped and fell in so doing, shows that it was an unusual and unexpected result attending the performance of a usual and necessary act. His falling was an event which took place without his foresight or expectation, and therefore clearly an accident

in the common acceptance of the word, and the resulting injury, therefore, within the plain meaning of the terms of his insurance, and not within the exception relied on. Such would be our conclusion if the question were left to our determination.”

1. *Theobald v. Railway Pass. Assur. Co.*, 10 Exch. 44; 26 Eng. L. & Eq. 422; 2 *Bigelow's Life & Acc. Ins. Rep.* 393 (1854).

2. *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175; 45 Am. Rep. 316; 12 Ins. L. J. 186. The court in this case said: “The danger was obvious, the exposure to it unnecessary, the want of due diligence clear; and the death of the insured occurred in consequence thereof.” This case was distinguished in *Keene v. New England Mut. Accident Assoc.*, 161 Mass. 149.

3. *Hoffman v. Travelers' Ins. Co.* (N. Y. Supreme Ct. 1871), reported in *Baltimore Underwriter* (Jan. 30, 1873); 7 Am. Law Rev. 594. Speaking of the insured's venture, the court observed: “That was a most reckless act. The rule is well settled that a party cannot walk on a railroad track without being guilty of negligence; and the courts hold that one about to cross the track must look both ways before attempting to cross, and that if he omits to do that he is guilty of negligence. So it seems to me that there is not a possibility of recovering under the proofs in the case. The circumstances show that there was gross negligence on the part of the deceased—more so than in any case I have

And the fact that the insured sat down upon the track when an engine moving toward him was but twenty-five feet away, was held to be so clear a case of "voluntary exposure" as to necessitate a dismissal of the complaint, and to render improper the submission to the jury of the question whether he was not there to rescue some slightly intoxicated men whom he had seen approaching the track.¹ In *England*, it was recently held that for one possessing ordinary faculties of sight and hearing to cross a railway track in front of an approaching train, was exposure to a risk which was either "obvious," or would have been "obvious" had he been paying proper heed.² And where the insured traveled on a railway track on a dark, rainy night, when he knew that trains were frequently passing, the lord chief justice, after receiving the verdict of the jury that this was not exposure to "obvious risk," declared that he would stay the execution, and that if the question were for him to decide, he "should say that deceased was running a risk which was very obvious indeed,"³ and subsequently the queen's bench allowed a rule to set aside the verdict.⁴ So an injury which befell the insured on such a night, while, with two packages in his hands, he was passing over a railway trestle bridge, when there were other ways of travel, was held to come within the exception, though this was his usual route home, and many others went that way.⁵ And a laborer, whose way to work was obstructed by a freight train, and who, after waiting ten or fifteen minutes, and hearing some one say that the train had broken in two, but who, without verifying that statement, or ascertaining whether an engine was attached, attempted, with others, to pass between two of the cars, and was injured by their sudden movement, was denied the right to recover on his accident policy.⁶

But it was held not to be "voluntary exposure to unnecessary danger" for the insured to cross a railroad track at a point where

had occasion to examine—and as gross negligence as if the man had hanged himself."

1. *Williams v. U. S. Mut. Accident Assoc.*, 133 N. Y. 366, reversing 14 N. Y. Supp. 728.

2. *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453. Lindley, L. J., said: "If the risk to which he exposed himself was not then obvious to him, that circumstance can only be accounted for on the supposition that he was not attending to what he was doing, *i. e.*, not looking to see if a train was coming and was near." Bowen, L. J., observed: "I should be disposed to go even further, and to say that the risk incurred was obvious as being evident to his senses."

3. *Lovell v. Accident Assur. Co.* (Eng. N. P.), 3 Ins. L. J. 877.

4. *Lovell v. Accident Assur. Co.* (Q. B.), 5 Ins. L. J. 559.

5. *Travelers' Ins. Co. v. Jones*, 80 Ga. 541; 12 Am. St. Rep. 270; 17 Ins. L. J. 784.

6. *Bean v. Employers' Liability Assur. Co.*, 50 Mo. App. 459. The court said: "These facts manifestly establish 'voluntary exposure to unnecessary danger.' Indeed, it would be difficult to state a case more clearly within these terms. . . . Is there room for doubt that this performance of entering between these cars was intentional—was voluntary? and is there any question that such an act was one which 'reasonable and ordinary prudence would pronounce dangerous?' Our own supreme court . . . has characterized such conduct as gross negligence."

many others daily crossed, though forbidden by the company, and though the insured carried an umbrella which obstructed his view of a detached car moving toward him, and by which he was struck and killed.¹ And where the location and surroundings were very similar to the foregoing, and bystanders warned the insured, when about to cross, of an approaching express train, which ran over him, recovery was still permitted.² So the death of one, who, while running to meet an incoming train and receive the mail bag, stumbled and fell against the steam chest of the engine, was held not to be within the exception clause;³ and the same conclusion was reached in the case of one who used a railroad track merely to cross a street through which the line ran.⁴

c. ACCIDENTS FROM MISCELLANEOUS CAUSES.—It has been held that the cleaning of a gun, not known to be loaded, is not "such voluntary exposure as the contract contemplated."⁵ In a comparatively early English case⁶ at *nisi prius*, where the insured was injured by lifting a heavy burden in the course of his business, one of the defenses was that the injury "was occasioned by the plaintiff's exposing himself to unnecessary risk, etc. (within a proviso in the policy)." But the court charged simply that the question was "whether the injury really and substantially arose from the accident;" and a verdict in the full amount was returned. The facts that the insured had, when shot, just left a house of ill fame at midnight, with a revolver on his person, in company with dissolute characters, and after drinking considerably, were not regarded as sufficient to bring him within the terms of the "voluntary exposure" clause.⁷ Where the policy required the insured "to use all due diligence for his personal safety and protection," the court declined to hold as a matter of law that

1. *Keene v. New England Mut. Accident Assoc.*, 161 Mass. 149. The facts here are similar to those in *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453, cited above. The difference in the decisions may, perhaps, be explained by the varying phraseology of the exception clause, in one case being exposure to "obvious risk," in the other "to unnecessary danger."

2. *Duncan v. Preferred Mut. Accident Assoc. (Super. Ct.)*, 13 N. Y. Supp. 620.

3. *Stumbling on Track.*—*Equitable Accident Ins. Co. v. Osborn*, 90 Ala. 201. The court observed: "But for the accident of stumbling, the inference is fair that he would not have been injured. The efficient and proximate cause of the death, therefore, was the accident, as much as if the collision had been with a huge stone instead of with the steam chest on the side of the engine."

4. *Wright v. Sun Mut. L. Ins. Co.*,

29 U. C. C. P. 221. But compare *Neill v. Travelers' Ins. Co.*, 31 U. C. C. P. 394; 12 Can. Sup. Ct. Rep. 55. And see the same case on appeal, where the judges were equally divided, 7 Ont. App. 570.

5. *Cleaning Gun.*—*Lurton, C. J.*, in *Miller v. American Mut. Accident Ins. Co.*, 92 Tenn. 167.

6. *Heavy Lifting.*—*Martin v. Travelers' Ins. Co.*, 1 Fost. & T. 505; 3 Bigelow's Life & Acc. Ins. Rep. 197.

7. *Leaving Bawdyhouse.*—In *Jones v. U. S. Mut. Accident Assoc. (Iowa, 1894)*, 61 N. W. Rep. 485, the court, by Kinne, J., said: "It is not sufficient, to relieve the defendant from liability, that the acts of the assured in going into the house of ill fame and in thereafter going upon the street as he did, were unnecessary. It must also appear that these acts were such as reasonable and ordinary prudence would pronounce dangerous, and that the death followed as a consequence thereof."

the stipulation had been violated because the insured, who was having a barn built, climbed up to the second story to inspect the work, though he was heavily clad in two overcoats, and was said to have been an awkward man, and there stepped upon a joist, which, owing to a concealed defect broke, and he fell to the ground and was killed.¹ So death by drowning of one who had been assisting in the rescue of a shipwrecked schooner's crew, was held not to be "directly or indirectly in consequence of . . . any voluntary exposure to unnecessary danger."² But one who was insured as a "retired" gentleman, was denied recovery for an injury sustained while operating a buzz saw, as a pastime, in a wagon manufactory owned by a company in which he was a stockholder and director; the policy or certificate excepting "employment or exposure not named or incident to the occupation under which he received membership."³

And where the insured fell and was killed, while attempting to lower himself by means of a piece of bedticking, from a window fifteen feet above a brick sidewalk, in order to elude police officers at the door, the *Illinois* appellate court observed: "The bare statement of the manner that deceased came to his death, brings it, we think, clearly within the clause of the policy of 'voluntary exposure to unnecessary danger.'" And the supreme court, in affirming the judgment, declared that "the case is too plain for argument."⁴ The federal supreme court has intimated that if one driver in a horse race observed that another driver "was ahead of him ever so little, his persistence in so running his horse as to bring about a collision, was willfully exposing himself to danger within the meaning of the policy."⁵

1. *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371. Beasley, C. J., in delivering the opinion of the court in this case, said: "These facts do not show any disregard to his personal safety on the part of the assured. There was no rashness or undue exposure in placing himself in the position described, and the breaking of the timber, which was the proximate cause of the death, was a pure accident. Besides this was altogether a question for the jury."

2. *Rescuing Shipwrecked Crew.*—*Tucker v. Mutual Ben. Life Co.*, 50 Hun (N. Y.) 50; *affirmed*, without an opinion, 121 N. Y. 718. In the supreme court Follett, J., delivering the opinion, said that "it was the duty of the insured to rescue the crew from the peril in which they were, and there is no evidence that in doing so he exposed himself to unnecessary danger."

3. *Operating Buzz Saw as a Pastime.*—*Knapp v. Preferred Mut. Accident Assoc.*, 53 Hun (N. Y.) 84, where the

court, by Dwight, J., said: "The work of operating a buzz saw is proverbially dangerous, and is probably not less so when engaged in for amusement than when practiced as a business or occupation. The dangers are such as probably to exclude the case of one engaged in the business from the class of preferred risks. The injury sustained by the plaintiff occurred from voluntary exposure to these dangers. Can it be said that such exposure was incident to the occupation or condition of a retired gentleman? If not, the contract was by its terms void as to the accident resulting therefrom."

4. *Shaffer v. Travelers' Ins. Co.*, (Ill. 1889), 22 N. E. Rep. 589.

5. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531, 541. This declaration is probably no more than a *dictum*, as the court further on in the opinion holds that the question whether the death was caused by willful exposure should have been left to the jury.

IV. THIRD STAGE: "VOLUNTARY EXPOSURE" IN SPECIFIC FORMS EXCEPTED—1. "Intentional Injuries Inflicted by the Insured or Any Other Person."—Certain exception clauses have found their way into the later policies which are in reality attempts to express the "voluntary exposure" clause in more precise and unequivocal terms, and which may be treated as a third stage in its development. Among the most familiar of these expressions is that which excepts "intentional injuries inflicted by the insured or any other person."

This clause now appears in most, if not all, of the accident policies, and on the whole has been quite effective in relieving the insurer. Previous to its insertion the companies had been held liable for intentional injuries inflicted by another than the insured.¹ But where the policy contains the clause above quoted, it is generally held that there can be no recovery if the insured was murdered,² or received the injury sued for in an assault made

1. Decisions Under Earlier Forms of Policies.—North America Accident Ins. Co. v. Bennett, 90 Tenn. 256; 20 Ins. L. J. 769, *distinguishing* between the older and newer forms of policies, and *citing* Amer. Law Reg. (Jan. 1879,) pp. 42-56; Lovelace v. Travelers' Protective Assoc. (Mo. 1894), 28 S. W. Rep. 877; Supreme Council v. Garrigus, 104 Ind. 140; 54 Am. Rep. 298; Gresham v. Equitable Accident Ins. Co., 87 Ga. 497; 13 L. R. A. 838; Goetzman v. Connecticut Mut. L. Ins. Co., 3 Hun (N. Y.) 515; 5 Thomp. & C. (N. Y.) 572; 5 Bigelow's Life & Acc. Ins. Rep. 328; Cluff v. Mutual Ben. L. Ins. Co., 13 Allen (Mass.) 308; Cluff v. Mut. Ben. L. Ins. Co., 99 Mass. 317; Overton v. St. Louis Mut. L. Ins. Co., 39 Mo. 122; 90 Am. Dec. 455; 1 Bigelow's Life & Acc. Ins. Rep. 313; Harper v. Phoenix Ins. Co., 19 Mo. 506; Harper v. Phoenix Ins. Co., 18 Mo. 109.

2. Clause Broken Where Insured is Murdered.—Hutchcrafts v. Travelers' Ins. Co., 87 Ky. 300; 12 Am. St. Rep. 484; 18 Ins. L. J. 570; Travelers' Ins. Co. v. McConkey, 127 U. S. 661; Fischer v. Travelers' Ins. Co., 77 Cal. 246; 18 Ins. L. J. 642; Travelers' Ins. Co. v. McCarthy, 15 Colo. 351; 22 Am. St. Rep. 410. In the *Kentucky* case first cited, the court, while holding that death by murder was accidental, said: "It is contended by the appellant that the meaning of the clause is, that, 'if the injured intentionally inflicted injuries upon himself, or if any other person intentionally inflicted injuries upon him with his consent, or at his instance, then the appellee should

not be liable.' A moment's reflection will show that the clause will not admit of this construction. The clause, when placed in juxtaposition with its antecedent, reads as follows: 'No claim shall be made under this ticket when the death may have been caused by intentional injuries inflicted by the insured or any other person.' The sentence, though awkwardly expressed, is complete, and clearly expresses the idea that if the insured intentionally injures himself by the infliction of bodily wounds from which he dies, he thereby breaks the condition of the policy; or that if he is intentionally injured by any other person by the infliction of bodily wounds from which he dies, the condition of the policy is thereby broken; therefore, to add the words 'with his consent, or at his instance,' would have the effect of torturing the meaning of the language used beyond its legitimate import. By the terms of the contract, the company undertakes to indemnify against death or injury effected 'through external, violent, and accidental means.' By virtue of this undertaking, the company would be liable, if the death or injury should be effected by any external and violent means whatever, that was, as to the insured, accidental, except in so far as the company, by the proviso, limited its liability; for it is a well-known rule of construction that where the undertaking of a party is expressed in general terms, as in this case, and specified things, as in this case, are excepted from the operation of the general terms, such terms are

upon him.¹ In *Wisconsin*, it was held that a policy excepting "self-inflicted injuries, . . . design of the insured or others," etc., would nevertheless cover injuries sustained by one who "involuntarily arose from his seat" in a railroad car "and walked unconsciously to the platform" where he fell off.²

In *California*, the rule above stated has been so far modified as to render the insurer liable where death was caused by another than the insured, if the slayer did not intend his act to be fatal,³ and a similar doctrine was foreshadowed by a *dictum* of the *Kentucky* court of appeals.⁴

2. Clauses Relating Specifically to Railway Accidents.—The dangers of railway travel already pointed out have led to the insertion of several clauses designed to exclude them. Thus, many of the

to be construed as covering all things coming within their scope, except those that are expressly excluded. As, therefore, the assassination of Hutchcraft was as to him an unforeseen event—a casualty—his taking off was through external, violent, and accidental means; but we also think the clause of the proviso that excludes the appellee's liability in case death or injury is intentionally inflicted by any other person, applies to this case."

1. Assaults.—*De Graw v. National Accident Soc.*, 51 Hun (N. Y.) 142; *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640. In the latter case, the insured was the victim of an assault in the office of O'Donovan Rossa, in New York city, in pursuance of an apparent conspiracy to assassinate him. The court observed: "The evidence leads to the conclusion that he, by a concerted arrangement, was to be assassinated. . . . The injury then was inflicted by another person, and we must hold, under the plain terms of the policy, which there is no reason for not enforcing, that there can be no recovery." The cases cited in the last note preceding are also referred to, and in the brief of the prevailing party there is also cited, as being of the same import, the unreported case of *Shreck v. Ins. Co.*, decided in the *United States* circuit court by Judge Thayer in 1887. In *De Graw v. National Accident Soc.*, 51 Hun (N. Y.) 142, the court said of a case whose facts were similar to the foregoing: "The contract of the defendant was not a contract of general indemnity, but of limited indemnity only. It was not intended as an insurance of the plaintiff against death, or injury, however it might occur, but to

insure him against a specified class of accidental injuries only, from which an injury intentionally inflicted by the insured, or any other person, was expressly excluded."

2. Scheiderer v. Travelers' Ins. Co., 58 Wis. 13; 46 Am. Rep. 612; 12 Ins. L. J. 691. Compare *Equitable Accident Ins. Co. v. Osborn*, 90 Ala. 201.

3. California Doctrine.—In *Richards v. Travelers' Ins. Co.*, 89 Cal. 170; 23 Am. St. Rep. 455, the court said: "It would not be a correct construction of the clause of the policy under review to say that it includes every case where a blow, not intended to kill, unfortunately and undesignedly produces death, and particularly when we consider the rules of construction which apply to the makers of instruments." The court here fails to cite the earlier case of *Fischer v. Travelers' Ins. Co.*, 77 Cal. 246; 18 Ins. L. J. 642, where the decision was in accord with the current of authority elsewhere, the court refusing to make the qualification last announced because the point had not been urged at the bar.

4. Kentucky Dictum.—"We think, however, that said clause was intended to apply to such injuries by other persons as are intentionally directed against the insured, and not to such injuries as the injured may receive at the hands of third persons who are attempting to do mischief generally; or who are attempting to injure any particular individual, other than the insured, or class of individuals, or any kind of property, for in such cases it cannot be said that the injuring was intentionally aimed directly and individually at the insured." *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300; 12 Am. St. Rep. 484; 18 Ins. L. J. 570.

policies except injuries incurred while "attempting to enter or leave moving steam vehicles." This clause is enforceable,¹ but has been held not to apply in the case of one insured as a railway conductor.² In a case decided by the *Illinois* appellate court, this clause was construed as being modified by the words "the result of design" occurring later in the same paragraph, and an injury not so happening was held to be excused though sustained while boarding a moving train.³ Another clause of like purpose excepts injuries received while riding on car platforms. This also is valid⁴ and was enforced in the case of a workman in a car shop who was returning home after work, though the policy also excluded from the operation of the clause railway employes in the performance of duty.⁵

Still another of these clauses excepts accidents occurring upon conveyances not intended for the use of passengers. This, however, has been held not to prevent recovery in the case of an engineer who rides on his locomotive,⁶ nor even in that of a "cattle dealer or broker," who, in accompanying his stock to market, climbs the iron ladder of a cattle car, intending to ride on the top of the car until the next station is reached.⁷

"Walking or being on the roadbed or bridge of any railway" is generally forbidden by the policies. And this clause is at least violated by one who travels longitudinally along the track between the rails.⁸ But it has been held not to apply to the use of tracks as a crossing,⁹ nor to the case of a passenger, who, upon stepping from a train upon a drawbridge, where it had stopped for a short time in the night, fell through a concealed hole in the bridge and was killed,¹⁰ nor where one who ran to get the mail

1. *Miller v. Travelers' Ins. Co.*, 39 Minn. 548. Compare *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216; 18 Ins. L. J. 892.

2. *Dailey v. Preferred Masonic Mut. Accident Assoc.* (Mich. 1894), 57 N. W. Rep. 184.

3. *Travelers' Preferred Accident Assoc. v. Stone*, 50 Ill. App. 222. Gary, J., delivering the opinion, said: "It is not our fault that this leads to a conclusion which it cannot be supposed the parties contemplated. The arrangement of the words interpreted is sensible enough; it is only the effect that is absurd."

4. *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216; 18 Ins. L. J. 892.

5. *Hull v. Equitable Accident Assoc.*, 41 Minn. 231; 18 Ins. L. J. 778.

6. *Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221; 1 Bigelow's Life & Acc. Ins. Rep. 321.

7. *Pacific Mut. L. Ins. Co. v. Snow-*

den, 58 Fed. Rep. 342. This is the effect of the decision, though the point is not discussed in the opinion.

8. *Piper v. Mercantile Mut. Accident Assoc.*, 161 Mass. 589.

9. *Wright v. Sun Mut. L. Ins. Co.*, 29 U. C. C. P. 221. See, however, *Neill v. Travelers' Ins. Co.*, 31 U. C. C. P. 394; 12 Can. Supreme Ct. 55, on appeal, 7 Ont. App. 570, where the court was equally divided.

10. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205. The court said, regarding the clause now under discussion: "The language of the exception clearly implies two thoughts; one, that the insured must not be on the road-bed or bridge for any length of time; the other, that the prohibition is not to guard against injury resulting from a defective road-bed, or defective railway bridge; but against the danger of injury from trains passing thereon. If the design was to apply the language to bridges defectively constructed, or

bags from an approaching train, stumbled and fell against the engine.¹

3. Miscellaneous Exceptions.—Where the policy excepts death or injury happening “while employed in . . . wrecking, except where such occupation is stated in the application and permitted,” the clause was held not to affect insurance on the life of a farmer who was drowned just after having rescued the crew of a shipwrecked schooner.² The insurer was also held liable where the insured was drowned while bathing, though the policy excepted injuries received “while taking a part in any gymnastic sports.”³ An exception of injuries occasioned by “lifting or overexertion” means only such as is voluntary and unnecessary, and does not include actions of the insured in times of danger and emergency.⁴

V. QUESTIONS OF EVIDENCE, ETC.—In suing upon an accident policy, the plaintiff must prove that the death or injury was caused by “external, violent, and accidental means.”⁵ But when this fact is established, the burden rests upon the insurer to prove a breach of the “voluntary exposure” clause, if it is relied upon as a defense.⁶ It has often been said that the question whether the insured has violated this clause, is one of fact for the jury,⁷ but many cases will be found in the foregoing pages where the courts declare in effect that certain acts constitute “voluntary exposure” *per se*.

out of repair, it would not have been restricted to railway bridges. It would have included all bridges, both foot and wagon. The purpose is not to avoid liability for injuries resulting from being on bridges unsafe in themselves. The manifest intent is to exempt from responsibility for damages caused by collision with trains moving thereon.”

1. Equitable Accident Ins. Co. v. Osborn, 90 Ala. 201, where the court said: “A fair and reasonable construction of the phrase in question is, voluntarily and intentionally being or walking on the railway road-bed, not being there by force of accident and involuntarily, for a mere comparative moment of time.”

2. “Employed in Wrecking.”—*Tucker v. Mutual Ben. L. Co.*, 50 Hun (N. Y.) 50. Follett, J., in the opinion, said: “The insured stated in the application that he was by occupation a farmer, and he was insured as such. He was a farmer and not, by occupation, a wrecker. As well might a farmer who should be smothered in attempting to rescue his neighbors from their burning dwelling be called a fireman, as this man a wrecker.”

3. “Gymnastic Sports” — Bathing.—*Knickerbocker Casualty Ins. Co. v. Jordan*, 7 Cinc. L. Bull. 71.

4. Lifting or Overexertion.—*Reynolds v. Equitable Accident Assoc.*, 59 Hun (N. Y.) 13; 17 N. Y. St. Rep. 337; 1 N. Y. Supp. 738 (1888).

5. Travelers' Ins. Co. v. McConkey, 127 U. S. 668; *Keene v. New England Mut. Accident Assoc.*, 161 Mass. 149.

6. Keene v. New England Mut. Accident Assoc., 161 Mass. 149; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; 16 Ins. L. J. 822; *Badenfeld v. Massachusetts Mut. Accident Assoc.*, 154 Mass. 77; *Guldenkirch v. U. S. Mut. Accident Assoc. (Brooklyn City Ct.)*, 5 N. Y. Supp. 428; *Williams v. U. S. Mut. Accident Assoc. (Supreme Ct.)*, 31 N. Y. Supp. 343.

7. Voluntary Exposure a Question of Fact.—*Providence L. Ins., etc., Co. v. Martin*, 32 Md. 310; 2 Bigelow's Life & Acc. Ins. Rep. 40; *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371; *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 544; *Tooley v. Railway Pass. Assur. Co.*, 3 Biss. (U. S.) 399; 4 Bigelow's Life & Acc. Ins. Rep. 34; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; 18 Ins.

VOLUNTARY LAW.—See INTERNATIONAL LAW, vol. 11, p. 436.

VOLUNTARY MANSLAUGHTER.—(See also HOMICIDE, vol. 9, p. 618).—Manslaughter is voluntary when committed with a design to kill, under the influence of a sudden and violent passion caused by great provocation, which the law, in its tenderness to the infirmity of human nature, considers such a mitigation of the offense as to rebut the presumption of malice which would otherwise arise. It is involuntary when committed by accident, or without any intention to take life.¹

VOLUNTARY PAYMENT.—See PAYMENT, vol. 18, p. 214; FREIGHT, vol. 8, p. 935.

VOLUNTEER.—One who receives a voluntary conveyance.²

A person who gives his services without any express or implied promise of remuneration in return, is called a volunteer, and is entitled to no remuneration for his services, nor to any compensation for injuries sustained by him in performing what he has undertaken. But a person who, though not obliged to do an act, yet has an interest in doing it, is not necessarily a volunteer. Thus, when the owner of goods assisted the servants of a railroad company, with the consent of the company, in delivering them, and was injured by the servants' negligence, it was held that he was entitled to damages.³

A person who voluntarily offers to do military service for the country in time of war.⁴

VOTE.—Suffrage; the voice of an individual in making a choice by many. The total number of votes cast at an election.⁵

L. J. 822; Cotten v. Fidelity, etc., Co., 41 Fed. Rep. 506; Pacific Mut. L. Ins. Co. v. Snowden, 58 Fed. Rep. 506; Jones v. U. S. Mut. Accident Assoc. (Iowa, 1894), 61 N. W. Rep. 485; Duncan v. Preferred Mut. Accident Assoc. (Super. Ct.), 13 N. Y. Supp. 620; Guldenkirch v. U. S. Mut. Accident Assoc. (Brooklyn City Ct.), 5 N. Y. Supp. 428.

1. U. S. v. Outerbridge, 5 Sawy. (U. S.) 622.

Voluntary manslaughter is defined to be the unlawful killing of a human creature without malice, either express or implied, and without any mixture of deliberation whatever; and in all cases of voluntary manslaughter there must be some actual assault upon the person killed, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances, to justify the excitement of passion, and to exclude all idea of deliberation or malice, either expressed or implied. Huff v. State, 85 Ga. 287.

2. Bouvier's L. Dict. See also VOLUNTARY CONVEYANCE, vol. 28.

3. See Wright v. London, etc., R. Co., 1 Q. B. Div. 252. See also MASTER AND SERVANT, vol. 14, p. 751.

4. Within a Resolution Providing for Bounties—Whether Substitute Is a Volunteer.—One who freely enlists in the place of another, and becomes his substitute of his own free will and accord, is a volunteer, within the spirit and intent of the statute. Magee v. Cutler, 43 Barb. (N. Y.) 240. But in Giddings v. Quartermaster-General, 25 Mich. 343, the court held, Christianity, C. J., dissenting, that a substitute is not a volunteer within the meaning of the acts providing for bounties to volunteers. These acts apply only to volunteers, as the people ordinarily understand the term, and not to one who enters the service in the place of another, as a substitute for hire.

5. The will of a member of a body, formally manifested toward the decision of a question by the body as a

whole, is his vote; and the aggregate of the expressions of the will of the members is the vote of the body. *Abbott's L. Dict.*

"A vote is but the expression of the will of a voter; and whether the formula to give expression to such will be a ballot or *viva voce*, the result is the same; either is a vote. It is a paradox to say that a vote can be given by one not a voter, and as it is the greatest number of votes which elects a candidate and gives title to the office, it follows logically that those ballots given or handed in by persons not voters are not votes, and cannot, therefore, be rightfully estimated, or have any influence upon the result." *People v. Pease*, 27 N. Y. 57.

Majority of Votes—Votes Distinguished from Electors.—It was required by the constitution of *Ohio* that an "amendment should be adopted if it received the assent of a majority of the electors voting at such election." The question was raised whether this meant a majority of the votes cast for or against the amendment, or a majority of the electors voting for representatives, governor, etc., at the election; it was held that the latter was the true construction. The court, in *State v. Foraker*, 46 Ohio St. 693, said: "In the case of *Gillespie v. Palmer*, 20 Wis. 544, much relied on by counsel for the relator, the judgment of the court was placed principally upon the language applicable to that case, and which, as there construed, is substantially different from the language contained in section 1, of article 16 of our constitution. There the language construed was 'a majority of all the votes cast at such election.' The court, holding that 'votes' is not synonymous with voters, determined that a majority of all the votes cast on the subject was sufficient to adopt the amendment. But no such question can arise, under our constitution, on the meaning of words, the language being, 'a majority of all the electors voting at such election.' While 'electors' may not be the exact synonym of voters, it is in no sense synonymous with votes. So that, if the decision were a sound one, it would not be in point here, by reason of the difference in the language of the two provisions. But the case does not seem to be regarded with very great favor in the state where it was decided."

By Vote.—When it is provided that a political body may act "by vote" it is

meant by a majority vote. In *Bean v. Prudential Committee*, 38 Vt. 178, the court said: "The 54th section of chapter 20 clearly favors this construction. It enacts that when a district votes to have two or more schoolhouses, the district shall by vote, or in such other manner as the legal voters present may determine, fix on the location. The phrase 'by vote' is always construed to mean by vote of the majority, unless the express term of the act show another intent; thus, sections 40 and 46 of this chapter show that the vote to abate taxes and to omit the names of such as are not able to pay their taxes must be by a vote of two-thirds of the voters present; while sections 37 and 43 show that the words 'by vote' mean by the vote of a majority."

Cumulative Voting.—See CUMULATIVE VOTING, vol. 4, p. 954; OFFICERS, vol. 17, p. 85; STOCKHOLDERS, vol. 23, p. 852.

Voting and Giving a Vote Synonymous.—"It is objected, first, that the indictment does not follow the words of the statute, nor charge the offense therein described. The charge is not, in the language of the act, that the defendant did 'vote,' but that he did 'willfully and unlawfully give in his vote.' The voting and giving a vote are precisely synonymous terms. They are so used in the very section on which the indictment is founded. Its language is, 'any person who shall vote or offer to vote, knowing that he is not duly qualified to vote at the place where, and time when, his vote is given or offered.' Giving the vote is voting, not offering to vote. The indictment, therefore, is not open to the objection urged upon the argument, that it is equivocal, and may mean either the giving the vote into the ballot box, *i. e.*, voting, or giving it into the hands of the officer, *i. e.*, offering to vote." *State v. Moore*, 27 N. J. L. 107.

Casting Vote.—A *New York* statute governing religious bodies gave the casting vote to the chairman. Where, at a meeting of a vestry, both wardens and eight vestrymen being present, and the senior warden in the chair, five voted in favor of engaging the relator as rector, and five, including the presiding officer, in the negative, whereupon the chairman declared the resolution to be lost; it was held that the chairman must be deemed to have given the casting vote; his declaration that the vote was

VOTER—(See also ELECTIONS, vol. 6, p. 445; VOTE).—A voter is one who has and exercises the right of suffrage.¹

lost being equivalent to that; that upon the vote taken, the resolution to call the relator failed for lack of a majority of the votes; and if the chairman voted twice, it was lost, by reason of a majority voting against it. The court, in *People v. Church of Atonement*, 48 Barb. (N. Y.) 606, said: "As a majority of the vestry did not vote in favor of calling the relator, he was not, therefore, called or elected unless the statute giving the chairman a casting vote is to be construed as meaning a vote only in the case of a tie arising upon the votes of the other members. The plain reading of the statute does not admit of such a construction. It first vests the power of election in a body of which the chairman is a constituent member. This is a grant to every such member of a right to vote. It then contains another grant of power to the presiding officer, *virtute officii*, in the words, 'he shall have the casting vote.' What is the legal effect of the latter grant? By the common law, a casting vote sometimes signifies the single vote of a person who never votes; but in the case of an equality, sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote. (1 Bl. Com. 181, n.; Jac. Law Dict. "Parliament" 7.) I think that in the statute under consideration, the term 'casting vote' is used in the latter sense. (1 Bl. Com. 418, n.; Cowp. 377.) It is true that a double vote is not allowed in corporate meetings, except by express statute (*Anonymous*, Lofft 315; 15 Vin. 214); but that it ought to be allowed where the statute is clear, cannot be doubted. In *Rex v. Giniver* (6 T. R. 732), a charter had been granted creating a corporation, and giving the bailiffs and aldermen, or a major part of them, power to choose a senior bailiff. A by-law was passed, giving the senior bailiff the casting voice, in cases where, in the election of bailiffs, aldermen or other officers, the voice should happen to be equal. The court held the by-law to be void, because it was contrary to the constitution of the charter; but it was tacitly conceded that if the provision of the by-law had been incorporated in the charter, the senior bailiff would have had, in case of the equality of votes, a double vote.

Lord Kenyon, C. J., and Lawrence, J., expressly asserted that such would have been the effect of the by-law if it had been valid. (See also *Rex v. Bumstead*, 2 B. & Ad. 699; 22 E. C. L. 174; *State v. Adams*, 2 Stew. (Ala.) 231.) It appears from the evidence that the chairman voted with his colleagues, and that the votes were equal. He must be deemed also to have given the casting vote. His declaration that the vote was lost was equivalent to that; and it would not have been strictly correct unless it should be so regarded. But if the foregoing views are correct, it is immaterial whether he declared the resolution lost upon the fact that the votes were equal, or whether he gave a casting vote. Upon the vote actually taken, the resolution to call the relator failed, for lack of a majority of votes of all the members of the vestry entitled to vote. If the chairman voted twice, it was lost by reason of a majority voting against it."

1. False Personation of Voter.—See FALSE PERSONATION, vol. 7, p. 698.

Qualified Voter—Legal Voter—See also QUALIFIED, vol. 19, p. 592; ELECTIONS, vol. 6, pp. 260, 445; MUNICIPAL SECURITIES, vol. 15, p. 1279.—That the phrase "qualified elector," in an act of the legislature, means a person who is legally qualified to vote; while a "legal voter" means (unless a different meaning appears from other language in the act) a qualified voter who does in fact vote, the court, in *Sandford v. Prentice*, 28 Wis. 362, said: "The primary and proper signification of the words 'legal voters' is, persons qualified by law to vote and who do vote. There is a difference between an elector or person legally qualified to vote, and a voter. In common parlance they may be used indiscriminately, but, strictly speaking, they are not the same. The voter is the elector who votes—the elector in the exercise of his franchise or privilege of voting—and not he who does not vote. There would be no propriety in saying, in the sense of his having voted, that an elector was a voter at a meeting or election which he did not attend. And that is not the application which the words of the act are to receive; but they must be understood according to their primary

VOTING TRUSTS—COMBINATIONS OF STOCKHOLDERS.—(As to the electoral rights generally of stockholders, see CUMULATIVE VOTING, vol. 4, p. 954; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 41; STOCKHOLDERS, vol. 23, p. 852.)

I. Combinations Generally, 502.

II. Voting Trusts, 503.

I. COMBINATIONS GENERALLY.—The owners of a majority of the stock in a corporation may combine to elect the officers and to manage its affairs. Practically the selection of candidates must precede an election, and it would often be difficult, if not impossible, to make such selection without comparison of views, combinations, concessions, and concerted action. No formidable and effective opposition to an existing board, however obnoxious, could be organized without combination.¹

Such combinations differ from those whereby one of the parties stipulates to accord or secure to the other, for a consideration, some private or personal advantage not shared by the stockholders generally;² the latter will not be countenanced by the courts.

and proper sense of actual voters. If the legislature had intended a majority of the qualified electors of the district, they would undoubtedly have used those words instead of the words 'legal voters,' or in some other way have made their intention plain." See also Louisville, etc., R. Co. v. Davidson County Ct., 1 Sneed (Tenn.) 637; 62 Am. Dec. 424. Compare State v. Williams, 5 Wis. 308.

1. Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506; affirmed 86 N. Y. 618. In this case, it was further held that such combinations are not in conflict with the provision of the statute that directors "shall be chosen annually by the majority of the votes of the stockholders voting at such elections."

It is the general rule of the law, sanctioned by public policy, that those having the largest interests in corporations may control them, as they have the greatest interest that they shall be well managed. Barnes v. Brown, 80 N. Y. 527.

In Meeker v. Winthrop Iron Co., 17 Fed. Rep. 48, it was held that the holders of a majority of the stock of a corporation may legally control the company's business, prescribe its general policy, make themselves its agents, and receive a fair compensation for their services; but in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They may not legally manipu-

late the company's business in their own interest, to the prejudice of other stockholders.

Corporations are governed by the republican principle that the whole are bound by the acts of the majority, when the acts conform to the law of their creation. Faulds v. Yates, 57 Ill. 416; 11 Am. Rep. 24. Here three persons owning a majority of the stock of the corporation entered into an agreement, as between themselves, that they would elect the directors; that they would determine among themselves as to its officers and management; and that if they could not agree, they would ballot for the officers and directors, and that the majority should rule, and their vote be cast as a unit so as to control the election. It was held that this agreement was not void as against public policy—it being competent for persons owning the majority of the stock to unite and thus secure the board of directors, etc.

2. Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506; affirmed 86 N. Y. 618.

In Guernsey v. Cook, 117 Mass. 548; 120 Mass. 501, the contract was that the defendant who, with another acting in concert with him, owned the majority of the stock of the corporation, agreed with the plaintiff that the plaintiff should be employed as treasurer at a certain salary, and should purchase one hundred shares of the defendant's

And a combination or conspiracy among the stockholders to obtain control, by the use and abuse of legal process, and by preventing a fair election, is, of course, illegal, and the election of directors under such circumstances is void.¹

Where stock is transferred, without consideration, for the purpose of fraudulently controlling an election, injunction is the proper remedy for preventing the transferees from voting.²

II. VOTING TRUSTS.—The most recent device resorted to by stockholders owning a majority of the capital stock, with a view to securing to themselves corporate management and control, is known as the "voting trust," the principal feature of which consists of the transfer by the shareholders of their certificates of stock to certain trustees, with power to vote thereon, and the receipt in turn of what are called trust certificates, specifying the amount of stock deposited by each, and his interest in the pool. The cases passing upon the validity of such arrangements are not numerous, but the principles thus far affirmed may be stated as follows: Where the object of the trust is merely to elect officers of the corporation, or to carry out a particular policy with a view to promote the best interests of all the stockholders, it is not in conflict with the law or its policy.³ But

stock at par, but leave it in the control of the defendant, and in the event of the plaintiff's discharge as treasurer, the defendant should repurchase his shares at the same price, with interest. The plaintiff was discharged, and brought his action for the price of the shares of stock. The contract was declared to be void, as a fraud upon the other stockholders, and as against public policy, in the absence of evidence that the transaction was not for the private benefit of the shareholder, or that it was consented to by the other members of the corporation. This case was followed in *Woodruff v. Wentworth*, 133 Mass. 309, where it was held that a contract between two stockholders, by the terms of which one, in consideration of a sum of money paid to him by the other, agreed to vote for a certain person as manager of the corporation and also to vote to increase the salaries of the officers of the corporation, including that of the manager, was void as against public policy, unless it was consented to by all the stockholders of the corporation; and doubt was expressed as to whether such consent would cure its vice.

In *Fremont v. Stone*, 42 Barb. (N. Y.) 170, the defendants had stipulated with the plaintiff that, on the payment by him of a certain sum as the price of

certain shares of stock then belonging to them, a change should be effected in the directory of the company of which they were members, at the dictation and in the interest of the plaintiff and his co-purchaser, through the contrivance of the defendants, and not by the votes of the stockholders at large. The action was brought for the specific performance of the contract of sale, and it was held that the contract, by reason of its purpose, was contrary to public policy and void.

1. *People v. Albany, etc.*, R. Co., 55 Barb. (N. Y.) 344.

2. *Webb v. Ridgely*, 38 Md. 364.

3. In *Griffith v. Jewett*, 15 Wkly. L. Bull. (Ohio) 419, the court said: "We can perceive no reason why a number of shareholders, either by means of a proxy, or by vesting the legal title in another, may not authorize him to vote upon their stock. And as such is the substance of this agreement, we consider it not illegal; so long as the parties to it, or their successors in interest, are satisfied with it, no other person may complain."

In *Moses v. Scott*, 84 Ala. 608, Stone C. J., said: "We cannot say there is anything *per se* illegal in an agreement entered into by and between certain stockholders in a joint stock company, by which they promise to vote together

if an element of fraud or unfairness is introduced into the original agreement, or the control is to be exercised for some improper purpose, such as securing to the parties to the agreement an undue pecuniary advantage, or conferring the power to dictate the vote upon another corporation which cannot, under the law, hold the stock and cast the vote, the trust is illegal.¹ In

as a unit in all matters pertaining to the government of the corporation. Each member has a clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct or gainsay his discretion; and it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote when cast is but the expressed wish of the stockholder, or at least must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleases."

In *Mobile, etc., R. Co. v. Nicholas*, 98 Ala. 92, it was held to be not unlawful, *per se*, to separate the voting power from the stockholder, so far as the appointment of a proxy may be considered a severance of the voting power, and the charter expressly grants the power. The court said: "We have examined case after case, and find generally that agreements declared void by the courts, where the power to vote was separated from the stockholder and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful, such as the courts would not sanction if the principal had voted and not the proxy. And in cases of a mere dry trust, it is held that the stockholder might revoke a power of attorney in form not irrevocable. The doctrine as to dry trusts does not arise in this case. . . . If there were no precedents, upon principle, we would hold that in determining the validity of an agreement which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties, neither will it annul them, except to preserve its own majesty and to conserve the greater interest of the public."

Stockholders may place their stock in the hands of a depository with direction to vote it as directed by a committee appointed by themselves, and subject to their control. *Ohio, etc., R. Co. v. State*, 49 Ohio St. 668; 39 Am. & Eng. Corp. Cas. 659. In this case, the court said that such an arrangement differed widely from a voting trust; and that such a trust would be void as against the policy of the corporation law of the state. The latter observation, however, was a *dictum*.

A stockholder is not entitled to have the officers of the corporation restrained from voting upon the stock of others for which they have secured proxies, upon the theory that the transaction creates a trust for the corporation, unless corporate funds were used in doing what was done. *Woodruff v. Dubuque, etc., R. Co.*, 30 Fed. Rep. 91.

1. *Hafer v. New York, etc., R. Co.*, 14 Wkly. L. Bull. (Ohio) 68.

In *Cone v. Russell*, 48 N. J. Eq. 208; 35 Am. & Eng. Corp. Cas. 424, the complainants, as executors and trustees, held certain shares of stock in an incorporated company. The defendants held certain other shares therein, which, added to those held by the complainants, constituted a majority of all the shares. The complainants on the one part, and the defendants on the other, entered into a contract by which the complainants agreed to execute, and in pursuance thereof, did execute, a proxy irrevocable for five years to the defendants to vote at all stockholders' meetings upon the complainants' shares, and the defendants, in consideration thereof, agreed to so vote the said shares that one of the complainants should be continuously employed as manager of the corporation at a salary of \$2,500 per year. The agreement was declared void, first, because against public policy, and, second, because a breach of trust by the complainants, and the complainants were held entitled to relief against the defendants and an injunction against the use of the proxy, notwith-

other words, such pooling arrangements are not illegal, unless their purpose is illegal; the propriety of the purpose validates the means, and must affirmatively appear.

Where stock is pledged as collateral, the debtor and creditor may agree to lodge the vote of such stock in some one who is to act for both, so long as the debt remains and the stock is held as security.¹

The trust agreement is, in legal effect, a mere proxy, and if not made on any other consideration than the mutuality of the concurrent act of the stockholders, is revocable by any of them at any time, and the trustees may be perpetually enjoined from voting on the stock of a party to the agreement after he has given them notice of his revocation.²

If the object of the trust is illegal, the trustees may be enjoined from voting the stock, at the suit of any stockholder;³ but if the object is not illegal, a stockholder not included in the trust may not maintain the suit.⁴

In several instances the combinations have been declared illegal because of the presence of stipulations unlawfully restraining the right of alienation of property.⁵

standing their position *in pari delicto* with the defendants. The court, in this case, cited and relied upon *Guernsey v. Cook*, 117 Mass. 548; *Woodruff v. Wentworth*, 133 Mass. 309; *Foll's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671; *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48.

In *Shepaug Voting Trust Cases*, 60 Conn. 581, *Robinson, J.*, for the court, said: "It is insisted that there is nothing illegal *per se*, in the pooling of stock to carry out a scheme of extension authorized by law and favored by the corporation. This may be true under proper limitations, and when this is all there is to the scheme; but when underlying that pooling contract there is between the members of the syndicate, who are directors or a majority of the directors of the corporation, a secret agreement which enters into this pooling contract, and forms the object of its creation, and by which they are to take to themselves the profits arising from such extension or from the contracts which they, as directors make, elements of unfairness and opportunity for fraudulent and dishonest practices are introduced which the court cannot too severely condemn. Such a pooling contract or voting trust is in violation of the most elementary principles of law governing the dealings of trustees with the trust property and their *cestuis que trustent*."

1. *Shelmerdine v. Welsh*, 20 Phila. (Pa.) 199; 47 Leg. Int. (Pa.) 26. In this case, it was questioned whether the voting trustees could elect one of their number an officer of the corporation.

2. *Vanderbilt v. Bennett*, 2 Ry. & Corp. L. J. 409; *Griffith v. Jewett*, 15 Wkly. L. Bull. (Ohio) 419; *Shepaug Voting Trust Cases*, 60 Conn. 553; *Moses v. Scott*, 84 Ala. 608; *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506; *affirmed* 86 N. Y. 618; *Woodruff v. Dubuque, etc.*, R. Co., 30 Fed. Rep. 91. See also *Clarke v. Central R., etc., Co.*, 50 Fed. Rep. 338.

3. *Hafer v. New York, etc., R. Co.*, Rep. 14 Wkly. L. Bull. (Ohio) 68.

4. *Griffith v. Jewett*, 15 Wkly. L. Bull. (Ohio) 419.

5. In *Fisher v. Bush*, 35 Hun (N. Y.) 641, where the complaint alleged that the plaintiff, the defendant, and eight other persons, signed the following written sealed instrument: "For value received from and paid to each other, we, the undersigned, stockholders of the Genesee Valley Canal R. Co., mutually agree with the other and to all, that we will not sell, assign, set over, pledge, or give power of attorney to vote, or agree to sell, assign, transfer, set over, pledge, or give power of attorney to vote, in any way, shape or manner, the stock which we respectively and individually own, hold, or possess in said

In a recent case in *Connecticut*, where the power conferred by the trust agreement had been given more than one year, and already exercised at one annual meeting, it was held to be terminated by virtue of the statutory provision that "no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting, and no such power shall be used at more than one annual meeting of such corporation."¹

VOUCHER.—The term "voucher," when used in connection with the disbursement of moneys, implies some written or printed instrument in the nature of a receipt, note, account, bill of particulars, or something of that character, which shows on what account or by what authority a particular payment has been made, and which may be kept or filed away by the party receiving it, for his own convenience or protection, or that of the public.²

company, without the concurrent consent of all the signers to this instrument.

. . . This agreement is made for mutual protection and to prevent the sale of the company's franchise by a majority of the members of the present board of directors, who are and who represent a minority of the shares of the capital stock of this company." It was held that the agreement was void because, first, it was in restraint of trade and against public policy; second, the clause providing that none of the signers should vote by proxy was a pernicious and unlawful one; third, it was not founded upon an adequate and sufficient consideration—agreements of this character must be supported by a real and special consideration. The court distinguished the case of *Havemeyer v. Havemeyer*, 45 N. Y. Super. Ct. 464, holding that the question of the necessity of an actual consideration to support the agreement in that case was not considered, and said: "Upon the general question as to the validity of such contracts, and when they will be confirmed as valid and obligatory, we are unable to discover that any rule of law was affirmed that is applicable to this case, or hostile to our position condemning the agreement before us as void, for the reason that the same is an unreasonable restraint upon the property rights of the defendant." See also *Williams v. Montgomery*, 68 Hun (N. Y.) 416.

Among the terms of the trust agreement, in *Moses v. Scott*, 84 Ala. 608, were these: During the three years the shareholders had the right to sell

their stock in whole or in part, but not the power to sell the right to vote it, and during that term the transferee could only obtain the transferor's right, viz., the right to own, but not to vote, the stock. In the event any or either of the parties should, at any time during the continuance of the said trust, offer his stock for sale subject to the conditions of the said trust, he should give the refusal to purchase the same to the other parties to the agreement, or to such of them as were willing to buy at the price offered *bona fide* therefor, and at which he was willing to sell. The court held these stipulations illegal and void, as being in restraint of the alienation of property.

But in *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, a contract, by which certain stockholders placed their stock with one person as trustee to hold for a certain time, agreeing not to sell it without having first given their associates the refusal of it at a price not above the then current market value, and in the event of their declining it, without next offering it to the trustee, but any of the parties to the trust agreement to be free to withdraw at any time on these terms, was held not contrary to public policy nor open to objection upon any ground.

1. *Shepaug Voting Trust Cases*, 60 Conn. 553.

2. *People v. Brinkerhoff*, 107 Ill. 495. And in that case it was held that the mere written order of the governor or adjutant general to the auditor to draw his warrant upon the military fund, in the absence of any account, bill of par-

A voucher is any instrument which attests, warrants, maintains, bears witness.¹

particulars, or other specifications showing the character of the expenditures, or on what account the warrant is to be drawn, is clearly insufficient, as a voucher, to justify and authorize the auditor to issue his warrant in favor of the captain of a military company of the state.

A *Massachusetts* statute provided for the appointment of an auditor, by the court, to examine "vouchers, state accounts," etc., in certain actions. In defining vouchers, as used in this statute, the court said, in *Whitwell v. Willard*, 1 Met. (Mass.) 218: "The term 'voucher,' in the sense in which it is used in this statute, designates an account book in which charges and acquittances are entered, and it signifies, also, any acquittance or receipt, discharging a person, or being evidence of payment. Jacob's L. Dict., 'Voucher.'"

1. *State v. Hickman*, 8 N. J. L. 299.

"Examining" and Allowing "Vouchers."—A *New York* statute provided that money drawn from the treasury should be upon "vouchers" to be examined and allowed by the auditor. In *People v. Green*, 5 Daly (N. Y.) 199, upon the question of the auditor's authority, Daly, C. J., said: "As respects the question presented upon this appeal, the provisions of section six in the act of 1857 (2 L. 1857, p. 286), and of section six in the act of 1870 (1 L. 1870, p. 482, are substantially the same. A construction was given to the provision of section six, in the act of 1857, by Judge Sutherland, in *People v. Haws*, 12 Abb. Pr. (N. Y. Supreme Ct.) 202, which is equally applicable to the provisions in section six of the act of 1870. That construction is that it was not the intention of this provision to give the officers of the finance department an absolute supervisory power over the acts of the board of supervisors, in examining, settling, and allowing accounts against the county, which would be equivalent to an absolute veto check over the discretionary power of the board of supervisors. That the provision that all moneys drawn from the treasury, upon the authority of the board of supervisors, shall be upon vouchers to be examined and allowed by the auditor and approved by the comptroller, means that it is the board of supervisors who are to determine whether the service was per-

formed or the expense incurred. I agree only in part in this construction, for, in my judgment, to examine, allow, and approve a voucher means something more. What is a voucher? The word has several meanings; but, in its ordinary signification, it means a document which serves to vouch the truth of accounts, or to confirm and establish facts of any kind. A merchant's books are the vouchers of the correctness of his accounts, or a receipt is a voucher of a payment, but neither are conclusive. 'To vouch' is to aver that a thing is true. 'It is,' says Crabbe, 'to rest the truth of another's statement upon our own responsibility.' (Crabbe's Synonyms, p. 441, Am. ed. of 1833.) The voucher of the board of supervisors is that the claim or account submitted to them is correct, and should be paid as a valid charge against the county. But it cannot be paid unless the voucher is examined, and allowed by the auditor and approved by the comptroller. Now, what does this mean? The voucher is, necessarily, the account or claim, with the attestation, in some form or other, of the board of supervisors, that it is a valid charge against the county. It is presented to the auditor for examination. What is he to examine? Is he simply to ascertain whether the attestation, or other evidence of the action of the board of supervisors, is in the proper form, and duly certified by the proper officer? The statute says he is to examine the voucher, and the account or claim is part of the voucher. A certificate of the action of the board of supervisors would be meaningless without the bill or account, for that has to go on file in the comptroller's office as the record evidence of the claim or demand. The examination of the voucher, then, necessarily means the examination of the account or claim, and if, upon looking into the account, the auditor discovers that a mistake has been made in the addition—that the items, correctly added up, do not amount to the sum claimed and certified to be correct by the board of supervisors, what is the auditor to do? Is he to allow the voucher, and hand it over to the comptroller, and is the comptroller, with the knowledge of that fact, to approve of it? In my judgment, if the auditor,

VOYAGE—(See also MARINE INSURANCE, vol. 14, p. 319).—A voyage is a passage by water from one port or place to another port or place.¹

upon examining the account, finds any mistake in it, he is not to allow it, nor is the comptroller to approve of it."

1. *Barker v. M'Andrew*, 18 C. B. N. S. 774. And see that case as to the commencement of the voyage. See also *Nelson v. Dahl*, 12 Ch. Div. 568; *Pyman v. Dreyfus*, 24 Q. B. Div. 152.

Where, by a charter-party, a vessel then lying at Genoa was warranted to sail on or before the 30th of July to Monte Video and Lima, and thence proceed to Callao for orders to load a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, etc., and certain running and lay days having been specified, it was provided that, should the vessel be unnecessarily detained at any other period of the voyage, such detention should be paid for at the agreed rate, it was held, that the detention of the vessel at Genoa till the 8th of September must, *prima facie* and unexplained, be taken to have been unnecessary; but that the voyage could not begin before the vessel left Genoa, and, consequently, that the clause as to unnecessary detention did not attach. The court, in *Valente v. Gibbs*, 28 L. J. C. P. 234, said: "The term 'voyage,' in the clause marked 'A' in the margin, does not apply to the detention at Genoa prior to the ship's sailing. I confess that the inclination of my opinion is, that the plaintiff is right in both contentions, but we are all clear that upon the second he is entitled to our judgment. Voyage is a term of recognized meaning in common parlance, and has received a legal interpretation accordingly. It may have a certain flexibility, according to the context, but where a word has a recognized sense, it is a well-known rule of construction that it must be taken to be used in that sense, unless it is clear that it was intended to be used differently. Mr. Willes has ably and ingeniously contended that the charterers had an equal interest in preventing delay, whether before or after the vessel sailed; but still there is nothing in this charter-party to show that the word 'voyage' is not used in its ordinary sense of transit. True, there is a warranty to sail on the 30th of July, and for any

breach of that warranty the defendants have a remedy; but by the terms of this contract the penalties attached to a detention on the voyage, not to a detention after a particular day, and we should be straining language were we to hold otherwise. I do not dissent from *Crow v. Palk*, 8 Q. B. 467, which is an authority as to the signification of the word 'voyage.'"

A fishing vessel being insured with a clause prohibiting her sailing "on any voyage east of Cape Sable," after a given date, sailed, after that date, for Eastport to procure bait, and suffered loss before arrival, she being at the time, with the exception of bait, manned and fully equipped for the fishing grounds east of the cape. In an action on the policy, it was held that the term "voyage" meant the enterprise begun and not the route taken; that it was for the jury to determine whether she was on a voyage to Eastport or to the fishing grounds; that if the going to Eastport was an independent voyage, not designed as a part of the fishing voyage, the plaintiffs could recover; but if the fishing grounds had been fixed upon as the end of the voyage, and the stopping for bait was an incidental part of it, the plaintiffs could not recover. *Friend v. Gloucester Mut. Fishing Ins. Co.*, 113 Mass. 326.

Whaling Voyage.—As to when the risk attaches under a policy upon a whaler for a "voyage," *Shaw, C. J.*, in *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 231, said: "When did this risk commence? The policy is on cargo, on board ship Tarquin, now on a whaling voyage. No termini of this voyage are expressed, except the return to Nantucket. But the voyage means the whole voyage from the commencement; and if not expressed, it is implied, and may be shown by proof of the fact, when the voyage did actually commence, by the sailing of the ship. An outward bound sailing ship, on so long a voyage, must of necessity, probably, carry a large amount of provisions, clothing, stores, casks, and whaling gear, sufficient in a considerable degree to fill the ship, and to warrant the application of the term cargo. But whether these outfits would be protected by a policy on cargo, is a question

VS.—See **VERSUS**.

VUGG.—See **MINES AND MINING CLAIMS**, vol. 15, p. 506.

WAGER—(See also **BET**, **BETTING**, vol. 2, p. 185; **CHANCE**, vol. 3, p. 88; **CONTRACT**, vol. 3, p. 873; **ELECTIONS**, vol. 6, p. 446; **GAMBLING CONTRACTS**, vol. 8, p. 992; **GAMING**, vol. 8, p. 1033; **GAMING HOUSES**, vol. 8, p. 1065; **ILLEGAL SALES**, vol. 9, p. 923; **INSURANCE**, vol. 11, p. 278; **LOTTERIES**, vol. 13, p. 1164; **SALES**, vol. 21, p. 469; **STOCK-BROKERS**, vol. 23, p. 699; **TONTINE INSURANCE**, vol. 26, p. 52).—A wager is a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them upon the happening or not happening of an uncertain event.¹

not arising in this cause, and one on which we give no opinion. But the oil and other articles, which are the ordinary products of the voyage, and the procuring of which constitutes its direct object, are undoubtedly included under the term cargo and covered by a policy on cargo. To construe this policy, according to the argument of the defendants, so as to make the risk commence on the day of its date, it would be necessary to limit the word 'voyage' to a very small part of the voyage, without any words expressing such limitation, and would render the words 'lost or not lost' wholly inoperative. The word 'now' we take to be merely descriptive, and designed to identify the voyage. With these views, therefore, we are of opinion that this policy would attach upon the oil, from the time the vessel first began to take whales in the course of this voyage; and had this ship struck a whale on her outward bound passage, we do not perceive why the oil produced would not have been part of the cargo on the whaling voyage insured. Indeed, so much time has elapsed, between the commencement of the voyage and the effecting of this policy, that it is hardly credible that any loss should have happened in the early part of it, which would not have been heard of by the owners at the time. But supposing there was no misrepresentation or concealment affecting the case, we see not why this policy would not cover any loss that might have happened, at any time anterior to the date of the policy, and after any oil was taken in."

Tug.—The term "voyage," however, as applied to vessels engaged in foreign and interstate commerce, within the meaning of the maritime law, is clearly

inapplicable to a tug making short trips, generally not from port to port, but from one body of water to another, merely furnishing the motive power to other vessels bound on a voyage, not taking on freight at one port and delivering it at another, but picking up its burdens upon the water, and wherever its aid is invoked, and dropping them again upon the water. It would be a misnomer to apply the term "voyage" in the sense of the maritime law to such trips. The John Martin, 2 Abb. (U. S.) 181.

Touching at Several Ports.—"A 'voyage' is not limited to the passage of a vessel from one port to another, but it may include several ports. (Bouvier's L. Dict., 'Voyage'; 1 Pars. S. & A. 307.)" *In re George Moncan*, 8 Sawy. (U. S.) 353. This case turned upon the exemption of Chinese sailors from the operation of the exclusion laws, when touching a port in the *United States* when upon a "voyage."

Voyage or Voyage Aforesaid.—See **AFORESAID**, vol. 1, p. 320.

Voyage Policy.—See **MARINE INSURANCE**, vol. 14, p. 334.

1. Bouvier's L. Dict., followed in *Ex p. Young*, 6 Biss. (U. S.) 67; *McGrew v. City Produce Exchange*, 85 Tenn. 572; *Merchants v. Goodrich*, 75 Ill. 560; *Jordan v. Kent*, 44 How. Pr. (N. Y. Supreme Ct.) 207.

"A wager may be defined as a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event, in which they have no interest except that arising from the possibilities of such gain or loss. This may be illustrated by an example: A and B agree, in consideration of a premium paid by B, that if a certain ship is lost at sea, A shall pay B

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the value of the ship. If B has no interest in the ship, it is a wagering contract, but if B has an interest, and will be loser if the ship is wrecked, it is a contract of indemnity and not a wager. So, if two men agree that if coffee rises in price, one of them shall pay a sum of money to the other, it is a wager, if they have no other interest in the coffee than that growing out of the contingency about which they stipulate. But it does not follow that every contract which produces such a result is a wager; the question is one of intention, as deduced from the facts and circumstances. Let us suppose that A agrees with B to buy a thousand bushels of wheat, at two dollars per bushel, to be delivered and paid for at the end of thirty days. If wheat rises in value, A will be a gainer, and if it goes lower, he will lose; but, inasmuch as the apparent object of the contract is an actual purchase of the wheat, it is not a gaming contract. Nor could such a contract be justly regarded as a wager, although when the time for the delivery of the wheat arrived, it was agreed that B should, instead of forwarding the wheat to A, pay him the damages to which he would be legally entitled for a refusal to deliver; that is to say, the difference between the stipulated price and the actual value of the wheat at the time fixed for the fulfillment of the contract. Such a settlement of the difference would not, if there was nothing more, be a sufficient ground for inferring that the contract was a gambling contract, or contrary to law. But the case would be materially different if the evidence, taken as a whole, showed that A and B did not really intend to buy and sell; that there was no intention on the one hand to deliver, or on the other to receive the wheat, and that their real purpose was to make a wager in the form of a contract of sale. Hence, if A and B were to deal with each other in the way supposed, during a series of months or years, and it appeared in evidence that B did not, in any single instance, forward the wheat, or have it in readiness for delivery, and that when the time arrived for the fulfillment of these successive contracts, they were always settled by a payment of a sum of money answering to the rise and fall in price, the question would then be one of fact for the jury, whether the parties really intended to buy and sell, or to make a wager on the price of grain." *Fareira v. Gabell*, 89 Pa. St. 90.

WAGER.**Definition.**

A wager is something hazarded on the issue of some uncertain event. *Cassard v. Hinman*, 1 Bosw. (N.Y.) 212.

A wager is the bet or stake laid upon the result of the game. *Woodcock v. McQueen*, 11 Ind. 15.

It means the contract by which a bet is made; and it is applied, also, to the thing or amount bet. *Smoot v. State*, 18 Ind. 19.

Wager and Game Distinguished.—A game is a thing played. A wager is a bet or stake laid upon the result of the game. *Woodcock v. McQueen*, 11 Ind. 15.

Necessity of Chance of Gain or Risk by Both Parties.—In *Edson v. Pawlet*, 22 Vt. 293, the plaintiff, a physician, contracted with the overseers of the poor of the town of P. that he would render medical services to a pauper, who was then chargeable to P., and that, if the town of P. should, in a contemplated order of removal, succeed in establishing the legal settlement of the pauper to be in the town of S., he should receive from P. a reasonable compensation for his services, but if P. failed to establish the settlement of the pauper to be in S., he should receive nothing for his services; and it appeared that P. did succeed, upon the order of removal, in establishing the settlement to be in S. It was held that the contract, so made between P. and the plaintiff, was not invalid, as between them, but that the plaintiff might recover from P. the value of his services, notwithstanding it had been adjudged, that, as between the towns of P. and S., the contract was so far against the policy of the law that no recovery could be had by P. for expenses for the services so rendered. The court said: "It may, perhaps, be difficult to give a legal definition of a wager. In ordinary acceptation, a wager is the placing of something valuable, belonging in part to each of two individuals, in such a position that it is to become the sole property of one, upon the result of some unsettled question. Each of the parties risks something, which he may lose, and each may gain something, beyond what he risks. If he merely hazard the loss of something, without any expectation, in any event, of having more in return than he ventures, it would not seem to be a wager."

In *Quarles v. State*, 5 Humph. (Tenn.) 561, it was held that in order to constitute a wager there must be a risk by

both parties. The court said: "But there is no testimony in the case that the goods delivered were sold at a price above their value. The purchasing party, therefore, staked nothing. If he lost, he was to pay for the goods, their value; if he won, he was to pay nothing. He, therefore, staked nothing, risked nothing. The risk was all on one side, and was not a betting or wager; although the contract, as being against public policy and public morality, was void. If the goods were assessed above their value in market, there was a wager, and the defendant ought to have been convicted."

Election Wagers.—(See also ELECTIONS, vol. 6, p. 446).—A promise in writing by one to pay double the value of a wagon and harness, which was delivered to him, in the event that James K. Polk was elected President of the *United States* over Henry Clay, in 1844, was a wager prohibited by the act forbidding betting on elections in this state, and could not be recovered. The court, in *Givens v. Rogers*, 11 Ala. 547, said: "Having ascertained that a wager upon a presidential election is within the letter, as well as the intention, of the law, we proceed to consider whether the facts agreed in this case established that such a bet was made. We consider it perfectly clear that the facts agreed do establish that the parties made a bet upon the result of the presidential election, in which the plaintiff staked his wagon, against the promise of the defendant to say about double its value, if he lost his wager; and as the wagon was delivered to the defendant, it is precisely the same as if the wagon on one side, and its value on the other, had been placed in the hands of a stakeholder, to abide the result. But it is insisted that, as the intention of the parties to violate the law is not admitted, this court cannot know that such a violation was intended. The facts being admitted, whether they amount to a bet on the presidential election is matter of law, and being ascertained to be a wager prohibited by law, the intent is inferable from the act itself, as every one is presumed to intend the necessary consequences of his acts. It can make no difference that it assumes in this case the form of a contract, it is nevertheless, both in its form and essence, a wager, prohibited by law, and is void."

Where the purchasers of land deposited with a stakeholder their checks

for \$5,000 in favor of the vendor's agent, the parties signing an agreement that the checks should be delivered to the payee in case a vote to be taken on that day in West Chicago should be in favor of what was known as the West Side Park Bill, but in case the majority of the votes should be cast against said bill, then the checks were to be delivered to the drawers; it was held that the transaction, standing by itself, without reference to the contract of the sale, was a wager upon the result of a public election, and one lacking equality, the risk being all on one side, and was void, and that the payee could not maintain replevin for the checks against the stakeholder. The court, in *Merchants' S. L. & T. Co. v. Goodrich*, 75 Ill. 560, said: "A wager is a contract by which two or more parties agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening of an uncertain event. 2 Bouvier's L. Dict. 638. The uncertain event here, upon the happening of which the checks were to be delivered to Goodrich, was the event of a public election. The contract was, therefore, a wagering contract that was against public policy, and a right of recovery could not be based upon it."

During the pendency of an election for President of the *United States*, for which office H. and U. were opposing candidates, the defendant in error agreed to sell, and the plaintiff in error agreed to buy, a lot of hogs at the price of nine cents per pound, to be paid for when H. should be elected. The market price of hogs at the date of the contract was less than four and a half cents per pound. In the pursuance of the contract, the hogs were delivered by the defendant in error to the plaintiff in error, who converted them to his own use. The election having resulted in the defeat of H., the defendant in error brought suit against the plaintiff in error and recovered the market value of the hogs. It was held that the transaction was a wager. *Lucas v. Harper*, 24 Ohio St. 328.

Whether Wager and Bet Are Synonymous.—An election is not a game, within the meaning of 1 *Indiana Rev. Stat.*, § 2. Where a bet or wager is laid and lost upon the result of an election, or upon any other act, event, or fact, except a game, it cannot be recovered under the statute. The court, in *Woodcock v. McQueen*, 11 Ind. 15, said: "A game is a thing played or done. A

Definition.

wager is the bet or stake laid upon the result of the game. Bet and wager are synonymous terms, and are applied both to the contract of betting and wagering, and to the thing or sum bet or wagered. For example, one bets, or wagers, or lays a bet or wager of so much, upon a certain result. But these terms cannot properly be applied to the act to be done or event to happen, upon which the bet or wager is laid. Bets or wagers may be laid upon acts to be done, events to happen, or facts existing, or to exist. The bets or wagers may be illegal, and the acts, events, or facts upon which they are laid, may not be. Bets or wagers may be laid upon games, and things that are not games. Everything upon which a bet or wager may be laid is not a game. Examples under these propositions: Wagers have been laid upon games played with cards, dice, etc., with horses, and one's own limbs, as horse and foot races (*Wade v. Deming*, 9 Ind. 35); upon elections; upon lawsuits; upon principles of law; upon the sex, religion, life, and marriage of a person; upon the question whether a certain person would become a king; upon the amount of the revenues of a government in a given year; upon the mode of playing a game, etc."

"It means the contract by which a bet is made; and it is applied, also, to the thing or amount bet. *Woodcock v. McQueen*, 11 Ind. 14; *Bouvier's L. Dict.*, tit. 'Wager;' also, the same title in *Tomlin*, *Burrill*, and *Wharton*. We have found no law authority that makes it mean the subject on which a bet is laid." *Smoot v. State*, 18 Ind. 19.

A wager is something hazarded on the issue of some uncertain event. A bet is a wager, though a wager is not necessarily a bet. *Cassard v. Hinman*, 1 Bosw. (N. Y.) 212.

Premium—Horse Race.—A premium offered by an authorized corporation or a private partnership to the owner of the horse that shall "make the best and quickest time," or exhibit a certain rate of speed, in a proposed trial of the speed of horses, to be had in a proper place, is not a bet or wager, is not unlawful, or against public policy, and may be collected in an action by the owner of the horse which "makes" such "time," or exhibits such rate of speed. The court, in *Alvord v. Smith*, 63 Ind. 62, said: "Nor do we think the facts alleged in the complaint

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show a wager or bet. There is a clear distinction between a wager or a bet, and a premium or reward. In a wager or a bet, there must be two parties, and it is known, before the chance or uncertain event upon which it is laid is accomplished, who are the parties who must either lose or win. In a premium or reward, there is but one party until the act, or thing, or purpose, for which it is offered, has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager, it is not known till after the event. The two need not be confounded."

In *Jordan v. Kent*, 44 How. Pr. (N. Y. Supreme Ct.) 207, the plaintiff put into the defendant's hands, who was secretary of a driving association, \$60, as an entrance fee, to entitle him to trot his horse over the race course in competition with other horses for two purses of \$300 each. The plaintiff trotted one of the said races, and was beaten, and the other race was withdrawn on account of bad weather, and the association tendered the plaintiff \$30, which he refused to receive. In an action against the defendant to recover the \$60 thus deposited, it was held that there was no such contract of wager between the plaintiff and the defendant as could sustain the action. The court said: "Bouvier defines a wager to be a 'contract by which two parties or more agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of a certain event.' This definition implies that to every wager there must be two or more contracting parties, having mutual or reciprocal rights in respect to the money or other things that are wagered, and usually called the stakes of the bet or wager, and that each of the parties shall jeopardize something, and have the chance to make something or to recover the stakes or thing bet or wagered, upon the determining of the contingent or uncertain event in his favor. The proof in the case utterly fails to prove the complaint, or to show that there was any such contract of wager between the plaintiff and defendant. The defendant did not put or pledge or jeopardize anything to depend upon the result of the horse race in question. He put in no money and he was not in any event to receive any money. He

WAGERING CONTRACT—(See also **GAMBLING CONTRACTS**, vol. 8, p. 992).—"A wager; that is, a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such loss."¹

WAGER POLICY—(See also **FIRE INSURANCE**, vol. 7, p. 1020; **GAMBLING CONTRACTS**, vol. 8, p. 1002; **INSURANCE**, vol. 11, p. 312; **MARINE INSURANCE**, vol. 14, p. 323).—Wager or gaming policies are those in which the persons, for whose use or benefit they issue, have no pecuniary interest in the life or thing insured.²

WAGES—(See also **SALARY**, vol. 21, p. 443).—The compensation paid, or to be paid, by the day, week, etc., for the services of laborers or other subordinate or menial employees.³

had no chance to make or receive any money or other things depending upon the result of such races. The plaintiff put into his hands \$60, as an entrance fee, to entitle him to run his horse over the race course in question, in competition with other horses for two purses of \$300 each. If there was any contract of wager, the other party to such contract must be the owner of the other horses, who put up a like sum or paid a like entrance fee for the privilege of competing for such purses. The complaint does not set up any contract of wager with any such persons. It sets up a contract of wager solely with the defendant, between whom and the plaintiff there was certainly no such contract. At most, the defendant might be deemed, perhaps, a stakeholder between the parties competing for the said purses, if any contract existed between such persons."

1. *Fareira v. Gabell*, 89 Pa. St. 89.

2. *Gamb v. Covenant Mut. L. Ins. Co.*, 50 Mo. 47.

A mere wager policy is that in which the party assured has no interest in the thing assured, and could sustain no possible loss by the event insured against, if he had not made such wager. *Amory v. Gilman*, 2 Mass. 7.

3. *Cowdin v. Huff*, 10 Ind. 83; *Abbott's L. Dict.*; *Anderson's L. Dict.*

Payment by the Job.—Under a contract for the grading of a railroad, which provided that the contractors should receive in payment the wages for actual labor of men and teams in performance of the work, at prices to be approved by the chief engineer, with

ten per cent. additional as compensation to themselves, it was held that they might properly sublet the work with the approval of the chief engineer, and were entitled to recover their percentage computed upon the amount paid to the subcontractors, such amount being the wages paid them for the performance of the work as contemplated in the contract. In *Ford v. St. Louis, etc., R. Co.*, 54 Iowa 728, the court said: "It is very plain that the contract contemplates that plaintiffs may employ laborers to do the work, and that they were not to do the work with their own hands. 'The wages for the actual labor men and teams' employed in the work is to be ascertained, and is to be the basis of the estimates for the compensation plaintiffs are to receive. The contract is silent as to whether the labor is to be employed by the day or by the 'job,' whether those who perform the labor shall receive compensation for the time spent by them while at work, or whether compensation shall be based upon the work done. The wages paid the laborers is the basis of the estimate of the sum to be paid plaintiff. The word wages means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of service, or a fixed sum for specified work; that is, payment may be made by the job. The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in service; it may be determined by the work done. It means compensation estimated in either way."

Current Wages.—In *Texas*, current wages for personal services are exempt from garnishment, and it has been held that the manager of a corporation, receiving two hundred dollars a month, fell within the provision.

In *Bell v. Indian Live Stock Co.* (Tex. 1889), 11 S. W. Rep. 346, the court said: "We have had more than ordinary difficulty in our investigation and decision of the second question involved in this case. In most of the states where laws of like character have been enacted, the exemption is given for a stated amount of 'wages,' or for the 'earnings' for a given length of time preceding the service of the writ. In all of the states, we believe, the protected wages or earnings must be the proceeds of, or compensation for, personal service. With us, the protected fund must be not only 'wages for personal services,' but must be also 'current wages.' It is evident that it was not intended that all wages for personal service should be exempt, but only such as are current. Webster defines 'current' to mean 'running or moving rapidly; now passing or present, in its progress, as, a current month or year.' Bouvier says the word 'current' is 'a term used to express present time, current month, etc.' 'Wages' are the compensation given to a hired person for service, and the same is true of 'salary.' The words seem to be synonymous, convertible terms, though we believe that use and general acceptance have given to the word 'salary' a significance somewhat different from the word 'wages,' in this, that the former is understood to relate to position or office, to be the compensation given for official or other service, as distinguished from 'wages,' the compensation for labor. It is of little or no importance, however, in determining the question now being discussed, whether the distinction here suggested be recognized or not. We have to deal with the phrase 'current wages,' without other limitation as to time or amount, and we think the exemption would apply without regard to whether the compensation be called 'wages' or 'salary.'"

Salary Distinguished from Wages.—The property clerk and assistant paymaster of the department of public parks of the city of New York, who has charge of valuable property of the city and disburses moneys, and receives an annual salary of \$3,000, is not to be

deemed an "employé" of the city, "earning wages," within the meaning of *New York Laws* 1890, ch. 388, requiring such an employé to be paid weekly. So held, on his application for a mandamus to the city comptroller to compel payment of his salary weekly. In *People v. Myers*, 25 Abb. N. Cas. (N. Y.) 368, the court said: "But, even assuming that the relator is not a public officer, and is an 'employé' within the meaning of the statute, he is not an 'employé' earning 'wages,' because his compensation is not fixed by the day, week or month, but by the year. He does not receive 'wages,' but is paid a large annual salary. It is true that in a certain sense it may be said that the word 'wages' includes the salaries of public officers and clerks, and the fees of lawyers, physicians and other professional men; but that is not the ordinary meaning of the word, and it is an elementary rule that 'the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and proper use.' (Dwarris on Statutes, p. 193.) The distinction between 'salary' and 'wages' is recognized by all lexicographers, by the courts in many adjudicated cases, and by the legislators of this and other states, and by congress, in innumerable statutes. Webster defines salary as follows: 'The recompense or consideration stipulated to be paid to a person for services, usually a fixed sum to be paid by the year, as to governors, magistrates, settled clergymen, instructors of seminaries, or other officers, civil or ecclesiastical. When wages are stated or stipulated by the month, week or day, we do not call the compensation salary, but pay or wages, as in the case of military men and laborers.' He defines wages as follows: 'Hire; reward; that which is paid or stipulated for services, but chiefly for services for manual labor, or for military or naval services. We speak of "servants' wages," "laborers' wages" or "soldiers' wages;" but we never apply the word to the rewards given to men in office, which are called fees or salary.' Abbott's L. Dict. defines 'wages' as follows: 'The agreed compensation for services rendered in a menial or subordinate capacity.' The same work defines 'salary' as 'A reward or compensation for services performed. It is usually applied to the reward paid to a public officer for the performance of his official

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duties.' Burrill's L. Dict. defines 'salary' as 'An annual compensation for services rendered; a fixed sum to be paid by the year for services.' Worcester, referring to 'wages,' says: 'In ordinary language the term wages is usually employed to distinguish the sums paid to persons hired to perform menial labor.' Winfield defines 'salary' as: 'The per annum compensation to men in official and some other situations.' The same authority defines 'wages' as follows: 'The word "wages" means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of services, or a fixed sum for a specified work; that is, payment may be made by the job.' . . . The English courts have also recognized the same distinction. In *Gordon v. Jennings*, 9 Q. B. Div. 45, the court said: 'The term "wages" is not applied to the remuneration of a high or important officer of the state, or of a country, for instance, but to that of domestic servants, laborers and persons of similar description.' I have not been referred to any case, and I believe none can be found, in which the word 'wages' has been held to include 'salary;' in fact all the cases hold directly the contrary."

"Though this word might be said to include payment for any services, yet in general the word 'salary' is used for payment of a higher class, and 'wages' is confined to the 'savings' of laborers and citizens." *Gordon v. Jennings*, 51 L. J. Q. B. Div. 417. Compare *Riley v. Warden*, 2 Exch. 59; *Sleeman v. Barrett*, 2 H. & C. 934. And to the same effect, see *SALARY*, vol. 21, p. 443, where many cases are cited. But compare *Bell v. Indian Live Stock Co.* (Tex. 1889), 11 S. W. Rep. 346, set out in this note.

Wages of Employee—Counsel Fees.—The term "wages of employés," as used in an order directing the payment of certain classes of debts out of the proceeds of the sale of a railroad under foreclosure, in preference to the secured liens, does not include the services of counsel employed for special purposes. In *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 505, *Brewer, J.*, said: "The allowance to the appellant was for three matters. He does not sue for services as general counsel of the mortgagor company, or for salary as an officer of that company. With re-

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spect to the provision in the order of appointment, he claims to come under the descriptive words therein used, 'wages of employés.' If that fails him, then he appeals to the general equity powers of the court to compensate him as one whose services were beneficial to the security holders. On the meaning of the words 'wages of employés,' he cites the case of *Gurney v. Atlantic, etc., R. Co.*, 58 N. Y. 358, in which an order directing the receiver of a railroad company, thereby appointed, to pay debts 'owing to the laborers and employés' for labor and services, was held broad enough to include a debt due to *Hon. Jeremiah S. Black*, for professional services as counsel. Without criticizing that decision, or noticing the special circumstances which seemed in the judgment of that court to justify the inclusion of professional services within the descriptive words of the appointment, we are of the opinion that the term 'wages of employés,' as used in the order now under consideration, does not include the services of counsel employed for special purposes. *Vane v. Newcombe*, 132 U. S. 220, 237."

Maritime Law—(See also *MARITIME LIENS*, vol. 14, p. 425).—Section 4251 of the *United States Revised Statutes*, providing that "no canal boat without masts or steam power which is required to be registered, licensed or enrolled and licensed, shall be subject to be libeled in any of the *United States* courts for the wages of any person who may be employed on board thereof or in navigating the same," does not apply to a claim for towing such a canal boat made by a corporation. In *Ryan v. Hook*, 34 Hun (N. Y.) 191, the court said: "The word 'wages,' as used in this statute, is presumed to have been used with its ordinary meaning of compensation to a hired person for his services. In works on maritime law, it is defined to be the compensation allowed to seamen for their services on board a vessel during a voyage. (*Abbott on Shipping* 615; 3 *Kent's Com.* 185.) Thus, its popular meaning and its meaning in admiralty law are substantially the same. To hold that it means towage would give it a strained and peculiar definition. A doubtful construction should not prevail in order to deprive a court of jurisdiction previously granted to it. It is clear that the district courts had jurisdiction of such cases before the passage of the

act of 1846. Hence, the intent of Congress to deprive them of that jurisdiction should be clear and explicit, or they should be held to still possess it. A natural construction is that Congress intended to deprive persons employed on board of a canal boat, or engaged in navigating her, of the right previously enjoyed by them, of libeling for seamen's wages; but not to deprive a steam tug of her right to libel for towage. Before the passage of the act the crew of a canal boat, employed in the navigable waters of the *United States*, were, in a legal sense, seamen, liable as such to pay the hospital tax, and having the right to libel for wages, and to enjoy the benefits of the marine hospitals. The burden and the privilege were taken away by the statute, and the object stated in the title thus accomplished."

Wages Distinguished from Earnings—Counsel Fees.—Under a *New York* statute providing that preference should be given to claims for wages of employes, when a receiver should be appointed for a corporation, it was held that an attorney's earnings were not preferred. In *People v. Remington*, 45 Hun. (N. Y.) 338, Follett, J., said: "Class ten embraces the claims of attorneys for professional services rendered, some of which have been liquidated and others unliquidated. The liquidated claims are evidenced by defendant's promissory notes, or by credits on its books. The burden is upon persons claiming preferences to bring themselves, by evidence, within the statute. It does not appear that the attorneys were employed for any particular period, or at a price agreed upon, and the sums due them for professional services rendered upon occasional retainers, are not 'wages' within the meaning of this statute. The word 'wages' has a less extensive meaning, and embraces a smaller class of credits than 'earnings.'"

Money due for board and lodging furnished to the debtor's workmen, is "earnings" within the meaning of the *Massachusetts* Stat. of 1865, ch. 43, § 2, which declares an unrecorded assignment of future earnings invalid against a trustee process. In *Jenks v. Dyer*, 102 Mass. 236, the court said: "We are of opinion that the word 'earnings,' in the *Massachusetts* Stat. of 1865, ch. 43, § 2, was used for the purpose of embracing a larger class of credits than would be included in the more common

term 'wages.' It involves the idea of compensation for services rendered, but is not limited to gains from merely personal labor. Money due from time to time from an employer to a third party, for board and lodging of his workmen, is in the nature of compensation for services rendered to such employer. It may involve, to such third party, expenditures for provision, house room, and other matters besides labor. But to the employer, or to those who receive the board, it is not a sale of the food, and rent of the lodgings. The result of the whole is a service rendered, for which the compensation is measured by the time of its continuance. The return due for such services may properly be called 'earnings.' The term applies to the whole reward for service, and not merely to the profits therefrom. We think the statute was intended to apply to credits of this nature." To the same effect, see *Somers v. Keliher*, 115 Mass. 165.

Money Due on Contract—Assignment for Benefit of Creditors—Preferences.—The *Wisconsin* statute preferred "wages" owing for services or labor. Money due upon contract with a wood factory for sawing assignor's lumber, was held not to be within this provision. In *Lang v. Simmons*, 64 Wis. 529, Taylor, J., said: "The material questions are, Were Bates and Barrett laborers, servants, or employes of the assignors? and, Was the money due them for wages as such laborers, servants, or employes of the assignors earned within six months previous to making the assignment? We think these questions must be answered in the negative. The money due from the assignors to Bates and Barrett was not for 'wages,' within the ordinary meaning of that word as defined by lexicographers. Webster defines the word 'wages' as 'a compensation given to a hired person for his or her services.' In the *Imperial Dict.* it is defined as follows: 'In ordinary language the term "wages" is usually restricted to sums paid as rewards to artisans, to domestic servants, to laborers employed in manufactures, in agriculture, mines, and other manual occupations.' Worcester says: 'In ordinary language the term "wages" is usually employed to designate the sums paid to persons hired to perform manual labor.' It is very clear that the money due from the assignors to Bates & Barrett was not due for 'wages,' within the definition of the

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WAGES—STATUTES REGULATING PAYMENT OF.—As to the assignment of wages, see *ASSIGNMENTS*, vol. 1, p. 828; *EQUITABLE ASSIGNMENTS*, vol. 6, p. 658; *FUTURE ACQUIRED PROPERTY*, vol. 7, p. 991. As to contracts of hiring generally, see *MASTER AND SERVANT*, vol. 14, p. 740. As to liability of stockholders for wages of corporate employees, see *STOCKHOLDERS*, vol. 23, p. 872. As to right of parent to minor child's wages, see *PARENT AND CHILD*, vol. 17, p. 379. As to right of husband to wife's earnings, see *HUSBAND AND WIFE*, vol. 9, p. 817. As to right of creditor in debtor's services and earnings, see *DEBTOR AND CREDITOR*, vol. 5, p. 185. As to statutory preference of claims for wages against insolvents, see *INSOLVENCY*, vol. 11, p. 221. As to preference of wages in assignments for benefit of creditors, see *ASSIGNMENT FOR BENEFIT OF CREDITORS*, vol. 1, p. 860. As to seamen's wages, see *SEAMEN*, vol. 21, p. 915. As to wages of master of vessel, see *MASTER OF A VESSEL*, vol. 14, p. 974. As to exemption of wages, and reaching wages by legal process, etc., see *ATTACHMENT*, vol. 1, p. 894; *EXECUTIONS*, vol. 7, p. 117; *FOREIGN ATTACHMENT*, vol. 8, p. 288; *GARNISHMENT*, vol. 8, p. 1096. As to reaching wages in supplementary proceedings, see *SUPPLEMENTARY PROCEEDINGS*, vol. 24, p. 649. As to lien for wages, see *LIENS*, vol. 13, p. 590; *MECHANICS' LIENS*, vol. 15, p. 1; *WORKING CONTRACTS*, vol. 29. As to recovery of wages for labor performed on Sunday, or under contract entered into on Sunday, see *SUNDAY*, vol. 24, pp. 560, 572. As to statutes regulating the medium of payment of wages, see *STORE ORDER ACTS*, vol. 23, p. 935. As to statutes requiring the payment of wages weekly, see *WEEKLY PAYMENT LAWS*. As to combinations to procure increase of wages, see *STRIKES*, vol. 24, p. 123. As to compensation of schoolteachers, see *SCHOOLS*, vol. 21, p. 757. As to fees and compensation of public officers, see *PUBLIC OFFICERS*,

word above given. They were not persons hired by the assignors to do manual labor for them, nor were they hired persons within the ordinary sense of the words 'hired persons.' They were manufacturers, doing business for themselves, and employing other persons, as well as machinery, to accomplish the work they contracted to do for others. The compensation they received for the work done by them was not so much for the manual labor performed by them or their servants, as it was for the use of the machinery by which the work was accomplished." And upon the construction of the English Truck Act, Rolfe, B., said, in *Riley v. Warden*, 2 Exch. 59: "I am of the same opinion. It appears to me to be clear, upon looking at this act of Parliament, that it applies only to

those persons who are to receive wages as the price of their labor, and that the term 'wages' is to be understood in its popular sense, and does not include wages which are the price of a contract. The plaintiff here employed several persons under him, and in that respect differs from what is popularly understood by a laborer. This act was intended to protect persons who earn their bread by their daily labor, from receiving goods as a payment for their wages instead of money. It would be difficult to know where to draw the line, if we were to hold that the plaintiff falls within the meaning of the act; for it would be difficult to say that it did not apply in a case where a party had undertaken a contract to complete twenty miles of railway." See also *Sleeman v. Barrett*, 2 H. & C. 934.

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vol. 19, p. 525, and the titles where particular offices and officers are treated.

The subject of wages has been already treated in many connections in this work. It is proposed here to notice the recent legislation having for its object the regulation of the payment of wages to corporate employees, and to set forth the cases arising thereunder.

In *Arkansas*, a statute required corporations, companies, and persons engaged in the operation or construction of railroads, or railroad bridges, and contractors and subcontractors engaged in the construction of any such road or bridge, to pay their employees, on the day of their discharge, the unpaid wages then earned by them, at the contract rate, without abatement or deduction, and provided that if the same were not paid on such day, then, as a penalty for the non-payment, the wages of such employee should continue at the same rate until paid. The object of the act was to make it unlawful for the corporations and persons named to contract to pay the wages of those employed by them, in the kinds of business specified, at any time subsequent to the day on which the employees might be discharged, or on which the employer might refuse to longer employ them. In other words, it declared that the wages should be paid on such day, notwithstanding they might not be due, according to the contract, until a later day. In this respect, the provision attempted to limit the right to contract, and the question arose, was it constitutional? It was decided that the act, so far as it affected natural persons, was invalid, in that it impaired their right to contract; but as to corporations it was, under the reserved power to alter and repeal laws relating to the formation and organization of corporations, a valid enactment, as it did not seriously impair their right to contract, but left them free to contract with their employees on profitable terms. And, further, that the act being divisible, the unconstitutional part might be eliminated, and the remainder allowed to stand. And, as the act was general and uniform in its operation upon all persons coming within the class to which it applied, it was not objectionable as special legislation.¹

1. *Leep v. St. Louis, etc., R. Co.*, 58 Ark. 407; 57 Am. & Eng. R. Cas. 1, Bunn, C. J., *dissenting*. Battle, J., for the majority of the court, in construing the words "without abatement or deduction," said: "This provision is susceptible of two constructions, one of which makes the act require the corporation to pay the employee all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby. If this be its intention, it is unconstitutional, because its enforcement

might take property from the corporation without due process of law, for the employee is not entitled to the stipulated wages until he has performed the contract. He may have damaged his employer by the failure to do so in a sum larger than the wages he would have been entitled to receive in the event he had complied with his agreement. To compel the corporation, in such a case, to pay any sum whatever, would be a deprivation of property without due process of law. The same would be equally true if the corporation should be compelled to pay full wages when the damages caused by

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In *Massachusetts*, a statute which provided that no employer should impose a fine upon, or withhold the wages, or any part of the wages, of an employee engaged at weaving, for imperfections that might arise during the progress of weaving, was declared unconstitutional.¹

the nonperformance of the contract do not exceed them. Such an amendment of the charters of corporations is clearly unjust to the corporators. The other construction is more reasonable. It makes the words 'without abatement or deduction' mean 'without discount.' The legislature evidently thought that the employee might receive money or property, in the course of his employment, in part payment of his labor, and evidently intended that the wages thus paid should not be repaid. A strict construction of the words 'without abatement or deduction' would deprive the corporation of a credit for the money or property, in a settlement with its employee for his services. Then, again, the act requires the corporation to pay only the unpaid wages earned, at the contract rate, at the time of his discharge. Stipulated wages cannot be earned except by the performance of the contract by which the employer agrees to pay them. Obviously, then, the act means, by the words 'without abatement or deduction,' that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment. When construed in this manner, this provision of the act is constitutional, and it is our duty to so construe it." In the foregoing case, it was further adjudged that the additional amount allowed by the statute, in the event that the wages were not paid at the time specified, was in the nature of exemplary damages and not a penalty, and therefore, a justice of the peace has jurisdiction of an action for the recovery of such amount, although he is forbidden to take jurisdiction of actions for the recovery of statutory penalties.

1. *Com. v. Perry*, 155 Mass. 117; *Com. v. Potomska Mills Corp.*, 155 Mass. 122, note. In the former case cited the court, by Knowlton, J., said: "If the act went no further than to forbid the imposition of a fine by an employer for imperfect work, it might be sustained as within the legislative

power conferred by the constitution of this commonwealth, in ch. 1, § 1, art. 4, which authorizes the general court 'to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same.' It might well be held that, if the legislature should determine it to be for the best interests of the people that a certain class of employees should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, it might pass a law to that effect. But when the attempt is to compel payment under a contract of the price for good work when only inferior work is done, a different question is presented. . . . Article 1 of the Declaration of Rights, in the constitution of *Massachusetts*, enumerates among the natural, inalienable rights of men the right 'of acquiring, possessing, and protecting property.' Article 1, § 10, of the constitution of the *United States*, provides, among other things, that no state shall pass any 'law impairing the obligation of contracts.' The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business, into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our constitution. If the statute is held to permit a manufacturer to hire weavers, and agree to pay them a

In *Texas*, a statute providing that in the event a railroad company should refuse to pay, under certain circumstances, its indebtedness to an employee, within fifteen days after demand thereof, it should be liable to pay such employee twenty per cent. on the amount due him, for damages, in addition to the amount due, was adjudged unconstitutional as being special legislation.¹

An *Illinois* statute requiring owners and operators of coal mines to provide scales for weighing coal, and making the weight of the coal the basis of the wages to be paid, was held unconstitutional.²

WAGON. — A wheeled carriage, a vehicle on four wheels and usually drawn by horses ; especially one carrying freight.³

certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to everyone when it declares that he has a 'natural, essential, and unalienable' right of 'acquiring, possessing, and protecting property.' Whichever interpretation be given to this part of the act, we are of opinion that it is unconstitutional."

1. *San Antonio, etc., R. Co. v. Wilson* (Tex. 1892), 50 Am. & Eng. R. Cas. 513. Referring to this case, the court, in *Leep v. St. Louis, etc., R. Co.*, 58 Ark. 407; 57 Am. & Eng. R. Cas. 1, said that the *Texas* act, it appeared, was held to be unconstitutional, because the constitution of that state confines legislation, in respect to railroads, to the duties they owe to the public as common carriers, and excludes all right of interference by the legislature with the employment or payment of their servants. See art. 10, § 2, Constitution of *Texas*.

2. *Millet v. People*, 117 Ill. 294; 15

Am. & Eng. Corp. Cas. 1. In this case the court said: "It is not competent for the legislature, under the constitution, to single out owners and operators of coal mines and provide that they shall bear burdens not imposed on other owners of property or employers of labor. . . . Such legislation cannot be sustained as an exercise of police power." See also *Ramsey v. People*, 142 Ill. 380.

3. Webster's Dict. followed in *Spikes v. Burgess*, 65 Wis. 428. The term is frequently employed in exemption clauses. It will be noted that the variance in the decisions set out below is in most instances due to the more liberal construction extended to exemptions.

Whether a Pleasure Carriage.—A one-horse wagon, with a spring seat and paneled sides, used only for the carriage of persons, was held to be "a pleasure carriage," within the meaning of an act establishing a certain turnpike. *Moss v. Moore*, 18 Johns. (N. Y.) 128. But see *Pardee v. Blanchard*, 19 Johns. (N. Y.) 442.

A light one-horse wagon, with a frame box, swelled sides, painted in imitation of panel work, a crooked bolster, a chair seat, and wooden springs, in which were two passengers, a trunk, a box, a bag of oats, and a bottle, is not "a chair or pleasure carriage, with one horse," within the meaning of the *New York* Act of April 1, 1800, to establish a turnpike road company, for improving the state road. *Pardee v. Blanchard*, 19 Johns. (N. Y.) 442.

Distinguished from Dray.—A city ordinance provided that "no person or persons shall keep a livery or sale stable, or let out horses or mules or other stock, carriages, buggies, or other vehicles, . . . without first obtain-

Definition.

ing a license, . . . provided, that nothing in this section shall be so construed as to allow any person to run a dray for hire." Another section provided that "no persons shall run a dray, cart, or other carriage, in the city, for the purpose of hauling for the public, goods, produce, wares or merchandise of any description," without a license. It was held that one who had taken a license as the keeper of a livery stable might hire out a two-horse wagon by the day, for the purpose of hauling lumber, without obtaining a license to run a dray. The court, in *Griffin v. Powell*, 64 Ga. 627, said: "The proviso in the ordinance used the word 'dray' in its common and popular sense, as contradistinguished from a wagon in its common and popular sense—and should be so construed. Therefore, as P. did not run a dray for hire, as contemplated in the proviso to the ordinance, there was no error in sustaining the *certiorari*." Compare *Cone v. Lewis*, 64 Tex. 333; 53 Am. Rep. 676.

Distinguished from Cart.—"It is true, as contended in the argument, that lexicographers define a 'cart' to be a vehicle with two wheels, and a 'wagon' one with four wheels. The proof makes it clear that the vehicle in question was not a cart, but that it was a wagon—a large wagon with four wheels, and suitable to be drawn with oxen." *Webb v. Brandon*, 4 Heisk. (Tenn.) 288. Compare *Favers v. Glass*, 22 Ala. 621.

Exemption.—A hearse is a "wagon," and, as such, exempt from execution, under the *Wisconsin* statute. The court, in *Spikes v. Burgess*, 65 Wis. 430, said: "The simple question presented is whether a 'hearse' may be exempt from seizure or sale on execution against the owner. The particular clause of the statute invoked by the plaintiff is that which gave him the privilege of holding as exempt 'one wagon, cart, or dray, one sleigh, one plow, one drag, and other farming utensils, including tackle for teams, not exceeding two hundred dollars in value.' The hearse is claimed to be a wagon within the meaning of this statute. It is described as a regular, four-wheeled wagon—the running gear being the same as any other wagon—with a frame inclosed on the top, and with glass sides, front, and back, and used exclusively for a hearse—for carrying bodies to the cemetery. 'It is a carriage for conveying the dead to the grave.' Webster's Dict. It is the

WAGON.**Definition.**

superstructure which adapts it to this particular use; and the use which gives it the particular name. But the question of exemption is not dependent upon any distinctive use. The privilege of claiming a wagon as exempt is not confined to persons engaged in agricultural pursuits, or any particular class of business. This was settled by this court in effect, when it held that a physician might hold a horse and sleigh as exempt under this same subdivision of the statute. *Knapp v. Bartlett*, 23 Wis. 68; 99 Am. Dec. 109. In that case it was said that 'the articles there named are exempted absolutely and to all persons alike.' See also *Humphrey v. Taylor*, 45 Wis. 251; 30 Am. Dec. 738. The learned counsel for the defendant admits that the privilege of exemption extends to every owner of a wagon, but insists that no vehicle can be a wagon, within the meaning of the statute, unless it is adapted to farm purposes or the carriage of ordinary freight or commodities or living persons. Undoubtedly, such a vehicle may be a wagon, but the term is general, and there are a variety of wagons, differing in style, form and dimensions, depending upon the character of the use, the nature of the business, and the pleasure or notions of the manufacturer or owner. 'A carriage or vehicle with four wheels' is a wagon. Worcester's Dict. It simply means 'a wheeled carriage; a vehicle on four wheels, and usually drawn by horses; especially one used for carrying freight.' Webster's Dict. 'A vehicle moved on four wheels, and usually drawn by horses.' Imperial Dict. The running gear of the hearse has the essentials of a wagon. With an ordinary superstructure no one would claim it was not a wagon. The character and style of the superstructure were merely to make it serviceable and attractive in a particular and very necessary line of industry. The mere fact that the superstructure differed from the superstructures on most wagons did not prevent it from being a wagon. For the reasons given we hold it was a wagon."

Exemption—Dray.—"The statute exempts from forced sale, if owned by the head of a family, one wagon, one carriage or buggy. In determining whether a dray is embraced within the meaning of the word 'wagon,' it is proper to look to the intention of the legislature in giving the exemption, and no such restricted meaning should be given

to it as will defeat that intention. The intention of the legislature was to protect all heads of families in the pursuit of their occupations, and a correct construction of the law would seem to protect the drayman and cartman in the possession of their vehicles, although they do not come within the strict definition of the word 'wagon.' *Rogers v. Ferguson*, 32 Tex. 535; *Nichols v. Claiborne*, 39 Tex. 363; *Gordon v. Shields*, 7 Kan. 325; *Quigley v. Gorham*, 5 Cal. 418; 60 Am. Dec. 139. The statute does not give the exemption of a vehicle, which may be classed as a 'wagon,' to persons only who may be farmers, or who pursue some given occupation, but 'to every family;' and the fact that the plaintiff was pursuing his business of a drayman, or that he used the vehicle in any particular way, could not defeat the exemption. But to the person pursuing the business of a drayman, such an exemption would seem peculiarly appropriate, and in harmony with the spirit of the statute which exempts 'all implements of husbandry,' and 'all tools, apparatus, and books belonging to any trade or profession.'" *Cone v. Lewis*, 64 Tex. 333; 53 Am. Rep. 767. Compare *Griffin v. Powell*, 64 Ga. 625.

Exemption—Buggy.—There is a conflict in the decisions on this point. The cases are set out below. In *Kansas*, it has been held that a buggy adapted and designed for the carrying of persons only, was not exempt from execution by virtue of the provisions of the sixth clause of section three of the act concerning exemptions. The court, in *Gordon v. Shields*, 7 Kan. 325, said: "Only this one question is presented in the record: Is a buggy included in the term 'wagon' as used in the exemption law. The court below found that the vehicle in question known as a buggy was 'not adapted and designed for carrying commodities, but is a single-seated, covered vehicle, adapted and designed for carrying persons only.' We think the term 'wagon' a generic one, including as well vehicles for the carriage of persons, as those for the transportation of commodities, and broad enough properly to embrace such a vehicle as the buggy in controversy. But we are constrained to think, after a careful examination of the statute, as well as the decisions of other courts, that the term 'wagon' is here used in a limited sense. The statute reads: 'Also, one wagon,

cart, or dray, two plows, one drag, and other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars.' This clause obviously was designed for the protection of the farmer, to secure to him his implements of husbandry. It is doubtless too narrow a construction, to hold that the use to which the articles named are actually put, at the time of seizure, determines the question of exemption. Whether used on a farm or not, is immaterial. But that the articles should be adapted to the purposes of husbandry seems to be required. 'Other farming utensils,' is the language. *Noscitur a sociis*. Only those wagons which are adapted to farm purposes are exempt. Now a vehicle which is, in the language of the court below, 'adapted and designed for carrying persons only,' cannot in any true sense be called a 'farming utensil'—is not an implement of husbandry."

In *Smith v. Chase*, 71 Me. 164, it was held that a peddler's wagon designed to be used in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the sides, and a railing around the top, and dasher in front, is not exempt as a "cart or truck wagon." The language of the statute is: "One plow, one cart or truck wagon, one harrow, one yoke with bows, ring, and staples, two chains, one ox sled, and one mowing machine." The court said: "The plaintiff claims that it comes directly within the definition of a truck wagon, which he says is a wagon used for the transportation and exchange or barter of commodities, deriving truck, from the French verb *troquer*, 'to exchange, to barter, to truck.' Defendant derives it from the Greek . . . 'a wheel,' from which come the English truck and trucks, signifying 'a low carriage for carrying goods, stone,' etc. Both fortify their positions by Webster's Dictionary, an acknowledged authority, but this does not bring us perceptibly nearer a solution of the question. What did the legislature intend to exempt as 'a cart or truck wagon?' . . . We do not believe that the legislature intended to exempt, under the term truck wagon, one of those movable stores that traverse the state on wheels or runners, covered, it may be, with the metreticulous adornments of carving and gilding, as well as paint and varnish, but rather one of those vehicles used most commonly for

farm work or heavy hauling, with horses or mules, as a 'cart' is with oxen."

In *Minnesota*, a contrary decision was reached. The court, in *Allen v. Coates*, 29 Minn. 48, said: "This brings us to the question, was the property exempt from execution? It appears, from the description given by the witnesses, to have been a 'light, open buggy with side springs,' the only wagon which plaintiff had. The question of the exemption of a 'buggy' was involved in *Dingman v. Raymond*, 27 Minn. 507. The different members of the court did not, in that case, arrive at the same conclusion on the question, as will appear from the opinions filed. After reconsidering the point, we are of the opinion that what is usually called a 'buggy' is within the meaning of the term 'wagon,' as used in the statute of exemptions." See also *Nichols v. Claiborne*, 39 Tex. 365.

Exemption—Hackney Coach.—"In the act which exempts certain articles from execution, the term 'wagon' is intended to mean a common vehicle for the transportation of goods, wares, and merchandise of all descriptions. A hackney coach, used for the conveyance of passengers, is a different article, and does not come within the equity or literal meaning of the act." *Quigley v. Gorham*, 5 Cal. 418; 60 Am. Dec. 139.

"The word 'wagon,' in the *Texas* statute of November 10, 1866, should be construed in its popular and most general sense, and should include all four-wheeled vehicles, whether covered or placed upon springs, and for whatever use they may be employed, whether for the transportation of property or persons. The intention of the legislature was to protect all laboring citizens in the pursuit of their occupations, and a correct construction of the law would seem to protect the drayman and cartman in the possession of their vehicles, although they do not come within the strict definition of the word 'wagon.' In the case at bar, the evidence is clear that the vehicle in controversy was used by its owner sometimes as a hack for the transportation of passengers, and sometimes as a wagon for the transportation of wood, cotton and corn; and whether used for the one purpose or the other, it was evidently the intention of the legislature that it should be exempt from forced sale. It was also proved that it was the only four-wheeled vehicle owned by him, or

under his or his family's control." *Rogers v. Ferguson*, 32 Tex. 534.

Exemption—Two-Seated Carriage.—"In *Allen v. Coates*, 29 Minn. 46, this court held a light open buggy exempt from execution under our statutes, and the rule is stated generally, without any restriction or limitation in respect to the character or style of the vehicle, or the peculiar uses to which it might be applied by the debtor. That case governs this. In this case, the 'wagon' claimed to be exempt is a light two-seated carriage, used by the debtor 'in riding to and from his work.' He may, however, at anytime, find it for his interest to put it to other practical and useful purposes. It is manifest that, under the general language of the statute, any attempt to make the limitation insisted upon in this case in its construction, would lead to much uncertainty and confusion in practice, each case depending upon its own peculiar facts, and leaving the rule doubtful and unsatisfactory." *Kimball v. Jones*, 41 Minn. 319.

Exemption—Wagon.—"A cart has been held to include wagon. *Favers v. Glass*, 22 Ala. 621. Here, the court said: "The only question before us is, whether the term 'horse or ox cart' will embrace a wagon, or vehicle with four wheels. . . . True the word 'cart,' in its primary and ordinary acceptation, signifies a carriage with two wheels; yet, it has a more extended signification, and means a carriage in general. In order to ascertain whether the legislature used it in its restricted or enlarged sense, we must look to the design and object of the statute. This evidently was, to secure 'to each poor family,' in the language of the council for defendant, 'some vehicle to be used in hauling their crops, and otherwise subserving their wants.' The number of wheels upon which it moved, we cannot suppose was a matter of any moment in the enactment of the law. . . . We have several times decided that this act must receive a liberal construction. *Noland v. Wickham*, 9 Ala. 169; *Salce v. Waters*, 17 Ala. 482. Giving it this construction, we are bound, we think, to hold that a four wheel vehicle, suited to the ordinary purposes of husbandry, drawn by oxen, and employed in the same uses to which carts, in the common acceptation of the term, are appropriated, is protected by the statute from levy and sale." See also *Webb v. Brandon*, 4 Heisk. (Tenn.) 289.

WAIVER—(See also **ELECTION**, vol. 6, p. 247).—For further cross references see the various subdivisions of this title.

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I. DEFINITION.—A waiver is the intentional relinquishment of a known right.¹

II. ESSENTIALS OF BINDING WAIVER—1. **Must Be by a Person Sui Juris.**—The waiver must be by one capable of binding himself.²

1. *Hoxie v. Home Ins. Co.*, 32 Conn. 40; 75 Am. Dec. 240; *Lewis v. Phoenix Mut. L. Ins. Co.*, 44 Conn. 91; *Kent v. Warner*, 12 Allen (Mass.) 563; *Shaw v. Spencer*, 100 Mass. 395; 1 Am. Rep. 115; 97 Am. Dec. 107; *West v. Platt*, 127 Mass. 372; *Holdsworth v. Tucker*, 143 Mass. 374.

Other Definitions.—Waiver has been defined variously to be "a voluntary surrender and relinquishment of a right." *Dawson v. Shillock*, 29 Minn. 191.

"A voluntary relinquishment of some right." *Stewart v. Crosby*, 50 Me. 134.

Also to imply "an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon." *Warren v. Crane*, 50 Mich. 301.

"A renunciation of some rule which invalidates the contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure." *Hare on Contracts*, p. 272.

"Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does, or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward." *Bishop on Contracts* (ed. 1887), § 792.

2. Infants are incapable of making an election, *Carr v. Branch*, 85 Va. 597; *Van v. Barnett*, 19 Ves. 102; *Seeley v. Jago*, 1 P. Wms. 389; and so are lunatics. *In re Wharton*, 5 De G. M. & G. 33; *Ashby v. Palmer*, 1 Meriv. 296. See *ELECTION*, vol. 6, p. 253.

A waiver of notice of non-payment of a bill by a habitual drunkard, after inquisition and finding, but before appointment of a committee, is of no effect. *Wadsworth v. Sherman*, 14 Barb. (N. Y.) 169; *Wadsworth v. Sharpstein*, 8 N. Y. 388.

A minor cannot waive service of process or legal notice by an appear-

2. Must Be with Knowledge and Intent to Waive.—No man can be bound by a waiver of his rights, unless it is made distinctly, and with full knowledge of the rights which he intends to waive;¹ thus, acts ordinarily amounting to a waiver of a forfeiture will not have that effect in the absence of knowledge of the forfeiture.² But there are cases in which the law attaches certain

ance. *Bonnell v. Holt*, 89 Ill. 72, and other cases cited; *JURISDICTION*, vol. 12, p. 300. Nor can an infant waive his homestead rights. *Booth v. Goodwin*, 29 Ark. 633.

1. *Montague v. Massey*, 76 Va. 314. A waiver must be an intentional act with knowledge. *Darnley v. London*, etc., R. Co., L. R., 2 H. L. 57; *Traynor v. Johnson*, 1 Head (Tenn.) 51. And see *supra*, this title, *Definition*; *Fuller v. Bean*, 34 N. H. 290; *Farlow v. Ellis*, 15 Gray (Mass.) 229; *Smith v. Dennie*, 6 Pick. (Mass.) 262; 17 Am. Dec. 368; *Hammett v. Linneman*, 48 N. Y. 399.

In *Bennecke v. Connecticut Mut. L. Ins. Co.*, 105 U. S. 359, *Wood, J.*, said: "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement, either verbal or in writing, to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party."

In *Dodge v. Minneapolis, etc., Roofing Co.*, 14 Minn. 39, *McMillan, J.*, said: "To constitute a waiver of a claim for a breach of warranty or contract, the acts or circumstances relied on to constitute the waiver, must have been performed or have transpired after the party, against whom the waiver is urged, knew or should have known the facts constituting the breach of warranty or contract. In this case the payment for the roof was made upon its completion. None of the defects in the roof, if they existed, could reasonably have been discovered for some time thereafter, and it would depend on circumstances how long thereafter; the acceptance of the work, and payment therefor by the plaintiff, cannot, under these circumstances, be construed either into an admission that there was no deficiency in the work, or a waiver of his claim for a breach of the contract."

In *Pence v. Langdon*, 99 U. S. 578, the question being of the right of the

plaintiff to rescind the contract for fraud, *Swayne, J.*, said: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong, while ignorant that it has been committed. Current suspicions and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not willfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch."

The defendant, who held a lien upon certain cattle, being ignorant of the fact that his lien extended to the offspring of the cattle, told an attaching creditor, who had attached such offspring, that "they had got nothing that belonged to him," and said to the appraisers that "no part of the property so appraised belonged to him," and also refused to attend the sale on request of the creditor, saying that "they had attached nothing of his." The court held that the defendant had not waived his lien, as a waiver was "an intentional relinquishment of a known right," and the defendant did not know that he had a lien on the offspring; also that he was not estopped, it appearing that no one had been misled or induced to a different action by what he said or did, or failed to say or do. *Boynton v. Braley*, 54 Vt. 92.

2. Where an insurance company is ignorant of the fact of the violation of a condition of the policy, acts which ordinarily operate to waive the forfeiture will not have that effect. *Robertson v. Metropolitan L. Ins. Co.*, 88 N. Y. 541; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326; *Bennecke v. Connecticut Mut. L. Ins. Co.*, 105 U. S. 355.

In *Tobin v. Western Mut. Aid Soc.*, 72 Iowa 261, where it was held that the defendant had waived a forfeiture for nonpayment of assessments by receiving and retaining subsequent annual

consequences to the acts of a party irrespective of his actual intent, and will presume him to have waived his right conclusively, without inquiring whether or not he had actual knowledge of it.¹

Waiver is usually a question of intent,² and knowledge of the right and an intent to waive it must be made to appear plainly,³ and this is to be determined usually from the declarations and conduct of the parties.⁴ Mere silence does not necessarily amount

dues in ignorance of the grounds of forfeiture, the court said: "The fact that the company, in receiving and retaining the money, did not know of the previous grounds of forfeiture, or intent to waive the same, is not material. . . . By the exercise of the slightest diligence, the defendant could have ascertained the alleged failure of Mrs. Tobin to pay assessments, and, by the return of the money collected during the months intervening before her death, prevented her from being lulled into security by the misleading acts of the company." See further, as to the necessity of knowledge as an element of a binding waiver, *ELECTION*, vol. 6, p. 254. See *infra*, this title, *Vendor and Purchaser—Waiver of Right to Object to Title*.

1. There are acts to which the law affixes a specific effect independent of the intention of the parties. *Holds-worth v. Tucker*, 143 Mass. 374. Thus, in *Fox v. Harding*, 7 Cush. (Mass.) 520, Bigelow, J., said: "There may be cases in which the facts are few and simple, and the acts or admissions of the parties clear and unequivocal, when it would be the duty of the court to instruct the jury that certain legal rights, upon which a party might otherwise have relied, have been surrendered and can no longer be insisted on; but these are cases where the law affixes certain consequences to acts of parties, when clearly and indisputably proved. So, too, in judicial proceedings, for the furtherance of public justice, and the discouragement of dilatory pleas and technical objections, parties who do not seasonably avail themselves of their legal rights, are held by courts to have conclusively waived them." And see also remarks of Storrs, C. J., in *Fitch v. Woodruff*, etc., *Iron Works*, 29 Conn. 82.

An examination of the various instances of waiver given in the second part of this title, will reveal other cases in which the law attaches a certain consequence to the acts of the parties

without inquiring into their actual intent. See *infra*, this title, *Specific Instances of Waiver*.

Estoppel.—It may be unnecessary to show an actual intent to waive, where the conduct of the party has been such as to estop him. See *Ross v. Swan*, 7 Lea (Tenn.) 467. In this case Freeman, J., said: "To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to estoppel on his part." And see *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. St. 452; 98 Am. Dec. 302.

2. *Fuller v. Bean*, 34 N. H. 290; *Farlow v. Ellis*, 15 Gray (Mass.) 229; *Smith v. Dennie*, 6 Pick. (Mass.) 262; 17 Am. Dec. 368; *Hammett v. Linne-man*, 48 N. Y. 399; *Traynor v. Johnson*, 1 Head (Tenn.) 151.

Meaning of Intent.—By "intent" is meant, not the secret understanding of the parties, but their intention as indicated by their language and conduct. *West v. Platt*, 127 Mass. 372.

3. *Montague v. Massey*, 76 Va. 307.
4. *West v. Platt*, 127 Mass. 372; *Fuller v. Bean*, 34 N. H. 290; *Fishback v. Van Dusen*, 33 Minn. 118; *Texas*, etc., *R. Co. v. Rust*, 19 Fed. Rep. 245.

In *Traynor v. Johnson*, 1 Head (Tenn.) 54, McKinney, J., said: "The motive or intention of the act in this case, as in most other instances, is a matter of inference, to be deduced with more or less certainty from the external and visible acts and conduct of the party; and all the accompanying circumstances of the particular transaction." *Prima facie*, however, taking possession after an abstract had been delivered, and not in pursuance of any provision in the conditions of sale, is a waiver of the objections appearing on that abstract, and it lies on the purchaser to rebut this presumption. This is not to be done by merely saying, at a subsequent time, "I did not so intend," it must be shown that the presumption is rebutted by a fair inference to be

to a waiver,¹ though negligence or delay unaccounted for is evidence of waiver;² and the insistence upon a specific objection may

derived from the acts of the person himself. *Bonn v. Stenson*, 24 Beav. 631.

In *West v. Platt*, 127 Mass. 372, Colt, J., said: "A waiver is indeed the intentional relinquishment of a known right; but the best evidence of intention is to be found in the language used by the parties. The true inquiry is, what was said or written, and whether what was said indicated the alleged intention. The plaintiff had a right to act on the natural interpretation of the correspondence, and the defendant's conduct in reference to it. The secret understanding or intent of the defendants or their agents could not affect his rights."

A delivery, apparently unrestricted, of goods sold for cash, is a waiver of the condition that payment is to be made before the passing of the property in the goods, although the seller has an undisclosed intent not to waive the condition. *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Scudder v. Bradbury*, 106 Mass. 428.

But the presumption of waiver arising from such unrestricted delivery, may be rebutted by the acts and declarations of the parties, or by the circumstances of the case. *Osborn v. Gantz*, 60 N. Y. 540.

See *Taft v. Dickinson*, 6 Allen (Mass.) 553, to the effect that the understanding which one party to a contract had of its meaning, not communicated or known to the other party, is not admissible in evidence in his own favor, in an action in which the effect of the contract is in controversy.

1. Mere silence on the part of a defendant does not amount to a waiver of the performance of a condition, unless, indeed, in cases where such silence is inconsistent with any other explanation. *Burlington R. Co. v. Boestler*, 15 Iowa 559.

A waiver is not to be implied from a party's silence, where he is under no obligation to say anything. *Texas, etc., R. Co. v. Rust*, 19 Fed. Rep. 245.

In *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419, the court said: "When there has been a breach of condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture,

and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture."

Where one has wrongfully sold property of another, not as agent, but on his own account, the owner, upon discovery of the wrong, is not required to make immediate efforts to regain his property, and silence, short of the time prescribed by the Statute of Limitations, will not bar his claim. *Hamlin v. Sears*, 82 N. Y. 327. And compare the cases cited in following note. See also *ESTOPPEL*, vol. 7, p. 12; *LIFE INSURANCE*, vol. 16, p. 659.

2. **Delay, Negligence, and Inaction, as Evidence of Waiver.**—*Farlow v. Ellis*, 15 Gray (Mass.) 229; *Fishback v. Van Dusen*, 33 Minn. 111; *Goldsmith v. Bryant*, 26 Wis. 34; *Smith v. Dennie*, 6 Pick. (Mass.) 262; 17 Am. Dec. 368. In these cases the question was whether the vendor in a conditional sale had waived the condition. Delay, though not in itself a waiver, may be evidence of waiver. *Selwyn v. Garfit*, 38 Ch. Div. 284. In *Farlow v. Ellis*, 15 Gray (Mass.) 231, Shaw, C. J., said: "The question then on trial in this case was, whether the plaintiff had waived the condition of this sale, and manifested by his language or conduct an intention or a willingness to waive the condition and make the sale absolute, without having the satisfactory paper. . . . Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage, which, but for such waiver, he would have enjoyed. It may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive. Still, voluntary choice not to claim is of the essence of waiver, and not mere negligence;

operate as a waiver of other objections open to the party, but not insisted on.¹

though from such negligence unexplained such intention may be inferred. The question of waiver, therefore, is a question of fact for the jury; it may be proved by various species of proofs and evidence, by declarations, by acts, and by non-feasance, or forbearing to claim or act; but, however proved, the question is, Has he willingly given up and forborne to claim the benefit of the condition? In this case, it was, Did the plaintiff voluntarily deliver the goods, without intending to rely on the condition?"

In *Smith v. Dennie*, 6 Pick. (Mass.) 262; 17 Am. Dec. 368, a chattel was sold upon condition that the vendee should give an indorsed note, but was delivered without any express reference to the condition, and remained in possession of the vendee eight days, when it was attached by his creditors, the vendor having made no claim during that period either for the note or the chattel. No reason was assigned for omitting such a claim. The jury found that there was no intention on the part of the vendor to waive the condition. A new trial was granted, the court saying: "We are of opinion that the verdict is against the evidence, for there was nothing in the case from which an intention to hold on upon the condition can be inferred—no declaration at the time, which though not necessary is important, and no call for security until it was forgotten or abandoned, and perhaps never would have been recurred to if the goods had not been attached."

Mere inaction on the part of an insurance company, for a period of thirty or thirty-five days after it receives information that the habits of the insured are at variance with the representations made by him to secure the policy, is not sufficient to warrant the jury in finding that it waived the forfeiture, the company having pursued the ordinary course with reference to the information, and acted with ordinary diligence. *Andreveno v. Mutual, etc., L. Assoc.*, 38 Fed. Rep. 806.

The defendant, by letter, requested the plaintiff to send him from two hundred to three hundred tons of coal by the "Navigator," to which the plaintiff assented. The "Navigator" could not be obtained, and the plaintiff, on December 31st, shipped one hundred and fifty-

two tons by another vessel, and by letter of the same date informed the defendant that he had done so, stating also that he had drawn upon him for the price. He also inclosed an invoice, and asked if he should engage another ship to make up the quantity. The defendant returned no answer to this letter, which was mailed in time to reach him on January 3rd. On January 6th the ship with the coal was lost. The bill drawn on the defendant was presented to him about a week after December 31st, but the defendant, who had heard of the loss, refused to accept. In an action for goods sold and delivered, the jury gave a verdict for the plaintiff for the one hundred and fifty-two tons, which the court refused to set aside, on the ground that the defendant, by his conduct, had waived his right to object to the plaintiff's mode of executing the contract. *Richardson v. Dunn*, 2 Q. B. 222. And see further, upon the question of the effect of delay or negligence, *LACHES*, vol. 12; p. 542 *et seq.*; *PLEDGE*, vol. 18, p. 714.

1. "The principle is, that when some formal act or acts are to be performed by a party as a condition precedent to some right, or to perfect a right of actions or property, and the act as performed is defective or imperfect, and the adverse party, whose right it is to object and insist upon a more perfect compliance with the condition, takes no objection to the manner of its performance, but accepting the performance as perfect, places his objection to the claim and right asserted upon another distinct and independent ground, he is held to have waived all objection to the formal and technical defects. Or when a single objection to the performance is taken, and the party is silent as to all others, they are deemed to be waived. The rule rests upon the ground that the party by his silence has misled his adversary, and not having spoken when he ought shall not be permitted to speak when he would. The principle has its most frequent application in actions upon policies of insurance, where there have been some defects in the preliminary proof of loss or of interest, which have not been objected to, but the claim has been resisted upon other grounds." *Johnson v. Oppenheim*, 55 N. Y. 291.

3. Must Be Upon Consideration, or Operate by Estoppel.—It would seem that, as a general rule, a waiver, to be binding, must operate by way of estoppel, or be supported by a valuable consideration.¹

"Indeed, it appears to be true that if an underwriter puts his objection to paying on some particular ground, such as the defectiveness of the proofs in some particular mentioned by him, he will be estopped thereafter to raise other objections of the same nature, open to him before. Whether this can be considered as a special example of a wide rule is not clear; probably it is not. It would not be safe to affirm that if a party to a contract, which had not as yet been fully performed by the other party in two or more particulars, should, with knowledge of such fact, object to the non-performance of one, he might be considered as having waived the non-performance of the rest. He might have special reason for raising the particular objection, without having it supposed that he did not intend to require performance of the other terms of the contract. A man does not lose his rights without intention or facts equivalent to intention." Bigelow on Estoppel (5th ed.), p. 662 *et seq.* And see *Canon v. Home Ins. Co.*, 53 Wis. 585; *Aetna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 401; 30 Am. Dec. 90; *Miller v. Eagle L., etc., Ins. Co.*, 2 E. D. Smith (N. Y.) 268; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362; *Clark v. New England Mut. F. Ins. Co.*, 6 Cush. (Mass.) 342; 53 Am. Dec. 44; *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *ESTOPPEL*, vol. 7, p. 32; *FIRE INSURANCE*, vol. 7, p. 1055; *INSURANCE*, vol. 11, p. 341; *LIFE INSURANCE*, vol. 13, pp. 658, 659.

Where goods were bought upon condition that they should be delivered within a reasonable time, it was held that a refusal to receive by the buyer, upon tender of the goods by the seller, based upon their quality, did not estop the buyer from claiming upon trial, for the first time, that the goods were not tendered within a reasonable time, the court saying that the essential element of an estoppel—that another party has acted to his prejudice, in reliance upon the alleged conduct—was wanting. *Tufts v. McClure*, 40 Iowa 317. *Contra Gould v. Banks*, 8 Wend. (N. Y.) 562; 24 Am. Dec. 90. See

further, upon this question of waiver by insisting upon a specific objection and silence as to the others, *infra*, this title, *Vendor and Purchaser*; *Bills and Notes—Waiver of Production Upon Demand of Payment; Tender*; *DEMAND*, vol. 5, pp. 528g, 528h; *NOTICE*, vol. 16, p. 827.

As to the renunciation of the contract or unqualified refusal to perform, by one party, as waiving or excusing tender of performance by the other party, see *CONTRACT*, vol. 3, p. 904; *DEMAND*, vol. 5, p. 528a; *INSURANCE*, vol. 11, p. 341; *LIFE INSURANCE*, vol. 13, p. 658; *SPECIFIC PERFORMANCE*, vol. 22, pp. 1040–1042. See also *VENDOR AND PURCHASER*, vol. 28, p. 67.

1. A waiver, unsupported by consideration, is not binding. *Belknap v. Bender*, 75 N. Y. 453; 31 Am. Rep. 476; and see *Merchants' Mut. Ins. Co. v. La Croix*, 45 Tex. 168; *Texas Banking, etc., Co. v. Hutchins*, 53 Tex. 68; 37 Am. Dec. 750.

In *Ripley v. Aetna Ins. Co.*, 30 N. Y. 164; 86 Am. Dec. 362, *Mullin, J.*, said: "It seems to me that a waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting, on performance of the contract or forfeiture of the condition. . . . If my tenant agrees to pay me rent on a day named or his lease will be forfeited, and if, before the day, I agree, for a valuable consideration, to waive the condition, I am bound by the agreement. If, without consideration, I agree that he may pay after the day, and he, by reason thereof, omits to pay at the day, I am estopped from enforcing a forfeiture. But if, without consideration, I assent to a waiver of payment at the day, but before the day withdraw my assent, and insist on performance in such season as to enable him to perform, I am not estopped."

A permission, given upon no consideration by the lessor to the lessee, to leave the premises before the expiration of the term, is a mere license, revocable at any time before the lessee acts upon it. *Dunning v. Mauzy*, 49 Ill. 368.

Where a policy of insurance provided for its determination upon the non-payment of the premiums upon the dates specified, it was held that a mere promise, made after default in the payment of a premium, to accept payment at a future day, did not so restore the contract as to enable recovery thereon for a loss happening before the time agreed upon for payment and before payment. *Lantz v. Vermont L. Ins. Co.*, 139 Pa. St. 546; 23 Am. St. Rep. 202. In this case Paxson, C. J., said: "A lapsed policy can only be restored to life, so far as the assured is concerned, by the actual payment and acceptance of the premium, or a contract based upon a sufficient consideration."

But see *Knickerbocker Ins. Co. v. Norton*, 96 U. S. 234, in which case it was held that an agreement to extend an overdue premium note, though without consideration, operated as a waiver of the forfeiture. In this case, Bradley, J., said: "The material question is, whether the forfeiture was waived; and we see no reason why this may not be done as well by an agreement made for extending the note after its maturity, as by one made before. . . . It is true, if the agreement be made before the note matures and before the forfeiture is incurred, it would be a fraud upon the assured to attempt to enforce the forfeiture, when, relying on the agreement, he permits the original day of payment to pass. On the other hand, if the agreement be made after the note matures, such agreement is itself a recognition, on the company's part, of the continued existence of the policy, and, consequently, of its election to waive the forfeiture. . . . Grant that the promise to extend the note is without consideration, and not binding upon the company, which is perhaps true as well when the promise is made before maturity as when it is made afterwards, still it does not take from the company's act the legitimate effects of such act upon the forfeiture of the policy. Perhaps the note might be sued on in disregard of the extension; but if it could be, that would not annihilate the fact that the company elected to waive the forfeiture by entering into the transaction. If it should repudiate its agreement, it could not repudiate the waiver of the forfeiture, without at least giving to the assured reasonable notice to pay the money. . . . The case of leases is not without analogy to the present. It is familiar

law that, when a lease has become forfeited, any act of the landlord indicating a recognition of its continuance, such as distraining for rent, or accepting rent which accrued after the forfeiture, is deemed a waiver of the condition. . . . This shows the readiness with which courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture. We think that the present case is within the reason of these authorities, and that the objection that the note was already part due, when the agreement to extend it was made, is not sufficient to prevent said agreement from operating as a waiver of the forfeiture."

See also *Titus v. Glens Falls Ins Co.*, 81 N. Y. 410, where it was held that the company had waived the forfeiture by requiring the insured to appear for examination, as required by the policy, after the fire and notice of the proceedings working the forfeiture. Earl, J., said: "But it may be asserted broadly that if in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel. . . . Forfeitures are not favored in the law, and this doctrine of waiver is not peculiar to insurance policies, but is applicable to all cases of forfeiture."

In *People v. Manhattan Co.*, 9 Wend. (N. Y.) 381, Sutherland, J., in speaking of the waiver of forfeiture by subsequent acts inconsistent with an intent to claim the forfeiture, illustrated by him by the case of lessor and lessee, said: "It will be remarked that this doctrine does not stand upon any advantage accrued to the lessor, or injury sustained by the lessee, from the act which is held to be a waiver. It is a technical doctrine, introduced and applied by courts for the purpose of defeating forfeiture."

In *Stackhouse v. Barnston*, 10 Ves. Jr., 466, Sir W. Grant said: "As to waiver, it is difficult to say precisely what is meant by that term, with reference to the legal effect. A waiver is nothing unless it amounts to a release. It is by a release, or something equivalent only, that an equitable demand can be given

III. WHAT MAY NOT BE WAIVED—1. On Grounds of Public Policy.

—The right of waiver is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed.¹ Thus, an agreement waiving the defense of usury is void,² and so, also, is the ratification of a forgery.³ A party cannot waive the objection to acts done, or contracts entered into in violation of Sunday laws,⁴

away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right, which in equity will not, without consideration, bar the right any more than at law accord without satisfaction would be a plea. . . . If that condition had been performed, however slight the consideration might have been, I do not know that the court would not consider it a sufficient foundation for a release, or what is equivalent to a release."

A subsequent agreement, waiving or modifying a prior agreement between the parties, must be supported by a sufficient consideration. See *infra*, this title, *Waiver or Variation of Contracts by Subsequent Agreement*.

1. Laws made for the preservation of public order or good morals, cannot be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor, when he does not thereby injure others or affect the public interest. *Georgia Code*, § 10.

Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement. *Dakota Civil Code*, § 2066; *California Civil Code*, § 3513.

Individuals cannot, by their convention, derogate from the force of laws made for the preservation of public order or good morals. But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good. *Louisiana Rev. Civil Code*, art. 11.

2. **Usury.**—An agreement by a mortgagor not to set up or take advantage of the defense of usury and expressly waiving such defense, is void. *Mabee v. Crozier*, 22 Hun (N. Y.) 264. See *Bosler v. Rheem*, 72 Pa. St. 54. So, of an agreement to withdraw a plea of usury. *Clark v. Spencer*, 14 Kan. 398; 19 Am. Rep. 96.

3. **Forgery.**—A ratification of a forgery is void, as being the ratification of a criminal act. *Shisler v. Vandike*, 92 Pa. St. 447; 37 Am. Rep. 702. And see *AGENCY*, vol. 1, p. 430 *et seq.*

4. **Sunday Laws.**—A note made in violation of the Lord's Day Act, is absolutely void, and cannot be ratified by the defendant by a subsequent promise or act on a week day so as to sustain an action upon it. *Day v. McAllister*, 15 Gray (Mass.) 433. In this case, Hoar, J., said: "The statute which prohibited it was not designed merely for the protection of the defendant, giving him a personal privilege which he might waive, but rested upon grounds of broad public policy. The defendant could not ratify the illegal contract, because its want of validity did not depend in any degree upon his choice. . . . It is not quite accurate to speak of the 'ratification' by a party, of something which the law forbids and which is made void, not from any want of his full consent, but in spite of it."

The service of process on Sunday is absolutely void, and cannot be made good by the subsequent waiver of the defendant. *Taylor v. Phillips*, 3 East 155. And so, also, a writ of summons dated on Sunday is a nullity, and the objection is not waived by lapse of time, and the court will take judicial notice that the day of the week was Sunday. *Hanson v. Shackelton*, 4 Dowl. Pr. Cas. 48. But where the return day of a writ of replevin was Sunday, the defendant was held to have waived the objection by appearing, pleading the general issue, and going to trial without objection. *Pierce v. Rehfuß*, 35 Mich. 53. And in *Roberts v. Bower*, 5 Hun (N. Y.) 558, where the jury, to whom the case was submitted on Saturday, came into court on Sunday and asked instructions on certain points, which were given by the court, and the defendant made no objection at the time, but after the jury had agreed upon a verdict, claimed that the charge was in violation of the provisions of

or that are contrary to public policy and morality,¹ nor is a court bound by any waiver or consent, to entertain illegal actions.²

the statute providing that no court shall be opened or transact any business on Sunday, unless for the purpose of receiving a verdict or discharging a jury, and that the verdict should be set aside, it was held the defendant, by consenting to the charge, waived any objection thereto.

The objection to a sale on the ground of illegality cannot be waived; to permit its subsequent ratification, or to consider it the sufficient and legal basis of a subsequent promise, would be a manifest inconsistency. It would be to annul the rule and enable the parties, by an easy expedient, to evade laws based upon considerations of public policy. *Boutelle v. Melendy*, 19 N. H. 196; 49 Am. Dec. 152.

1. In *Oscanyon v. Arms Co.*, 103 U. S. 261, Field, J., in delivering the opinion of the court, said: "Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law." And see *Handy v. St. Paul Pub. Co.*, 41 Minn. 188; 16 Am. St. Rep. 695; *Cary v. Western Union Tel. Co.*, 20 Abb. N. Cas. (N. Y.) 333; *McKee v. Cheney*, 52 How. Pr. (N. Y.) 144; *Russell v. Burton*, 66 Barb. (N. Y.) 539.

A defendant, who, to an action upon a contract void as against public policy, pleads the illegality, and also, by way of reconvention, claims damages for breach of the contract by the plaintiff, does not waive the illegality of the contract by his reconventional demand. *Coppel v. Hall*, 7 Wall. (U. S.) 542. In this case the court said: "In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. . . . Whenever the illegality appears, whether the evidence comes from one side or

the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons." See also *Shenk v. Phelps*, 6 Ill. App. 612, to the effect that if a note is void as against public policy, the illegality cannot be waived.

Other Instances of Waiver Void as Against Public Policy.—See PUBLIC POLICY, vol. 19, p. 566; CONTRACT, vol. 3, pp. 876, 879; ILLEGAL CONTRACTS, vol. 9, p. 913 *et seq.*; CONSTITUTIONAL LAW, vol. 3, p. 733; JURISDICTION, vol. 12, p. 305; FELLOW SERVANTS, vol. 7, p. 863; MASTER AND SERVANT, vol. 14, p. 910; HUSBAND AND WIFE, vol. 9, p. 807. See also *infra*, this title, *Waiver of Homestead and Exemptions*.

2. In *Evans v. Richardson*, 3 Meriv. 469, the plaintiff relied upon an illegal contract. The defendant did not set up or rely on the illegality as a defense, but the court on its own motion set up the objection, saying: "It is of no consequence who makes the objection. If the party has not, the court will set it up."

In *Cardoze v. Swift*, 113 Mass. 250, which was an action for false representations practiced in a sale, the plaintiff's evidence showed that the sale took place on Sunday. The defendant did not set up the illegality in his answer, which was simply a general denial. The court instructed the jury that if the plaintiff's case disclosed the fact that the transaction took place on Sunday, the action could not be maintained. The jury having found for the defendant, the plaintiff alleged exceptions, which were overruled. *Gray, C. J.*, said: "In such an action, a defendant, who has not pleaded illegality in the contract sued on, has no right to offer evidence of such illegality, or even to avail himself of it when disclosed in the plaintiff's testimony, if the court does not refuse to entertain the plaintiff's case. *Granger v. Ilsley*, 2 Gray (Mass.) 521; *Bradford v. Tinkham*, 6 Gray (Mass.) 494; *Libby v. Downey*, 5 Allen (Mass.) 299; *Goss v. Austin*, 11 Allen (Mass.) 525. But no waiver by the defendant, or consent of parties, can oblige a court of justice to try or enforce a claim which, upon the plain-

But one may waive a statutory or constitutional provision affecting his property or alienable rights, when no considerations of public policy are involved.¹

2. Jurisdiction.—No waiver or consent of the parties can give jurisdiction to a court not authorized to take it.²

IV. QUESTION FOR JURY.—The question of waiver, being usually one of intent as indicated by the acts and declarations of the parties, is generally one for the jury;³ though where all the facts are

tiff's own showing, has no foundation in law. The plaintiff has, therefore, no ground of exception to the instruction given to the jury."

The court will not entertain jurisdiction of a bill in equity for an account of profits resulting from an illegal trading with inhabitants of states declared in insurrection against the *United States*, if the illegal character of the transaction appears in evidence, although it does not appear on the face of the bill, and is not set up in the answer, "as no waiver by them (the defendants) or consent of parties can oblige a court to determine their rights under an illegal contract." (Here the character of the transaction appears upon the master's report.) *Dunham v. Presby*, 120 Mass. 285.

1. *Phyfe v. Eimer*, 45 N. Y. 104.

Where no principle of public policy is concerned, a party is at liberty to waive a statutory provision intended for his benefit. But the intention to waive such benefit must be clear. *White v. Connecticut Mut. L. Ins. Co.*, 4 Dill. (U. S.) 183.

A party may waive a right in his favor created by statute, the same as any other. *Tombs v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 585; *Shutte v. Thompson*, 15 Wall. (U. S.) 159.

By participating in procuring the passage of a statute, and acquiescing in the same, and becoming a recipient of benefits under it, one may waive his right to afterwards question its constitutionality. *Ferguson v. Landram*, 5 Bush (Ky.) 230; 96 Am. Dec. 350.

A party will be estopped by his actions. *Tone v. Columbus*, 39 Ohio St. 281; 48 Am. Rep. 438. And see *People v. Murray*, 5 Hill (N. Y.) 468; *Vose v. Cockcroft*, 44 N. Y. 415; *Ralston v. Oursler*, 12 Ohio St. 111; *ESTOPPEL*, vol. 7, p. 22.

In *Beecher v. Marquette, etc., Rolling Mills Co.*, 45 Mich. 108, it was held that the stockholders might waive the irregularity in a corporate mortgage,

made in disregard of an act forbidding and making invalid a corporate mortgage, unless authorized by the stockholders upon due notice, and that no third person could set up such irregularity.

For further instances of waiver of constitutional rights, see *infra*, this title, *Waiver in Judicial Proceedings*.

2. See JURISDICTION, vol. 12, p. 301 *et seq.*; PLEADING, vol. 18, p. 520; also *infra*, this title, *Waiver in Judicial Proceedings*.

3. It is a mixed question of law and fact, each case necessarily depending much upon its own peculiar circumstances and surroundings. It is a question of intention and a fact to be determined by the triers of fact. *O'Key v. State Ins. Co.*, 29 Mo. App. 111.

In *Fitch v. Woodruff, etc., Iron Works*, 29 Conn. 91, Storrs, C. J., in delivering the opinion of the court, said: "If it be conceded that there may be cases when the declarations or acts of the parties to a contract are so express and unequivocal that it would not only be practical and competent, but even the duty of the court to determine, as a matter of law, that certain rights had been waived and could no longer be insisted on, those cases are very rare; because a question of waiver is one of intention, and most usually depends on acts or declarations, which, in regard to their character, are of an inconclusive or doubtful nature, and furnish only evidence of intention and grounds of inference and deduction, which it is the appropriate province of a jury only to consider."

And see *Fox v. Harding*, 7 Cush. (Mass.) 520, where Bigelow, J., said: "Indeed, it may be laid down as a general rule, that the question, whether the evidence in any case establishes a waiver of any legal right by a party, is one of fact to be settled by the verdict of a jury. There may be cases in which the facts are few and simple, and the acts or admissions of the parties clear

admitted, the court may instruct the jury as to their sufficiency to establish a waiver.¹

V. SHOULD BE SPECIALLY PLEADED.—It would seem that, as a general rule, waiver should be specially pleaded.²

and unequivocal, when it would be the duty of the court to instruct the jury that certain legal rights, upon which a party might otherwise have relied, have been surrendered and can no longer be insisted on; but these are cases where the law affixes certain consequences to acts of parties, when clearly and indisputably proved. So, too, in judicial proceedings, for the furtherance of public justice, and the discouragement of dilatory pleas and technical objections, parties who do not seasonably avail themselves of their legal rights, are held by courts to have conclusively waived them. But, ordinarily, where the rights and liabilities of parties depend on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and complicated, it is a question for the jury to determine, how far parties have waived any of their legal rights. In all questions of this sort, so much depends on the intent with which parties act, that it would be impossible for courts to establish any certain rule by which all cases could be governed. They must necessarily be left to the determination of juries, whose peculiar province it is to ascertain the intent of parties, as gathered from the various facts and circumstances proved in each particular case."

In *Traynor v. Johnson*, 1 Head (Tenn.) 51, the plaintiff let her slave to the defendant, by express contract, to be employed in a particular service. The defendant sublet the slave to be employed in a different service, in which the slave was taken ill. At the suggestion of the physician, the slave was taken to the plaintiff's house, where he died. In a suit by the plaintiff for conversion, it was held that the mere fact of the plaintiff's receiving the slave, under the circumstances, was not in itself a waiver of the conversion, but it depended upon the motive with which it was done, which was a question for the jury.

Whether a vendor of goods has waived a condition of the sale, is a question for the jury. *Farlow v. Ellis*, 15 Gray (Mass.) 232; *Smith v. Dennie*, 6

Pick. (Mass.) 266; 17 Am. Dec. 368; *Fishback v. Van Dusen*, 33 Minn. 118; *Osborn v. Gantz*, 60 N. Y. 540.

As to the question of waiver of conditions in contracts being for the jury, see *Chapman v. Colby*, 47 Mich. 46; *Hale Mfg. Co. v. American Saw Co.*, 43 Mich. 250; *Phoenix Ins. Co. v. Munday*, 5 Coldw. (Tenn.) 551; *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350; *Coursin v. Pennsylvania Ins. Co.*, 46 Pa. St. 330.

1. Where all the facts and circumstances relating to the subject are admitted, the defendant has a right to require the court to instruct the jury whether the evidence is sufficient to establish a waiver. *Spring Garden, etc., Ins. Co. v. Evans*, 9 Md. 20.

Waiver in Writing.—Where the agreement as to the question of notice of sale by a pledgor is in writing, the question of waiver is for the court. *Mowry v. Wood*, 12 Wis. 414.

2. Thus an allegation that the plaintiff had performed his part of a mutual executory contract, is not supported by proof that the defendant had waived such performance. Such waiver should be specially pleaded. *Colt v. Miller*, 10 Cush. (Mass.) 49; *Palmer v. Sawyer*, 114 Mass. 1; *Freeland v. Ritz*, 154 Mass. 262; *Home Ins. Co. v. Duke*, 43 Ind. 421. See 1 Chitty's Pleading (16th Am. ed.), p. 335.

Where, in an action upon an insurance policy, the defendant pleaded that the plaintiff, in violation of the conditions of the policy, had altered the buildings, and the plaintiff traversed this plea, it was held that evidence of a waiver of the breach of condition by the defendant was not admissible. *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. St. 443; 98 Am. Dec. 302.

Where the payment of money is a condition precedent to the performance of a covenant to convey land, evidence of waiver of the condition is not admissible in support of an averment of performance. *Baldwin v. Munn*, 2 Wend. (N. Y.) 399; 20 Am. Dec. 627. But see to the effect that evidence of waiver of a tender by the opposite party is competent under an allegation of tender, *Holmes v. Holmes*, 9 N. Y.

VI. SPECIFIC INSTANCES OF WAIVER—1. Waiver or Variation of Contracts by Subsequent Agreement.

a. SIMPLE CONTRACTS—(See also CONTRACT, vol. 3, p. 889; RESCISSION, vol. 21, p. 68 *et seq.*).—After an agreement has been reduced to writing, it is competent for the parties, at any time prior to a breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract.¹ Waiver of a

525. See also *Woolner v. Hill*, 93 N. Y. 581.

Where a vendor of land brings a bill for a specific performance of the contract against the vendee, and relies upon a waiver of objections to title by the latter, he must so frame his bill as to put the question in issue, or evidence to prove the waiver will not be received. *Page v. Greeley*, 75 Ill. 400.

In *Colt v. Miller*, 10 Cush. (Mass.) 51, Metcalf, J., said: "The ground taken by the plaintiff is, that the defendant, by his conduct, waived his right to be furnished with the materials according to the agreement, and that proof of such waiver supports the averment that the plaintiff did furnish them according to the agreement. And two cases were cited (*Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Norton v. Lewis*, 2 Conn. 478) in which it was held that, in an action by the indorsee of a note against the indorser, the allegation, that notice was given to the defendant of nonpayment by the promisor, was supported by proof that the defendant waived such notice. Those decisions have often been questioned and are certainly contrary to the law as held in *England*. *Burgh v. Legge*, 5 M. & W. 418; *Chitty on Bills* (10th Am. ed.) 577. But supposing them to have been rightfully decided, they only show a single exception to an established rule."

Bills and Notes—Pleading Waiver of Demand and Notice.—In *Massachusetts* and other states, a waiver of demand and notice need not be specially pleaded, evidence of such waiver being held admissible under an allegation of demand and notice. *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Harrison v. Bailey*, 99 Mass. 620; 97 Am. Dec. 63; *Armstrong v. Chadwick*, 127 Mass. 156; *Smith v. Poillon*, 87 N. Y. 594; 41 Am. Rep. 402; *Windham Bank v. Norton*, 22 Conn. 213; 56 Am. Dec.

397; *Farmers', etc., Bank v. Day*, 13 Vt. 36; *Faulkner v. Faulkner*, 73 Mo. 327. But see *Pier v. Heinrichoffen*, 52 Mo. 333; *contra Burgh v. Legge*, 5 M. & W. 418. See *Cordery v. Colvin*, 32 L. J. C. P. 211; *Lumbert v. Palmer*, 29 Iowa 104.

See also, to the effect that matter of excuse for not making demand or giving notice, should be specially pleaded, *Allen v. Edmundson*, 2 Exch. 719; *Curtis v. State Bank*, 6 Blackf. (Ind.) 312; 38 Am. Dec. 143; *Hall v. Davis*, 41 Ga. 614; *Frazier v. Harvie*, 2 Litt. (Ky.) 185; *Baumgardner v. Reeves*, 35 Pa. St. 256.

1. *Goss v. Nugent*, 5 B. & Ad. 64; 27 E. C. L. 33; *Langden v. Stokes*, Cro. Car. 383; *Inge v. Lippingwell*, Dick. 469; *Rogers v. Atkinson*, 1 Kelly (Ga.) 12; *Simonton v. Liverpool, etc., Ins. Co.*, 51 Ga. 80; *Mitchell v. Ins. Co.*, 54 Ga. 290; *Rigsbee v. Bowler*, 17 Ind. 167; *Todd v. Allen*, 18 Kan. 543; *Courtenay v. Fuller*, 65 Me. 158; *Wiggin v. Goodwin*, 63 Me. 392; *Watkins v. Hodges*, 6 Har. & J. (Md.) 38; *Mactier v. Wirgman*, 4 Har. & J. (Md.) 578; *Cummings v. Arnold*, 3 Met. (Mass.) 486; 37 Am. Dec. 155; *Hastings v. Lovejoy*, 140 Mass. 261; 54 Am. Rep. 463; *Buel v. Miller*, 4 N. H. 196; *Grafton Bank v. Woodward*, 5 N. H. 107; 20 Am. Dec. 566; *McMurphy v. Garland*, 47 N. H. 323; *Perrine v. Cheeseman*, 11 N. J. L. 176; 19 Am. Dec. 388; *King v. Morford*, 1 N. J. Eq. 280; *Goucher v. Martin*, 9 Watts (Pa.) 110; *Vibus v. Wirting*, 2 Yeates (Pa.) 350; *Bryan v. Hunt*, 4 Sneed (Tenn.) 543; 70 Am. Dec. 262; *Grandin v. U. S.*, 22 Wall. (U. S.) 506; *Swain v. Seamens*, 9 Wall. (U. S.) 271; *Hewitt v. Brown*, 21 Minn. 165; *Hogan v. Crawford*, 31 Tex. 634; *Wharton v. Missouri Car Foundry Co.*, 1 Mo. App. 582; *Vastine v. Wyman*, 5 Mo. App. 598; *Allen v. Sowerby*, 37 Md. 420; *Cain v. Pullen*, 34 La. Ann. 517; *Flanders v. Fay*, 40

contract may be implied from nonperformance,¹ and the subsequent agreement may operate only as a conditional discharge.²

The new agreement waiving or modifying the prior one must be supported by a sufficient consideration,³ and must be proved clearly,⁴ and if the prior agreement is waived or abandoned by mutual consent after part performance or part payment of the

Vt. 316; *Thurston v. Ludwig*, 6 Ohio St. 1; 67 Am. Dec. 328; *Emerson v. Slater*, 22 How. (U. S.) 41; *Heatherby v. Record*, 12 Tex. 49; *Morrill v. Colehour*, 82 Ill. 626.

The new contract may be proved "partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will then be left of the written agreement." *Seman, C. J.*, in *Goss v. Nugent*, 5 B. & Ad. 64; 27 E. C. L. 33.

So far as the new agreement is inconsistent with the former contract, it must be taken to rescind it. *Patmore v. Colburn*, 1 C. M. & R. 65; *Taylor v. Hillary*, 1 C. M. & R. 741; *Sanderson v. Graves*, L. R., 10 Exch. 234.

Thus, where a contract provided for the completion of a building by a fixed day under penalties for delay, a new agreement for additional work making it impossible to complete by the day fixed, was held a waiver of the former stipulations as to time and penalties. *Thornhill v. Neats*, 8 C. B. N. S. 831; 98 E. C. L. 830.

But a subsequent parol agreement to postpone the delivery of articles under a written contract without seal, is not a waiver of the contract, but only an enlargement of the time for the performance of it. *Watkins v. Hodges*, 6 Har. & J. (Md.) 38, *citing* cases.

1. Whether the new agreement was substituted for the old and thus operated as a rescission or discharge of it, must be determined by the intention of the parties, to be ascertained from their correspondence and conduct. *Rogers v. Rogers*, 139 Mass. 440.

Rescission of a contract may be implied in some cases from mere non-performance for such time as indicates an intention of abandoning it. *Leake's Law of Contracts* (1892), p. 683, *citing* *Rushbrook v. Lawrence*, L. R., 5 Ch. 3; *Mills v. Haywood*, 6 Ch. Div. 196; *Lloyd v. Collett*, 4 Bro. C. C. 469; *Guest v. Homfray*, 5 Ves. 818; *Heapy v. Hill*, 2 Sim. & S. 29; *Pollard v. Clayton*, 1 K. & J. 462; *Bond v. Walford*, 32 Ch. Div. 238. In this last case

rescission of promises to marry was implied from three years cohabitation without marriage.

Where a vendor sold land in lots subject to covenants not to carry on the trade of a beer shop, and afterward suffered beer shops to be opened and supplied them with beer, it was held he had waived the covenants over all the lots. *Kelsey v. Dodd*, 52 L. J. Ch. 34.

2. The subsequent agreement may operate as a conditional discharge of the old agreement, which may be restored to full effect upon failure of the new. *Firth v. Midland R. Co.*, L. R., 20 Eq. 100.

3. *Emerson v. Slater*, 22 How. (U. S.) 41; *Henning v. U. S. Ins. Co.*, 47 Mo. 431; 4 Am. Rep. 332; *Wharton v. Missouri Car Foundry Co.*, 1 Mo. App. 577; *Flanders v. Fay*, 40 Vt. 317; *Bryan v. Hunt*, 4 Sneed (Tenn.) 546; 70 Am. Dec. 262; *Thurston v. Ludwig*, 6 Ohio St. 1; 67 Am. Dec. 328; *Adler v. Friedman*, 16 Cal. 140; *McKinstry v. Runk*, 12 N. J. Eq. 60; *Courtenay v. Fuller*, 65 Me. 158; *Malone v. Dougherty*, 79 Pa. St. 53; *Hogan v. Crawford*, 31 Tex. 635; *Merkle v. Wehrheim*, 32 Ill. 534.

Mutual promises constitute a good consideration. *Thomason v. Dill*, 30 Ala. 456; *McNish v. Reynolds*, 95 Pa. St. 483; *Thurston v. Ludwig*, 6 Ohio St. 1.

In *Adler v. Friedman*, 16 Cal. 140, *Cope, J.*, said: "It is obvious that the new agreement must be valid in itself, and such as may be made the basis of an action."

4. *Falls v. Carpenter*, 1 Dev. & B. Eq. (N. Car.) 273; 28 Am. Dec. 592; *McKinstry v. Runk*, 12 N. J. Eq. 60; *McGrann v. North Lebanon R. Co.*, 29 Pa. St. 89; *Clifford v. Kelly*, 7 Ir. Ch. 333.

Loose and casual conversations, made by one party apart from the other, and which make no allusions to a change of contract, cannot avail to overturn the terms of a written contract. *Smith v. Garth*, 32 Ala. 373.

consideration, no claim, in general, can be maintained with reference to such part payment or part performance, unless specially reserved.¹

b. CONTRACTS UNDER SEAL—(See also *CONTRACT*, vol. 3, p. 892; *RELEASE*, vol. 20, p. 742).—By the strict rule of the common law, a contract under seal could not be modified or waived before breach, by parol agreement, but this has been superseded in *England*, by the supreme court of judicature act by which such parol agreement may be pleaded in answer to the deed; and the tendency of the decisions in the *United States* has been to apply the same rule to sealed instruments as to simple contracts.² In equity the technical rule of the common law was

1. *Lamburn v. Cruden*, 2 M. & G. 253; *Grimman v. Legge*, 8 B. & C. 324; 15 E. C. L. 229. But see *Thomas v. Williams*, 1 A. & E. 685.

In *Lamburn v. Cruden*, 2 M. & G. 253; 40 E. C. L. 358, *Tindal, C. J.*, said: "No new contract arises, by implication of law, upon a simple dissolution of a special contract of hiring and service, in respect of services performed under such special contract previously to its being so dissolved." In *Grimman v. Legge*, 8 B. & C. 324; 15 E. C. L. 229, it was held that where a tenancy at rent payable quarterly, was terminated in the middle of a quarter by mutual consent, the landlord could not recover rent for the whole quarter, or *pro rata*. So, where a partnership between two solicitors was dissolved by mutual consent, unconditionally, it was held that a bill would not lie by one partner against the other for a return of a part of the premium paid by the former to the latter. See *v. Page*, 30 L. J. Ch. 857.

But see *Watkins v. Hodges*, 6 Har. & J. (Md.) 45, where *Martin, J.*, said: "If the original contract was rescinded by the parties after a part performance by the plaintiff, either by waiving the performance of the residue of the contract, or entering into a new one so inconsistent with the first that they could not stand together, the plaintiff might recover for the part performance on a general count."

Waiver or Variation of Partnership Articles.—See *PARTNERSHIP*, vol. 17, p. 904 *et seq.*

2. *Hastings v. Lovejoy*, 140 Mass. 261; 54 Am. Rep. 463; *Holdsworth v. Tucker*, 143 Mass. 374; *Munroe v. Perkins*, 9 Pick. (Mass.) 299; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Blasdel v. Souther*, 6 Gray (Mass.) 51; *Thomason v. Dill*, 30 Ala. 456;

Lattimore v. Harson, 14 Johns. (N. Y.) 330; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Jenks v. Robertson*, 2 Thomp. & C. (N. Y.) 255; *McGrann v. North Lebanon R. Co.*, 29 Pa. St. 89; *Shepherd v. Wysong*, 3 W. Va. 46; *Canal Co. v. Ray*, 101 U. S. 522; *Whiting v. Heslep*, 4 Cal. 327; *McDonald v. Mountain Lake, etc., Co.*, 4 Cal. 336. But see, *contra*, *Loach v. Farnum*, 90 Ill. 369; *Barnett v. Barnes*, 73 Ill. 216; *McMurphy v. Garland*, 47 N. H. 316; *Cabe v. Jameson*, 10 Ired. (N. Car.) 193; 51 Am. Dec. 386; *Smith v. Lewis*, 24 Conn. 641; 63 Am. Dec. 180.

The time for the performance of the condition of a sealed, as well as a simple, contract, may be enlarged by parol. *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Keating v. Price*, 1 Johns. Cas. (N. Y.) 22; 1 Cow. (N. Y.) 250; *Ratcliffe v. Pemberton*, 1 Esp. N. P. Cas. 35.

In *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528, it was held that the strict performance of the condition of a bond might be waived by parol.

In an action for rent reserved in a sealed lease, the lessee may prove in defense that, after the delivery of the lease, the lessor, for a good consideration, entered into a parol agreement that for the future the rent should be reduced. *Hastings v. Lovejoy*, 140 Mass. 261; 50 Am. Rep. 463. But see, *contra*, *Loach v. Farnum*, 90 Ill. 368; *Barnett v. Barnes*, 73 Ill. 216.

In *Holdsworth v. Tucker*, 143 Mass. 374, *Fields, J.*, said: "It may be assumed that in this commonwealth, in an action upon a contract under seal which is executory upon both sides, the defendant may show in defense that, before any part of the contract has been executed, and before a breach, the parties have agreed to vary its terms, and that the defendant offered

always disregarded.¹ A covenant under seal, however, cannot be modified or waived by a parol executory agreement.²

The waiver of a sealed instrument by parol must, as in the case of the waiver of a simple contract, be supported by a sufficient consideration,³ and in a suit upon such modified instrument, the action should be in assumpsit and not in covenant.⁴

to perform the contract as thus varied."

In *Morrill v. Colehour*, 82 Ill. 626, it was said that "the rule seems to be well established that the terms and conditions of a written contract, and even a covenant, may be dispensed with by a verbal agreement founded upon a proper consideration."

1. *Canal Co. v. Ray*, 101 U. S. 522; *Hoffman v. Lee*, 3 Watts (Pa.) 356; *Barnes v. Lloyd*, 1 How. (Miss.) 590; *McCreery v. Day*, 119 N. Y. 1; 16 Am. St. Rep. 793; *Nash v. Armstrong*, 10 C. B. N. S. 259; 100 E. C. L. 258; *Steeds v. Steeds*, 22 Q. B. Div. 537; *Bullen and Leake's Prec. in Pleading* (4th ed), vol. II, p. 80.

In *Canal Co. v. Ray*, 101 U. S. 527, *Strong, J.*, said: "Notwithstanding what was said in some of the old cases, it is now recognized that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity." See SPECIFIC PERFORMANCE, vol. 22, p. 1062.

2. *Coe v. Hobby*, 72 N. Y. 148; 28 Am. Rep. 120; *Delacroix v. Bulkley*, 13 Wend. (N. Y.) 73; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *French v. New*, 28 N. Y. 150; *Barnard v. Darling*, 11 Wend. (N. Y.) 30; *Jenks v. Robertson*, 2 Thomp. & C. (N. Y.) 257; *Miller v. Hemphill*, 9 Ark. 489; *Levy v. Very*, 12 Ark. 148.

3. *Hastings v. Lovejoy*, 140 Mass. 261; 54 Am. Rep. 463; *Loach v. Farnum*, 90 Ill. 370; *Barnard v. Darling*, 11 Wend. (N. Y.) 30; 28 Am. Rep. 120; *Coe v. Hobby*, 72 N. Y. 148.

Where parties, engaging to furnish materials and perform certain work in the erection of a building, claimed that they had made a mistake of five hundred dollars in the price of the same, and refused to go on and complete the contract, and thereupon the other party verbally agreed to pay five hundred dollars in addition to the original contract price, under which the contractors completed the work, it was

held that the new and supplemental agreement to pay five hundred dollars more was not without consideration, and was binding. *Cooke v. Murphy*, 70 Ill. 96. See *Munroe v. Perkins*, 9 Pick. (Mass.) 298.

4. *Vickary v. Moore*, 2 Watts (Pa.) 456; 27 Am. Dec. 323; *Lehigh Coal Co. v. Harlan*, 27 Pa. St. 429; *Carrier v. Dilworth*, 89 Pa. St. 410; *George v. Farr*, 46 N. H. 171; *Dana v. Hancock*, 30 Vt. 619; *Braggs v. Vermont*, etc., R. Co., 31 Vt. 211.

In *Lehigh Coal Co. v. Harlan*, 27 Pa. St. 441, *Woodward, J.*, said: "It is insisted, and so charged in the declaration, that the defendants waived and dispensed with the requirement of their assent in writing. Suppose they did, would covenant then lie upon a sealed instrument so modified by parol? Let it be noticed that this was not a condition precedent to be performed by the plaintiffs, and which the defendants might have waived by parol without impairing the integrity of their covenant, or the plaintiffs' right of action thereon, but it is part of the very covenant sued on—one of the conditions on which the doing of the work, and the consequent liability of the defendants, were suspended, and if it was changed by parol, the defendants' action should have been assumpsit, and not covenant. The distinction is taken in *Vickary v. Moore*, 2 Watts (Pa.) 457; 27 Am. Dec. 323, and followed in other cases between an alteration of the plaintiff's stipulations, being but conditions precedent to the action, and those of the defendant, on which it is directly founded. The performance of the first may be waived, so as to entitle the plaintiff, without more, to an action on the defendant's covenants, but to sustain a count based specifically on covenants, modified by parol, would require us to give to the whole the quality and effect of a specialty. . . . The law of all the cases is, that when a plaintiff sues on a covenant which has been modified by parol in a point essential to the defendant's liability,

c. CONTRACTS WITHIN THE STATUTE OF FRAUDS.—A new agreement altering the terms of a prior written contract within the Statute of Frauds, or discharging or waiving it in part only, is also within the statute, and in order to be binding, must be in writing,¹ even though the alteration, waiver, or discharge may be

the action should be assumpsit, 'the written contract being treated as abandoned, or used no further than to mark the terms and extent of the new stipulations.'"

Thus a parol agreement to accept the delivery of goods at a different place from that stipulated in the covenant, will not render a change in the form of action necessary. *McCombs v. McKennan*, 2 W. & S. (Pa.) 216; 37 Am. Dec. 505.

1. *Goss v. Lord Nugent*, 5 B. & Ad. 66; 27 E. C. L. 33; *Stead v. Dawber*, 10 Ad. & El. 57; 37 E. C. L. 40; *Plevins v. Downing*, 1 C. P. Div. 220; *Noble v. Ward*, L. R., 2 Exch. 135; *Marshall v. Lynn*, 6 M. & W. 109; *Hickman v. Haynes*, L. R., 10 C. P. 598; *Snelling v. Thomas*, L. R., 17 Eq. 303; *Abell v. Munson*, 18 Mich. 306; 100 Am. Dec. 165; *Cook v. Bell*, 18 Mich. 387; *McEwan v. Ortman*, 34 Mich. 325; *Brown v. Sanborn*, 21 Minn. 402; *Blood v. Goodrich*, 9 Wend. (N. Y.) 79; 24 Am. Dec. 121; *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 200; *Schultz v. Bradley*, 57 N. Y. 646; *Long v. Hartwell*, 34 N. J. L. 124; *Espy v. Anderson*, 14 Pa. St. 311; *Ladd v. King*, 1 R. I. 224; 51 Am. Dec. 624; *Emerson v. Slater*, 22 How. (U. S.) 42; *Swain v. Seamens*, 9 Wall. (U. S.) 272; *Dana v. Hancock*, 30 Vt. 617; *Packer v. Steward*, 34 Vt. 130; *Heth v. Woolbridge*, 6 Rand. (Va.) 605; 18 Am. Dec. 751; *Williamson v. Paxton*, 18 Gratt. (Va.) 492; *Phelps v. Seely*, 22 Gratt. (Va.) 585.

Under a contract for the sale of land it is not admissible to prove a subsequent verbal agreement to waive title as to part, *Goss v. Lord Nugent*, 5 B. & Ad. 66; 27 E. C. L. 33; or to substitute a different time for completion, *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 200; 32 E. C. L. 386; *Blood v. Goodrich*, 9 Wend. (N. Y.) 79; 24 Am. Dec. 121; *Stowell v. Robinson*, 3 Bing. N. Cas. 928; 32 E. C. L. 386; or a different mode of payment. *Cook v. Bell*, 18 Mich. 387.

So, under a written contract for the sale of goods, it is not admissible to prove a verbal agreement to extend the time for delivery, *Stead v. Dawber*, 10

Ad. & El. 57; 37 E. C. L. 40; *Plevins v. Downing*, 1 C. P. Div. 220; or to vary the place or mode of delivery, *Moore v. Campbell*, 10 Exch. 323; or to increase the quantity of goods to be delivered. *Schultz v. Bradley*, 57 N. Y. 646.

Under a written contract for service for more than a year at an annual salary, it is inadmissible to prove a subsequent oral agreement to pay the salary quarterly, and the fact that payments have been usually made quarterly does not vary the rights of the parties. *Girland v. Richmond*, 2 C. B. 835; 52 E. L. L. 835.

Parol waiver of a clause of forfeiture in a contract for the sale of land, is not binding. *Williamson v. Paxton*, 18 Gratt. (Va.) 492.

But a condition in such a contract for the benefit of the party to be charged, may be waived orally by him. *Blood v. Hardy*, 15 Me. 61.

Where the vendee has taken a deed of land in which it is agreed that the purchase-money is not to be paid until certain incumbrances are removed, a subsequent oral agreement upon consideration, by which the vendee waives the stipulation as to incumbrances, and agrees to pay the money absolutely, is good, since the deed has been executed and the contract relates merely to the payment of money. *Negley v. Jeffers*, 28 Ohio St. 100.

But where a contract for the sale of goods is taken out of the Statute of Frauds by the payment of earnest money, and, as in this case, is not reduced to writing, it does not contravene the spirit or policy of the statute to allow its terms to be varied by parol, any more than to allow the terms of the original contract to be thus proved. *Packer v. Steward*, 34 Vt. 130.

Dispensation of Performance.—There is a distinction between an alteration in a written contract, and a dispensation or variation of performance acceded to by one party at the request of the other, without any binding agreement to that effect, which may be proved by parol evidence as being equivalent to performance. *Leake's Digest of the Law of Contracts* (1892), p. 691. See *Stead*

in terms, which, taken alone, are not within the statute.¹ This principle is general and applies to contracts required to be in writing by any law.²

The contrary rule prevails in *Massachusetts*, however,³ and in

v. Dawber, 10 Ad. & El. 57; 37 E. C. L. 40, where this distinction is made.

Thus, where the vendor, being ready to deliver within the agreed time, withholds delivery until after the agreed time, at the request of the vendee who afterward refuses to accept delivery, the vendor may recover damages. In such case, it is said that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it. But if the vendor requests delay in delivery, and the vendee assents, the vendor can no longer rely on the original contract, because he cannot aver and prove that he was ready and willing to deliver according to its terms, and he cannot avail himself of the contract as varied, the variation being verbal. *Plevins v. Downing*, 1 C. P. Div. 225; *Tyers v. Rosedale, etc., Iron Co., L. R.*, 10 Exch. 195.

So, if the vendee, being ready and willing to accept, assents to postponement of delivery to accommodate the vendor, and at his request, he performs as against the vendor, who is estopped from objecting to the delay. *Ogle v. Vane, L. R.*, 3 Q. B. 272. For other cases which seem to illustrate this distinction between a dispensation acceded to, and an agreement varying the prior contract, see *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Keating v. Price*, 1 Johns. Cas. (N. Y.) 22; 1 Am. Dec. 92; *Hassbrouck v. Tappen*, 15 Johns. (N. Y.) 204. See also, upon this subject, *SALES*, vol. 21, p. 537 *et seq.*

One who verbally assents to extend the time for the performance of a written contract for the sale of land, and thereby puts the other off his guard, will be estopped from taking advantage of the nonperformance at the time agreed. *Longfellow v. Moore*, 102 Ill. 289.

1. The agreement being entire, a parol waiver of any terms must be in writing, no difference being made between terms within the statute, and terms, which taken alone, are not. *Harvey v. Grabham*, 5 Ad. & El. 61; 31 E. C. L. 270; *Dana v. Hancock*, 30 Vt. 617.

Every part of the contract, in regard to which the parties are stipulating,

must be taken to be material. *Marshall v. Lynn*, 6 M. & W. 117.

In *Dyer v. Graves*, 37 Vt. 375, Barrett, J., said: "The books show that, in case a contract for the sale of land, or of an interest in, or concerning land, embraces some subject-matter of a different character, which stands in the contract upon a distinct consideration, so that the contract, both in the subject-matter and the consideration, is divisible and separable, such contract, though not in writing, may be enforced by suit, as to such part of it as does not fall within the operation of the Statute of Frauds; while that statute would effectually preclude an action upon the other part of it." And see *Ladd v. King*, 1 R. I. 226; 51 Am. Dec. 624.

2. *Adler v. Friedman*, 16 Cal. 140; *Jones v. U. S.*, 11 Ct. of Cl. 740; *Simonton v. Liverpool, etc., Ins. Co.*, 51 Ga. 80; *Mitchell v. Universal L. Ins. Co.*, 54 Ga. 290. See also *Rigsbee v. Bowler*, 17 Ind. 169.

3. A contrary view prevails in *Massachusetts*, where it is held that contracts within the Statute of Frauds may be varied in any of their terms by subsequent oral agreement, thus placing such contracts upon the same footing as contracts not affected by the statute. *Cummings v. Arnold*, 3 Met. (Mass.) 486; 37 Am. Dec. 155; *Hastings v. Lovejoy*, 140 Mass. 261; 54 Am. Dec. 463. And see *Blanchard v. Trim*, 38 N. Y. 227, citing, with approval, *Cummings v. Arnold*, 3 Met. (Mass.) 486; 37 Am. Dec. 155. This latter case was, however, thus criticized by *Greene, C. J.*, in *Ladd v. King*, 1 R. I. 224; 51 Am. Dec. 624: "This reasoning does not appear to us to be satisfactory. If the agreement for substituted performance has been performed by the one party, and received by the other, then undoubtedly it is an accord and satisfaction of the written contract. But a tender of performance of the substituted agreement, not accepted by the other party, is no accord and satisfaction; and, if not received, it is then executory and performance can only be enforced by suit. In such a state of things, which is in force, the original written, or the substituted verbal, contract? If A and

equity part performance of such new oral agreement may take it out of the statute and admit it to proof in answer to a claim for the execution of the original contract;¹ and the acceptance of a substituted performance agreed upon by parol, may be set up in defense in a suit on the written contract.²

By general agreement of authority, a total waiver, discharge, or rescission of the prior written contract, may be made by subsequent verbal agreement.³

B contract in writing for the sale to B of Black-acre, and, afterward, by parol, they agree that the sale should be of White-acre instead of Black-acre, and A offers to convey to B White-acre, according to verbal agreement, and B refuses to receive it, and sues A on the written contract for the sale of Black-acre, can B set up the verbal contract and his tender of performance of it, as a bar to the action? Is the verbal agreement of any more force because performance has been tendered? . . . Upon the principle adopted by the supreme court of *Massachusetts*, the purchaser under a written contract may be deprived of the land he agreed for, and compelled, upon the strength of a subsequent verbal agreement of which performance has been tendered, to accept other land. We think if the performance is changed the contract is changed; that when there is a substituted performance agreed upon, whether as to time or subject-matter, there is a substituted contract, and, if it relates to land, it must be in writing."

1. *Legal v. Miller*, 2 Ves. 299; *Price v. Dyer*, 17 Ves. 364; *Stowtenburgh v. Tompkins*, 9 N. J. Eq. 337. See also *Williamson v. Paxton*, 18 Gratt. (Va.) 492.

2. A substituted performance agreed upon by parol actually performed and accepted, may be set up in defense in a suit in the written contract, as being equivalent to the performance stipulated for. *Long v. Hartwell*, 34 N. J. L. 124; *Leather Cloth Co. v. Hieronimus*, L. R., 10 Q. B. 140.

And it may be shown in defense, in a suit upon the written contract, that performance was waived by the plaintiff verbally. And after performance is due, a substituted performance may discharge liability by way of accord and satisfaction. *Lawrence v. Dole*, 11 Vt. 555; *Dana v. Hancock*, 30 Vt. 620.

3. *Gorman v. Salisbury*, 1 Vern. 240; *Price v. Dyer*, 17 Ves. 363; *Clifford v.*

Kelly, 7 Ir. Ch. 333; *Gilbert v. Hall*, 1 L. J. N. S. Ch. 15; *Robinson v. Page*, 3 Russ. 119; *Goss v. Lord Nugent*, 5 B. & Ad. 65; 27 E. C. L. 33; *Morrill v. Colehour*, 82 Ill. 626; *Bowman v. Cunningham*, 78 Ill. 48; *Tolson v. Tolson*, 10 Mo. 736; *Buel v. Miller*, 4 N. H. 196; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 429; 7 Am. Dec. 499; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Baldwin v. Salter*, 8 Paige (N. Y.) 475; *Long v. Hartwell*, 34 N. J. L. 125; *King v. Morford*, 1 N. J. Eq. 274; *Negley v. Jeffers*, 28 Ohio St. 100; *Guthrie v. Thompson*, 1 Oregon 353; *Lucas v. Mitchell*, 3 A. K. Marsh. (Ky.) 244; *Oug v. Campbell*, 6 Watts (Pa.) 396; *Boyce v. McCullough*, 3 W. & S. (Pa.) 429; 39 Am. Dec. 35; *Shoofstall v. Adams*, 2 Grant (Pa.) 213; *Espy v. Anderson*, 14 Pa. St. 311; *Dayton v. Newman*, 19 Pa. St. 196; *Kline's Appeal*, 39 Pa. St. 468; *Garver v. McNulty*, 39 Pa. St. 485; *Lauer v. Lee*, 42 Pa. St. 172; *Raffensberger v. Cullison*, 28 Pa. St. 426; *Fleming v. Martin*, 2 Head (Tenn.) 49; *Walker v. Wheatly*, 2 Humph. (Tenn.) 119. But see *Huffman v. Hummer*, 18 N. J. Eq. 90; *Wilkins v. Evans*, 1 Del. Ch. 165.

In *Texas*, it has been held that an agreement to rescind an executory contract relating to land must be in writing. *Dial v. Crain*, 10 Tex. 454. See also *Jevne v. Osgood*, 57 Ill. 340.

Specific performance is refused where by parol a new contract is substituted for the old, and if the defendant does not set up the statute, and admits the second or substituted contract, specific performance will be decreed of the latter. *Ryno v. Darby*, 20 N. J. Eq. 231.

Proof of the oral waiver or rescission must be clear and convincing. *Clifford v. Kelly*, 7 Ir. Ch. 333; *Buckhouse v. Crossby*, 2 Eq. Cas. Abr. 32; *Price v. Dyer*, 17 Ves. 363; *Robinson v. Page*, 3 Russ. 119; *Walker v. Wheatly*, 2 Humph. (Tenn.) 124.

2. **Vendor and Purchaser**—*a*. **WAIVER OF RIGHT TO OBJECT TO TITLE.**—The purchaser of land may waive his right to object to the title of the vendor either expressly,¹ or by implication arising from his conduct, as by entering into possession and exercising acts of ownership,² continuing in possession an unreasonable

1. See *Blacklow v. Laws*, 2 Hare 40; *Oakden v. Pike*, 34 L. J. Ch. 620; *Want v. Stallibrass*, L. R., 8 Exch. 175; *In re Tanqueray-Willauime*, 20 Ch. Div. 465. In these cases the agreement of the parties contained a stipulation that all objections not sent in within a certain time after the delivery of the abstract should be considered as waived.

Such a stipulation contemplates the delivery of a complete abstract, and the time limited for taking objections runs only from the delivery of such abstract. *Want v. Stallibrass*, L. R., 8 Exch. 175, *Kelly, C. B.*; *Blacklow v. Laws*, 2 Hare 40.

If the vendor, after the time specified for sending in objections, receives objections and requisitions, and negotiates upon them with the vendee, and does not insist upon the stipulation, he waives it. *Oakden v. Pike*, 34 L. J. Ch. 620.

In *Want v. Stallibrass*, L. R., 8 Exch. 175, the contract of sale provided that the vendor should deliver an abstract of title within seven days, and that all objections not delivered within fourteen days after the delivery of the abstract should be considered as waived, and that the deposit of the vendee should be forfeited in case of his failure to comply with the conditions of the contract. The vendee paid a deposit, and the vendor delivered an abstract within seven days, which showed that he had no title to the premises. More than fourteen days after, the vendee objected to the title. Upon suit by the vendee to recover his deposit, it was held by *Kelly, C. B.*, that he might recover on the ground that no complete abstract had been delivered, and that, therefore, the time limited for taking objections had never begun to run; by *Pollock, B.*, on the ground that the stipulation did not apply to the case of the vendor's being unable to give any title, but only to objections which might have been properly enforced against a vendor who had a title. "The basis of the contract," said *Pollock, B.*, "is that the vendor has a title, and, although parties might, by their conditions of sale, waive even this, I do not think the plaintiff has done

so; on the contrary, it appears to me that by failing to give any objection or requisition within the stipulated time, he cannot be taken to have waived that which was the foundation of the whole contract, and which, on the face of the defendant's own abstract, is shown not to exist." And see *In re Tanqueray-Willauime*, 20 Ch. Div. 473, to the effect that such a stipulation does not prevent a purchaser from raising, after the time limited, an objection "going to the root of the title."

2. A vendee under a contract for the purchase of a lease, waives his right to call for the production of the lessor's title by paying part of the purchase-money, entering into possession, and mortgaging his interest. *Hayden v. Bell*, 1 Beav. 337.

A purchaser under a contract containing no provision as to possession, took possession of the premises immediately after the signing of the contract, and, after having notice of certain defects in the title irremovable by the vendor, continued in possession and made considerable structural alterations in the house. The court held that he had waived his right to require the removal of the defects, or to repudiate the contract. *In re Gloag's Contract*, 23 Ch. Div. 320. Here *Fry, J.*, said: "Before considering the facts of this case, I will take the opportunity of observing that, in my judgment, there is a broad distinction between cases in which the contract provides that a good title shall be shown, and also provides that possession may be taken by the purchaser before the title is completed, and cases in which the purchaser takes possession without any express stipulations in the contract. And, again, there is a broad distinction with reference to acts which may amount to a waiver of the right to insist on a good title, between cases in which the objections to the title of which the purchaser knows are removable by the vendor, and cases in which they are irremovable. For instance, if the purchaser takes possession knowing that the vendor has mortgaged the property, this will not amount to a

length of time before objecting to the title as set forth in the abstract,¹ or by accepting a deed from the vendor without objec-

waiver of his right to have the mortgage paid off by the vendor. On the other hand, if a purchaser knew that the estate which he had agreed to purchase was subject to a right of sporting over it, vested in some third person over whom the vendor had no control, taking possession, by the purchaser, with knowledge of the existence of this right, would be a waiver of his right to call for the release of the sporting right, or to repudiate his contract if it could not be released."

1. A vendee, being a tenant already in possession, waives his right to object to the title, and accepts the same by retaining the abstract for five months without objection, and on being required by the vendor to complete within fourteen days, by merely asking for the production of the title deeds to verify the abstract. *Pegg v. Wisden*, 16 Beav. 239

The defendant, after being let into possession in accordance with the terms of the contract of purchase, received the abstract of title and made no objection to it for more than two years, in which time he made alterations in the premises and let them, and also wrote to the plaintiff several times asking for indulgence, and promising to pay the purchase-money. The court held that he had waived his right to an examination of the title. *Margravine of Anspach v. Noel*, 1 Madd. 172.

The defendant, having contracted to purchase the premises in 1814, entered into possession shortly after, and thenceforth remained in possession, the vendor filing his bill for specific performance in 1833. Repeated applications were made to the defendant to complete the purchase, or to state objections to the title. The defendant stated certain frivolous objections, and finally refused to have any further discussion of the matter. The court held that the defendant, by continuing in possession under such circumstances, had waived any objections to the title. *Hall v. Laver*, 3 Y. & C. 197.

The defendant, having agreed to take an underlease, took possession, with the knowledge and consent of the plaintiff, of part of the premises, about a month before the date fixed by the agreement for his entering into posses-

sion, being let into possession of the remainder of the premises at the date so fixed. The defendant, prior to his taking possession, had raised objections to the title, which were afterward the subject of correspondence and discussion, down to the time when the defendant refused to complete his purchase. The court held that possession thus taken amounted only to evidence of an acceptance of title, which might be rebutted by circumstances showing that it was not intended by the parties to have that effect; and that the conduct of the parties showed conclusively that there was no such intention in this case. *Hyde v. Warden*, 3 Exch. Div. 72. Compare *Kountze v. Helmuth*, 67 Hun (N. Y.) 343.

The defendants in 1849 purchased an equity of redemption, the agreement containing a stipulation for immediate possession and for the delivery of an abstract when required by the defendants at their expense, and also an agreement by the defendants to indemnify the vendor against the payment of the mortgage and interest. The defendants took possession in 1850 and remained in possession until 1852. They had never required an abstract, and had allowed the mortgage interest to fall in arrears, and the mortgagees had sued the vendors and had notified the tenants to pay rent to them. The court held that the defendants had lost the right to investigate the title, and specific performance was decreed with costs. *Sibbald v. Lowrie*, 18 Jur. 141. In this case, Stuart, V. C., said: "If the agreement for the purchase stipulated for immediate possession, and also for the delivery of an abstract, the mere taking possession according to the terms of the agreement was no waiver of the right to investigate the abstract, which must be taken to show a good title; but although that was the general rule, still the acts and conduct of the parties might materially vary their rights. In the case cited of *Margravine of Anspach v. Noel*, 1 Madd. 172, there was an instance."

Where the purchaser, at his own request, and not under the contract of sale, took possession of the premises after an abstract had been delivered, promised to pay part of the purchase-money, and made no objection to the

tion.¹ But merely taking possession in pursuance of a stipula-

title until long after when suit was threatened, it was held that he had waived all objections apparent upon the abstract delivered, but not any objection not so appearing on the abstract. *Bown v. Stenson*, 24 Beav. 631. In this case, the Master of the Rolls said: "*Prima facie*; however, taking possession after an abstract had been delivered, and not in pursuance of any provision in the conditions of sale, is a waiver of the objections appearing on that abstract, and it lies on the purchaser to rebut this presumption. This is not to be done by merely saying, at a subsequent time, 'I did not so intend,' it must be shown that the presumption is rebutted by a fair inference to be derived from the acts of the person himself. The rule, it is to be observed, is founded on reason, because after the purchaser has taken possession of the property it may become altered, dilapidated, or employed for injurious purposes. To all which the vendor can say nothing, if the property really belongs to the purchaser, which it does when he has accepted the title. Where possession is taken under the conditions of sale, before the title is shown, if anything like waste is committed, the vendor would be entitled to an injunction to prevent it; but in the other case no injunction would be granted. The question is not, in fact, as stated in argument, whether the defendant has waived having a good title thereon to the property he has bought, but whether, an abstract of the title being delivered to him, he has not waived his right of calling on the vendor to remove any objection which may appear on the face of it. If the abstract had been merely illusory, another question might have arisen, viz., whether his acts amounted to an intention to perform the contract without any title at all. . . . I repeat that if the defendant had brought forward any objection to the title not appearing in the abstract, I should not have compelled him to complete the contract till that objection had been removed."

1. A vendee may be held to have waived an objection to a deed by not insisting on it at the time, and continuing negotiations on other matters of the sale. *Dresel v. Jordan*, 104 Mass. 407. And see *Kenniston v. Blakie*, 121 Mass. 552.

In *Morgan v. Stearns*, 40 Cal. 438, Wallace, J., said: "There is no doubt that it is not such a deed as the contract of sale had provided for. But the objection will not avail the defendant, for several reasons. The first is, that he made no objection to it at the time, on these or any other grounds. If he had made such an objection, the plaintiff might have prepared another in accordance with the exact terms of the contract in these particulars. A party who intends to object to the proposed conveyance, under such circumstances, will be held to do so at the time of its presentation, or he may take time to consider it, or to consult counsel, but he cannot be permitted to retain the proposed deed without objection, or reservation of the right to object, and afterward, when sued for a breach, set up the objection for the first time, in answer to the action."

Where the vendor tenders a deed to the vendee, and the vendee makes no objection to the deed, does not examine it, nor express a willingness to accept a proper deed, but merely declares his inability to pay for the land, he waives all objections to the deed tendered, and cannot interpose the objections when sued. *Moak v. Bryant*, 51 Miss. 560.

If a lease tendered for acceptance differs in various particulars from the form agreed upon by the parties, and the proposed lessee, without objecting thereto, expresses his unwillingness to accept a lease in any form, he may be found to have waived a strict compliance by the lessor with the terms of the agreement. *Freeland v. Ritz*, 154 Mass. 257.

In a suit by the vendor against the vendee upon the contract, it was held error in the court to refuse to admit evidence that, when the vendor tendered the deed and bond in fulfillment of his part, no objection was made to either, for form or substance. *Cooley, C. J.*, said that "a failure to object would not be conclusive on the question of waiver of objections, but it would be an important circumstance to submit to the jury" and that the "waiver ought to be very full and distinct before it should be received as satisfactory." *Gault v. Van Zile*, 37 Mich. 22.

Under a contract providing for possession by the vendee and for the placing of the title deeds in escrow, to be de-

tion in the contract is a matter of little significance,¹ and one is not precluded from objecting to a title by the fact that his counsel has approved of it.² A purchaser, by declining to proceed with the performance of a contract of sale, waives his right to require a tender of a deed from the vendor.³

livered when all the payments had been made, it was held that the vendee had waived all formal objections to the deeds by possession of the premises for four years, and by part payment of the purchase-money after the deposit of the deeds in escrow, without objection. *Thayer v. Torrey*, 37 N. J. L. 339.

In *Gerrish v. Norris*, 9 Cush. (Mass.) 167, Dewey, J., said: "If a party, who is, by his covenant, bound to receive a deed from another, makes specific objections to the deed, this is a waiver of all others that are of such a nature that, if stated by the party, they might have been obviated by him who was to deliver the deed. In such case, if the objection taken be removed, the others are to be treated as waived." See, as modifying this statement, *Holdsworth v. Tucker*, 143 Mass. 369. In this latter case, an action on a bond for the conveyance of a parcel of land, it appeared that one of the boundaries of the land described in the bond was "southerly by F. St.," and that the boundary, as given in the deed tendered, was "south by the north line of contemplated F. St." When the parties met before the trial, the only objection made by the plaintiff to this description was to the word "contemplated." At the trial the plaintiff took the objection for the first time that the description in the deed did not convey the land to the center of the street. On the question whether the plaintiff had waived this objection, the judge instructed the jury in effect that, if the plaintiff was willing to accept the deed if the word "contemplated" was stricken out, she waived the substantial mistake in the boundary of the land whether she knew it or not. It was held that this ruling was erroneous—that the jury could not properly find that the plaintiff waived the defect in the deed, unless they found she knew of it, and assented to the change in the boundary. Such assent need not be expressed in terms, but it must be found to have existed as a fact. Of *Gerrish v. Norris*, 9 Cush. (Mass.) 167, the court said: "The justice who presided at the trial did not rule that the defendant by not taking the objection

to the deed at the time it was tendered, which he now raises, waived the objection, but submitted the question of waiver to the jury. The statement in the first paragraph of the opinion, however, is too broad if applied to substantial changes in contracts, and seems to have misled the presiding justice in the case at bar."

1. The taking possession, where in pursuance of a stipulation in the contract providing for such taking before completion, is a matter of little significance in determining whether the purchaser has accepted the title. See *Sibbald v. Lowrie*, 18 Jur. 141; *Bown v. Stenson*, 24 Beav. 631; *In re Gloag's Contract*, 23 Ch. Div. 320; *Wright v. Griffith*, 1 Ir. Ch. 703; *Page v. Greeley*, 75 Ill. 400; *Osborne v. Harvey*, 1 Y. & C. C. 116. In this last case it was held that the purchaser, who had entered into possession by virtue of the conditions of sale, had not waived his right to object to the title by stubbing up an osier bed, levelling part of the land, and filling up a frud.

2. *Deverell v. Botton*, 18 Ves. 514. See *McCulloch v. Gregory*, 1 K. & J. 286, 292.

3. Land that without the owner's knowledge was under attachment, was sold at auction, ten days being "allowed to examine the title, within which time the property must be settled for at the office of the auctioneer." The attachment was not discharged within ten days, but within that time the purchaser wrote to the auctioneer, declining "to proceed further in the matter," as he considered "the whole proceeding invalid." In an action upon the contract against the purchaser to recover damages for nonperformance, it was held that his letter was a waiver of his right to object that there was an incumbrance upon the land, and that being an absolute refusal to perform, it excused the vendor from tendering a deed, or discharging the incumbrance so as to be in condition to convey a good title. See *Carpenter v. Holcomb*, 105 Mass. 280.

Where the purchaser refused to perform the contract on the ground of a specific objection to the title, which

But the question of implied waiver is one of fact depending upon the intention of the purchaser, to be determined upon by the circumstances of the case.¹ In order that the waiver may be conclusive, the purchaser must have known of the objection to the title,² and even though he may have accept-

proved to be insufficient, it was held, upon a suit by him to recover part of the purchase-money paid by him, that he could not afterward avail himself of the fact that the seller had not procured a mortgage on the premises to be discharged, and had not gone through the formality of tendering a deed, the court saying that the seller "was not required to go through the useless ceremony of discharging the mortgage and tendering to the plaintiff a deed which he had notified the defendant would not be accepted." *Galvin v. Collins*, 128 Mass. 525.

1. *Burroughs v. Oakley*, 3 Swanst. 159; *Simpson v. Ladd*, 4 De G. M. & G. 673; *Blacklow v. Laws*, 2 Hare 40, 47; *Page v. Greeley*, 75 Ill. 400. See *Bown v. Stenson*, 24 Beav. 631.

In *Burroughs v. Oakley*, 3 Swanst. 159, the Master of the Rolls said: "In proceeding to consider the effect of the evidence, a court of equity called on to enforce specific performance of an agreement for the conveyance of an estate to one party, and payment of the purchase-money to the other, must feel anxiety to protect the purchaser, and give to him reasonable security for his title; not compelling him to take a title without knowing whether it is good or bad. The vendor, if his title is good, suffers only the temporary inconvenience of delay, but the vendee, if it is bad, may sustain a severe loss. The inclination of the court, therefore, is in favor of the vendee, and a vendor claiming to be excepted from the general rule, is required clearly to establish a case of exception. . . . The decisions in *Fleetwood v. Green*, 15 Ves. 594, and the other cases cited, *Margrave v. Anspach v. Noel*, 1 Madd. 172, and *Fordyce v. Ford*, 4 Bro. C. C. 495, are founded not so much in a rule of equity, limiting a time within which objections must be taken, and visiting delay with punishment, as on a conclusion of fact, the court being satisfied that the purchaser intended to waive, and has actually waived, his right of examining the title. When the court is convinced that it is the just conclusion from the facts of the case, then, and

then only, it is authorized in denying to the purchaser his ordinary equitable right. The question, therefore, is one of fact; what is sufficient to authorize that denial?"

2. Knowledge of Defects Necessary.—

A vendee does not waive objections to the title by taking possession, if he is ignorant of the defects in the title. *Gans v. Renshaw*, 2 Pa. St. 34; 44 Am. Dec. 152.

In *Jones v. Taylor*, 7 Tex. 244; 56 Am. Dec. 48, *Hemphill, C. J.*, said: "The contract, in this case, is executory; and though the vendee went into and remained in possession, yet this does not amount, of itself, to a waiver of objections to the title. There must be other circumstances, such as show that he had a knowledge of its defects, and intended to accept such title as could be made, relying, in case of failure, upon the covenants of warranty, for redress." To the same effect, see also *Cooper v. Singleton*, 19 Tex. 260; 70 Am. Dec. 333.

In *Jenkins v. Hiles*, 6 Ves. 655n, *Lord Eldon* said: "The court will at least take care that, where it is contended that the defendant has waived his right to a reference, it shall be clear that there was no surprise upon him, and that there has been a full and fair representation as to the title, on the part of the plaintiff."

A purchaser is bound by his acceptance of the title so far only as he is made cognizant of it, and if anything is kept back by the vendor, he is not, as to that, bound by his acceptance. *Bousfield v. Hodges*, 33 Beav. 90.

A purchaser under a decree accepted the title and paid his money into court. Afterward it was discovered that a will had been misstated in the abstract in such a way as to mislead the counsel and conceal a defect in the title. Upon petition before conveyance, the purchaser was discharged, and the purchase-money was ordered to be repaid; but as his solicitor had neglected to examine the original will, although the abstract showed it was peculiar, and although reminded of the necessity of so doing by counsel advising

ed,¹ or, by his conduct, waived his right of inquiry into the title,² yet if it subsequently appears before completion that the vendor cannot give a good title, the court will not, knowing the title to be bad, force a conveyance upon the purchaser. And acceptance of the title which will prevent the purchaser from getting rid of his purchase on account of a defect, will not preclude him necessarily from compensation for such defect,³ though his conduct may be such as to deprive him of this latter right.⁴ Where the vendor

upon the abstract, it was held that he was not entitled to interest, and that he must pay the costs of all the parties except the vendor. *McCulloch v. Gregory*, 1 K. & J. 294. See *Bown v. Stenson*, 24 Beav. 631, where it was held that the purchaser by his conduct, subsequent to the delivery of the abstract, waived defects appearing upon the abstract, but not defects not so appearing.

"It is obvious that acts, to amount to the waiver of an objection before it is known, must be very strong and distinct; such acts, in short, as are equivalent to a declaration by the purchaser that he has taken the estate at all possible risks, and considers himself as the absolute and unconditional owner of it, and so preclude any investigation at all." *Fry on Specific Performance* (3d Eng. ed.), § 1350. See *Dixon v. Astley*, 1 Meriv. 133, to the effect that where the defendant knows of the objections to title, slighter acts of ownership committed by him are sufficient than might be necessary when the objections were unknown.

1. Even though the parties have approved of the title and acquiesced in it, if, in the interval before the contract is completed, and while the purchase-money is in the hands of one party, and the legal estate in the other, it turns out that the vendor has no title, the court will not order a conveyance to be made and accepted. *Blatchford v. Kirkpatrick*, 6 Beav. 236.

After the purchaser of an estate sold under a decree had approved of the title, a deed was discovered which showed that the plaintiff could not make a title to more than a moiety of the estate. The court discharged the purchaser from his purchase. *Ward v. Trathen*, 14 Sim. 82.

2. See *Warren v. Richardson*, *Younge* 1, where *Bacon, L. C.*, said: "This is a suit for specific performance. The court was of opinion that the defendant had waived what he would

otherwise most clearly have had a right to—an inquiry into the plaintiff's title, that is, into his power to make a valid lease, according to his agreement; in other words, to put upon the plaintiff the burden of showing his title, and proving it to be a safe one. Though the court thought the defendant had by his conduct waived the right, it has now come out collaterally, but I think clearly, that the plaintiff cannot make a title according to his contract. It would be a great hardship upon a party, to force him to accept a title which is ascertained to be defective. . . . What creates the difficulty in this case is, that the conduct of the party had barred his right to the usual investigation into the title; and this defect is a defect of title. . . . I think that the more just course, and the best supported by the rules prevailing on this subject of specific performance, and which is sustained by the greatest variety of analogies, is, in consequence of its appearing that the plaintiff cannot make the defendant a good title, to refuse a decree for a specific performance. A waiver of the defendant's right to make the plaintiff produce his title does not seem necessarily to import that he will accept the title, though it should manifestly appear to be bad."

3. *Hughes v. Jones*, 3 De G. F. & J. 316, *Turner, L. J.*

4. In *Burnell v. Brown*, 1 J. & W. 168, upon a bill by the vendor for specific performance to compel the completion of the purchase of an estate, the vendee admitted the agreement, but claimed a deduction from the price, as compensation for a right of sporting reserved over the estate. This right was not mentioned in the particulars of sale, but was stated in an abstract delivered to the defendant. After the abstract was delivered, the defendant took possession on his own request, and several letters passed between the plaintiff and defendant, and the greater part of the purchase price was paid,

brings a bill for specific performance and relies upon a waiver of objection to the title by the purchaser, he must frame his bill so as to put the question in issue, or evidence to prove the waiver will not be received.¹

b. WAIVER OF STRICT PERFORMANCE WHERE TIME IS OF THE ESSENCE—(See also SPECIFIC PERFORMANCE, vol. 22, p. 1059).—Where time is of the essence of the contract, strict performance, according to the terms of the agreement, may be waived by expressly extending the time for performance,² or by a course of conduct inconsistent with an intention of insisting upon such performance.³

without objection to the right. The court held that the defendant had waived the objection and was not entitled to the reduction. See the remarks of Fry, J., with reference to removable and irremovable defects, in *Gloag's Contract*, 23 Ch. Div. 320, in which this case is cited.

1. *Page v. Greeley*, 75 Ill. 400, *citing* *Clive v. Beaumont*, 1 De G. & S. 397; *Gaston v. Frankum*, 2 De G. & S. 501.

2. The right to insist upon completion at the stipulated time is waived by extending the time for completion. But the substituted time is of the essence, if time was originally essential, the extension not operating as a destruction of its essential character. *Barclay v. Messenger*, 43 L. J. Ch. 449.

Where the vendor told the vendee that he would not insist upon forfeiture, and the latter in consequence allowed the payments to become in arrears and made valuable improvements, it was held that the vendor had waived his right to declare a forfeiture. *Blair v. Blair*, 48 Iowa 393.

3. Where the contract contained a stipulation that the abstract should be delivered immediately, and that if the purchase was not completed by a day specified, the purchaser should be released, and the abstract was not delivered immediately, but at a time when it was impossible for the title to be completed within the time limited, and communications on the subject of title continued after the day specified for completion, the stipulation as to time was held to have been waived by the purchaser. *Hipwell v. Knight*, 1 Y. & C. 401.

In *Hipwell v. Knight*, 1 Y. & C. 401, 418, *Anderson, B.*, said: "One result of the cases on this subject seems undoubtedly to be, that slight circum-

stances are sufficient in a court of equity to prevent a party from taking the benefit of such a stipulation, and that whenever a party has done any act inconsistent with the supposition, that he continues to hold his opponent strictly to this part of the agreement, he is to be taken to have waived it altogether."

Title is waived by continuing the negotiations as to the purchase after the day fixed for completion, whether of the essence originally, *Webb v. Hughes*, L. R., 10 Eq. 281; or made so by virtue of notice, *King v. Wilson*, 6 Beav. 124; unless the negotiations are expressed to be "without prejudice to the right to rescind." *Tilley v. Thomas*, L. R., 3 Ch. 61. See *Magenis v. Fallon*, 2 Moll. 576.

In *Webb v. Hughes*, L. R., 10 Eq. 281, *Malins, V. C.*, said: "But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may, in a reasonable manner, give notice to the vendor, and fix a period at which the business is to be terminated. But having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown."

Treating the contract as subsisting after the time fixed for completion, as by claiming rent under the agreement,

c. **WAIVER OF VENDOR'S RIGHT TO RESCIND.**—A vendor, having the right to rescind a contract for the sale of land, upon the purchaser's making any objection or requisition as to the title, which he is unable or unwilling to remove or comply with, waives such right by continuing to treat with the purchaser after he has made such objection.¹

d. **WAIVER OF VENDOR'S LIEN.**—See *infra*, this title, *Waiver of Liens*.

waives the delay. *Hudson v. Bartram*, 3 Madd. 440.

A subsequent offer to fulfill the contract and urging compliance on the other side, instead of treating the contract as at an end, amounts to a waiver. *Jordan v. Rhodes*, 24 Ga. 478.

Where the vendor gave a bond for a deed and took four notes from the vendee, it was held that he had waived the forfeiture and preserved the contract in force by suing upon the first two notes after they fell due. *Baker v. Bishop Hill Colony*, 45 Ill. 264.

Allowing the deposit to remain in the vendor's hands will not deprive the vendee of his right to insist upon rescission, where he has taken other sufficient steps for the purpose. *Southcombe v. Bishop of Exeter*, 6 Hare 224.

On the sale of an interest in a public house, the fixtures to be taken at a valuation, the purchase price and the amount fixed by the valuation to be paid on or before a certain day, the plaintiff paid a deposit, which was to be forfeited if he did not complete his part of the agreement. On the day fixed by the agreement for completion, the plaintiff's appraiser informed the defendant's appraiser that he could not attend to finish the valuation on that day, but would do so the next day, when the plaintiff would be ready with the purchase-money. This communication was received without objection. The defendant the next day refused to allow the valuation to proceed, and it was held that the defendant could not insist upon the forfeiture, and that the plaintiff could recover his deposit. *Carpenter v. Blandford*, 4 Man. & Ry. 93.

Receipt of payments on account of the purchase-money, after the day stipulated, is a waiver of the right to insist upon forfeiture. *Stewart v. Cross*, 66 Ala. 22; *Stow v. Russell*, 36 Ill. 18.

But the receipt of overdue install-

ments, while waiving forfeiture as respects such overdue installments, will not operate as a waiver of the right to declare a forfeiture for the nonpayment of installments, subsequently due. *Lent v. Burlington, etc., R. Co.*, 11 Neb. 201.

The fact that the vendor has before indulged the vendee by accepting overdue payments, is no excuse for a failure to pay promptly, and will not prevent the vendor from declaring a forfeiture. *Phelps v. Illinois, etc., R. Co.*, 63 Ill. 468.

Mere delay in giving notice under a contract giving the vendor the right to declare the contract forfeited by giving notice, is not a waiver of the right. *Kerns v. McKean*, 65 Cal. 411.

1. A condition not uncommon is that allowing the vendor to rescind, upon the vendee's taking any objection or making any requisition as to title with which the vendor is unable or unwilling to remove or comply. The vendor waives this condition by continuing to treat with the vendee for the completion of the purchase, after the vendee has taken his objections or made his requisitions. *Bowman v. Hyland*, 8 Ch. Div. 588; *Morley v. Cook*, 2 Hare 106; *Tanner v. Smith*, 10 Sim. 410.

The vendor, by bringing a bill for specific performance, waives his right to rescind in respect of requisitions made before the bringing of the bill, but he may rescind on account of an objection raised by the answer to the bill. *Gray v. Fowler, L. R.*, 8 Exch. 249.

Where the vendee insists upon his requisitions, after the vendor has declined to comply with them, the latter may rescind the sale without giving the vendee time within which to waive his requisitions. *Duddell v. Simpson, L. R.*, 2 Ch. 102; *In re Dames*, 27 Ch. Div. 172; 29 Ch. Div. 626.

In *Morley v. Cook*, 2 Hare 111, it was said that conditions of this kind ought to be discouraged, and ought not to receive a construction oppressive on the purchaser.

3. Sales—*a*. ACCEPTANCE OF GOODS AS WAIVING DEFAULT.—The acceptance of goods under pressure of necessity will not operate as a waiver of the buyer's right to damages for a breach of the contract of sale.¹

1. See IMPLIED WARRANTY, vol. 10, pp. 105-108; SALES, vol. 21, p. 652; LATENT DEFECTS, vol. 12, pp. 929, 930.

The question of waiver is largely one of intention, each case depending upon its own special facts. A voluntary acceptance, without objection, of a purchase article, where there are no compulsory circumstances necessitating such acceptance, and no special damages to be occasioned thereby, may properly be regarded as evincing an intention to waive the time specified for delivery. But where the circumstances are such as to show that the acceptance can in no just sense be regarded as voluntary, but rather as compulsory, the presumption of an intention to waive does not arise. *Ramsey v. Tully*, 12 Ill. App. 463. In this case the appellants were engaged in the construction of a public work, for the completion of which they had given bonds. The work was but half finished, and they could obtain brick of the requisite quality nowhere but from the appellees. They notified them of their necessities and requested them to comply with their contract. It was held that an acceptance, under such circumstances, after the time for delivery had passed, could not be said to be voluntary in such sense as to evince an intention to waive their right to claim damages for the delay.

In *Ketchum v. Wells*, 19 Wis. 26, the plaintiff contracted to deliver to the defendants a certain quantity of stave bolts of certain dimensions, and delivered a portion of the amount contracted for. The defendants relied upon the bolts to keep their mill in operation, and selected and used some of the bolts delivered, although they were not such as were called for by the contract. It was held that the defendants had not waived their right to object that the bolts so used were not such as the contract required.

In *Cox v. Long*, 69 N. Car. 7, the defendant contracted to deliver to the plaintiff shingles of certain dimensions. The plaintiff, after paying for the shingles delivered by the defendant, and hauling them to his building, found them not to be of the dimensions specified. It was then too late

for the plaintiff to secure other shingles without great damage and delay, and he was compelled to use the shingles delivered by the defendant. The court held that by receiving and using the shingles, the plaintiff had not waived his right to recover damages for the breach of contract.

In *Levy v. Schwartz*, 34 La. Ann. 209, the court said: "As to the taking possession and use of the defective press, it is to be considered that it was erected upon brick foundations on the premises of plaintiff, and is, therefore, subject to the same principles which are applicable to defective buildings on a man's land, or defective repairs on his house, or defective ploughing in his field, or defective engines and boilers put in his ship. In such cases a man is put in possession by the very construction of the work on his premises, as a concomitant of his possession of the premises themselves, and he has the right to make such use of it as its defective condition will admit of, without thereby waiving his right to damages. (Citing *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442; *Munroe v. Butt*, 8 El. & Bl. 738; 92 E. C. L. 737; *Wimshurst v. Deeley*, 2 C. B. 253; 52 E. C. L. 252; *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255; *Stewart v. Fulton*, 31 Mo. 59; *Findley v. Breedlove*, 4 Martin N. S. (La.) 105; *Conery v. Noyes*, 17 La. Ann. 203.) Principles differing to some extent might apply to the case of independent chattels, such as a piece of furniture or a carriage, constructed under contract, as to which the party would have a clear and convenient option of taking or leaving."

In *Cincinnati v. Cameron*, 33 Ohio St. 336, *Wright, J.*, in delivering the opinion of the court, said: "It is by no means true that because a corporation accepts and makes use of the work done, that therefore it is estopped. The circumstances may be such that it cannot help itself. A railroad cannot forego the use of its entire track, because it has a dispute with some contractor about extras in some bridge. In such case the argument that the company has accepted and used the work has no force whatever. Upon

b. FAILURE TO SEASONABLY EXERCISE RIGHT OF REJECTION.—The buyer will be held to have waived the right to reject goods by a failure to exercise it within a reasonable time after delivery, or by exercising acts of ownership over the goods.¹

c. WAIVER OF CONDITIONS IN SALE.²—See *CONDITIONAL SALES*, vol. 3, p. 435; *SALES*, vol. 21, pp. 484, 650 *et seq.*

d. WAIVER OF LIEN FOR PURCHASE-MONEY.—See *infra*, this title, *Waiver of Liens*.

4. Landlord and Tenant—*a.* WAIVER OF CONDITIONS AND FORFEITURES.³—See *LANDLORD AND TENANT*, vol. 12, p. 758; *LIMITATIONS IN INSTRUMENTS*, vol. 13, pp. 780, 802.

b. WAIVER OF NOTICE TO QUIT.—Notice to quit is waived by the receipt of rent, as such, accruing after the expiration of the notice.⁴ It also may be waived by telling the tenant that he

this ground the doctrine of estoppel only applies in those cases where the corporation may accept or reject with equal convenience.”

For a general discussion of the effect of the acceptance of goods by the vendee upon his rights against the vendor, see *Hare on Contracts*, ch. 22, where the matter is clearly treated.

1. *Reed v. Randall*, 29 N. Y. 358; *Pratt v. Peck*, 70 Wis. 620; *Cash v. Giles*, 3 C. & P. 407; 14 E. C. L. 172. And see *SALES*, vol. 21, pp. 557–562; *LATENT DEFECTS*, vol. 12, p. 929; *RESCISSION*, vol. 21, pp. 80–82.

2. See *supra*, this title, *Question for Jury*. For renunciation of the contract, or impossibility of performance created by one party, as waiving or dispensing with performance of conditions precedent by the other party, see *CONTRACT*, vol. 3, p. 904 *et seq.*; *SALES*, vol. 21, p. 651 *et seq.*; *Benjamin on Sales* (6th Am. ed.), p. 516 *et seq.*; and notes by Bennett, p. 650 *et seq.* See also, *supra*, this title, *Essentials of Binding Waiver*, note.

3. See also, *infra*, this title, *Waiver of Conditions and Forfeitures*.

4. *Goodright v. Cordwent*, 6 T. R. 219; *Collins v. Canty*, 6 Cush. (Mass.) 415; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391; *Blyth v. Dennet*, 13 C. B. 178; 76 E. C. L. 178; *Boggs v. Black*, 1 Binn. (Pa.) 336.

Where rent had usually been paid at a banker's, and a clerk of the banker, without special authority and being ignorant of the notice to quit, received rent subsequently accruing, and there was no evidence that the rent came to the hands of the lessor, it was held that there was no waiver of the notice. *Doe v. Calvert*, 2 Campb. 387.

In *Doe v. Menx*, 1 C. & P. 346, it was held that the acceptance of rent accruing after forfeiture was no waiver of the forfeiture, where the lessor had already begun ejectment proceedings against the tenant.

In *Goodright v. Cordwent*, 6 T. R. 219, Lord Kenyon said: “If the defendant had paid, and the lessor of the plaintiff had received, the money, as satisfaction for the injury done by the defendant in continuing on the plaintiff's land as trespasser, then the plaintiff might have recovered in ejectment. But if it were paid *eo nomine* as rent, and received as such, and the jury have found that it was so, I cannot assent to the doctrine laid down in the cases cited, that the receipt of rent accruing after the expiration of the notice to quit is not a waiver of it; for according to that doctrine the same person might stand in the relation of tenant and trespasser to his landlord at the same time.”

Whether Receipt of Rent Is Ipso Facto a Waiver, or Only Evidence of Waiver.—In *Fitzpatrick v. Child*, 2 Brew. (Pa.) 365, where the landlord received rent for the month subsequent to the expiration of the notice, the court held, on the authority of *Doe v. Batten*, 1 Cowp. 243, that the receipt of such rent was an equivocal act, to be determined by the *quo animo*, and was evidence to go to the jury. But see *Goodright v. Cordwent*, 6 T. R. 219, and remarks of Lord Kenyon.

In *Croft v. Lumley*, 5 El. & Bl. 648; 85 E. C. L. 646; El. Bl. & El. 1069; 96 E. C. L. 1069, after forfeiture by breach of covenant, the lessee tendered to the lessor rent, as such, accruing after such breach. The lessor refused to take it except on the terms that it should be

need not quit,¹ or by distraining for such after accruing rent;² but the mere receipt of rent accruing before the expiration of the notice, will not operate as a waiver,³ nor will a mere demand of rent, whether accruing before,⁴ or after,⁵ such expiration, so operate. The giving of a second notice is not necessarily a waiver of the first notice.⁶

Notice is not waived by the tenant by a mere holding over,⁷ or by an inadvertent detention of the keys,⁸ after the expiration of the notice.

taken, not as rent, but as compensation for use and occupation subsequent to the forfeiture. The lessee refused to agree to any such condition, and the lessor then took the money, declaring that he did not take it as rent or as waiving the forfeiture. It was held that the money must be taken in legal effect according to the expressed will of the party paying it, in this case as rent; and that the receipt of the money as rent operated in point of law as a waiver of the forfeiture in spite of the protest. See also, upon this question, 1 Smith's Lead. Cas. (9th Am. ed.), p. 125 *et seq.*; FORFEITURE, vol. 8, p. 449.

1. *Tuttle v. Bean*, 13 Met. (Mass.) 275; *Supplee v. Timothy*, 124 Pa. St. 375.

The landlord does not waive his notice by agreeing, at the expiration of the notice, with a view to the convenience of the tenant, that the latter may remain in possession of the premises a little while longer to sell off his goods, *Babcock v. Albee*, 13 Met. (Mass.) 273; or by promising, after giving the notice, not to turn the tenant out, unless the premises should be sold. *Whiteacre v. Symonds*, 10 East 13.

In *Hoff v. Baum*, 21 Cal. 120, the tenant, before the expiration of the notice to quit, proposed to the landlord, through a third person, to continue his occupancy at a larger rent, to which proposal the landlord assented, but did not in terms notify the tenant of his acceptance of it. The tenant continued to occupy the premises. The court held, in an action by the landlord to recover rent at the increased rate, that it must be inferred that the subsequent occupation by the tenant was as tenant with the consent of the landlord, and not as trespasser. The landlord waived notice to quit, by making a new demise of the premises to the tenant. *Kelly v. Loehr*, 1 Brew. (Pa.) 303.

2. *Zouch v. Willingale*, 1 H. Bl. 311.

3. The mere reception of rent ac-

crued before the time for the termination of the tenancy, is not a waiver of the notice, or a renewal of the lease; for the lessor has the right to that absolutely, whether the tenancy is terminated or not. But such reception of rent, with continued occupation by the tenant for several months after the expiration of the notice, and the landlord's allowance of such occupation, is competent evidence to be submitted to the jury as tending to show a waiver. *Norris v. Morrill*, 43 N. H. 213.

4. *Conner v. Jones*, 28 Cal. 59.

5. *Blyth v. Bennet*, 13 C. B. 178; 76 E. C. L. 178.

6. It was held not to be a waiver where the second notice was given pending the prosecution of ejectment proceedings under the first notice, the court saying that it was not possible for the defendant to suppose that the plaintiff intended to waive the first notice, when he knew that the plaintiff was, on the foundation of that very notice, proceeding by ejectment to turn him out of the farm. *Doe v. Humphreys*, 2 East 237.

In *Doe v. Steel*, 3 Campb. 115, the landlord gave a second notice to the tenant, after the first notice had determined, to quit the premises which the tenant "then held under him," in fourteen days, otherwise he would require double value. Lord Ellenborough said that the second notice could not be understood to be intended as a waiver of the first, having for its object merely the recovery of double value, and being only a qualified condonation of the trespass, but left the question of *quo animo* to the jury.

7. *Jenner v. Clegg*, 1 M. & Rob. 213.

8. *Gray v. Bompas*, 11 C. B. N. S. 520; 103 E. C. L. 519. Tenants, after giving notice, retained possession of the mine, and worked the coal for two months after the expiration of the notice. The plaintiff claimed that this was a waiver of the notice. The defendants insisted that they had worked

5. Mortgagor and Mortgagee—*a*. MORTGAGES OF PERSONALTY—
 (1) *Waiver of Rights Under the Mortgage.*—A mortgagee waives his rights under the mortgage by consenting to a sale of the mortgaged property by the mortgagor,¹ or by levying an attachment upon the property in a suit upon the mortgaged debt.²

the mine, not with any view of continuing the tenancy, but under a right by custom to cut away certain portions of the coal. The court held that the question whether the defendants had continued working with intent to waive the notice and continue the tenancy, was properly left to the jury. *Jones v. Shears*, 4 Ad. & El. 832; 31 E. C. L. 198.

A landlord waives the giving of written notice by the tenant by consenting that the tenant may quit and deliver up the premises at his pleasure. *Farson v. Goodale*, 8 Allen (Mass.) 202.

Waiver of Objections to Sufficiency of Notice.—Where a notice given by a tenant is informal and defective, as in failing to state the time when the premises should be vacated, and the landlord waives any objection to its form, or by his words or conduct leads the tenant reasonably and properly to understand that he waives such objection, he cannot afterward object that the notice was insufficient; and evidence that the landlord tried to induce the tenant to stay, that the tenant left and sent the keys to the landlord, who at no time objected to the sufficiency of the notice, is evidence sufficient to warrant the jury in finding such waiver. *Boynton v. Bodwell*, 113 Mass. 531.

1. A sale by the mortgagor, with the consent of the mortgagee, passes a good title to the purchaser. *Roberts v. Crawford*, 54 N. H. 532; *Gage v. Whittier*, 17 N. H. 312; *Pratt v. Maynard*, 116 Mass. 388; *Stafford v. Whitcomb*, 8 Allen (Mass.) 518; *Clark v. Hale*, 8 Gray (Mass.) 187; and conversely, a sale by the mortgagee, with the assent of the mortgagor, passes a good title to the purchaser. *Patrick v. Meserve*, 18 N. H. 300.

Where the mortgagee consents to a sale by the mortgagor, and to the transfer of possession to the purchaser, upon the latter's parol agreement to pay the mortgage debt within ninety days, he waives his mortgage as against a subsequent mortgagee for value without notice to such purchaser. *Brandt v. Daniels*, 45 Ill. 453.

A second mortgagee, by consenting to a sale of the mortgaged property by

the mortgagor, waives his rights under the second mortgage, but he does not thereby warrant the purchaser's title, and estop himself to set up against the purchaser a title under a subsequent assignment of the first mortgage. *Clark v. Hale*, 8 Gray (Mass.) 187.

A verbal consent is sufficient. *Roberts v. Crawford*, 54 N. H. 532; *Pratt v. Maynard*, 116 Mass. 388.

A waiver by the mortgagee of his rights under the mortgage, does not effect his right to recover the debt secured by the mortgage. *Jones v. Turck*, 33 Iowa 246.

A mere declaration by the mortgagee, on learning from the mortgagor that the latter had sold the mortgaged property, that he cared nothing for the property and did not want it, does not preclude him from afterward asserting his mortgage. *White v. Phelps*, 12 N. H. 382.

The mortgagee does not waive his lien by his silence, on being informed of the sale of a portion of the mortgaged property by the mortgagor. *Patterson v. Taylor*, 15 Fla. 336.

A mortgagee who stands by and allows the mortgagor to sell the mortgaged property as his own, without disclosing his lien, cannot afterward recover the goods from the purchaser, who takes a good title as against the mortgagee. *Thompson v. Blanchard*, 4 N. Y. 303; *Brooks v. Record*, 47 Ill. 30.

2. *Evans v. Warren*, 122 Mass. 303. See *Libby v. Cushman*, 29 Me. 429; *Whitney v. Farrar*, 51 Me. 418; *Buck v. Ingersoll*, 11 Met. (Mass.) 226.

Such attachment is, in itself, a waiver of the claim under the mortgage. The liens respectively created by mortgage and by attachment on the same property are essentially different, and cannot co-exist. *Evans v. Warren*, 122 Mass. 304.

A mortgagee holding a mortgage upon personal property securing various claims, brought an action upon some of the claims secured by the mortgage, attached the mortgaged property, secured judgment, and satisfied his execution out of the property attached. It was held that he had waived

(2) *Waiver of Foreclosure*.—A mortgagee may waive or open foreclosure by express agreement, oral or written, or by any other unequivocal act.¹

(3) *Waiver of Irregularities in Sale*.—The mortgagor, by accepting the surplus proceeds of a sale of the mortgaged property

his mortgage as against subsequent attaching creditors, who were held entitled to the proceeds of the property after the execution of the mortgagee was satisfied. *Haynes v. Sanborn*, 45 N. H. 429. The court in this case said: "If Sanborn had a valid mortgage, he might have asserted his title as mortgagee by taking and holding possession of the goods and disposing of them under his mortgage. But when he attached the mortgaged property he put it out of his power and control, and placed it in the custody of the law. He thereby made it liable to subsequent attachment by other creditors. . . . It is quite plain that the two remedies, by attachment and under the mortgage, are inconsistent and cannot be pursued at the same time and together."

The mortgagees of timber land attached, on a suit against the mortgagor, certain lumber removed without their consent from the mortgaged premises, and afterward seized and sold the lumber under the mortgage. It was held that the attachment did not preclude the mortgagees from claiming under the mortgage, if at the time it was made the mortgagees had no notice that the lumber was the same included in the mortgage, but that if they had knowledge of their title, they could not afterward claim under the mortgage. *Howe v. Wadsworth*, 59 N. H. 397.

But if the mortgagee's attachment is defeated by the forcible seizure of the property, by an officer claiming under a prior attachment, the mortgage is not waived as to such prior attachment. The claimants under the prior attachment, having elected to treat the mortgagee's attachment as a nullity, cannot afterward insist upon it as valid to defeat the mortgage. *Ellinwood v. Holt*, 60 N. H. 57.

A mortgagee may waive his claim under the mortgage, and attach the mortgaged property to secure the mortgage debt, without violating any of the mortgagor's rights. *Buck v. Ingersoll*, 11 Met. (Mass.) 226. And compare the cases on waiver of pledge by attaching or levying upon the pledge, *infra*, this title, *Pledge and Pledgor*.

1. *Phelps v. Hendrick*, 105 Mass. 107.

Acceptance of Payment After Forfeiture.—Acceptance of payment of the mortgage debt, after forfeiture, is a waiver of the forfeiture, and opens the foreclosure. *West v. Crary*, 47 N. Y. 423. The same is true in case of the acceptance of part payment. *Winchester v. Ball*, 54 Me. 558.

Even after a sale upon forfeiture, the mortgagee may waive the forfeiture, and entitle the mortgagor to recover the surplus proceeds of the sale. *Thompson v. Moore*, 36 Me. 47. In this case the mortgagee stated that the surplus belonged to the mortgagors, and that he was ready to pay it to them. The court held that it was no error to instruct the jury that the mortgagee might waive the forfeiture, and if he had done so deliberately and understandingly, they might return a verdict for the surplus.

A mortgagee of personal property, after foreclosure, made an oral agreement, in the presence of the mortgagor, with J. S., to whom the mortgagor had sold the property, that if J. S. would pay him the amount due on the mortgage, he would assign it to J. S., or discharge it. J. S. the next day tendered the amount due, but the mortgagee refused to receive it, and sold the property. It was held that the foreclosure had been waived, and that the sale was a conversion for which the mortgagee was liable to J. S. *Phelps v. Hendrick*, 105 Mass. 106.

Suing and obtaining judgment, not for a deficiency, but for the whole mortgage debt, after foreclosure, is, presumptively, at least, a waiver of the foreclosure. *Clarke v. Robinson*, 15 R. I. 226.

In *Clarke v. Robinson*, 15 R. I. 231, it was held that a mortgagee, who, after foreclosure, had begun suit at law to recover the whole mortgage debt, and had prosecuted the action to final judgment after the commencement of a suit in equity against him, in which the claim was made that the foreclosure was opened by the suit at law, had disclaimed the foreclosure and opened the mortgage, irrespective of his intention.

under the mortgage, affirms the sale, and waives any objections as to its validity.¹

b. MORTGAGES OF REALTY—(1) *Waiver of Foreclosure*.—A mortgagee may waive the foreclosure of his mortgage, after it has become absolute, by an unequivocal act or contract, with a consideration,² or after the commencement of foreclosure proceedings, he may waive or suspend them, and keep the mortgage open.³ Suing for the debt,⁴ accepting payment after foreclosure,⁵ or

1. *Bennett v. Bailey*, 150 Mass. 257; *France v. Haynes*, 67 Iowa 139.

But he does not, thereby, necessarily waive a claim against the mortgagee for fraud in conducting the sale. *Bennett v. Bailey*, 150 Mass. 257.

2. *Smalley v. Hickok*, 12 Vt. 153; *Lawrence v. Fletcher*, 8 Met. (Mass.) 153; *Joslin v. Wyman*, 9 Gray (Mass.) 63; *Stetson v. Everett*, 59 Me. 376.

But it cannot be allowed where the facts, which are relied on, are at all doubtful in their character, or where they may be explained consistently with the right of the mortgagees to retain the estate under the foreclosure. *Lawrence v. Fletcher*, 8 Met. (Mass.) 153.

The *prima facie* conclusion, when a legal foreclosure is shown, is that it was so intended, and that it must so operate, until proof is adduced which overcomes this presumption. And an agreement by the mortgagee, upon receipt within a specified time of a fixed sum equal to the mortgage debt, to release his title acquired "by virtue of the foreclosure of my mortgage," adding "it is the foreclosure title only which I hereby agree to convey," is not sufficient evidence to keep the mortgage open as a mortgage unexpired, but shows only an intention to sell the foreclosure title for a sum equal to the mortgage debt. *Stetson v. Everett*, 59 Me. 376.

An entry by a mortgagee for the purpose of foreclosing the mortgage, is not a waiver or abandonment of rights acquired by a previous sale under the power contained in the mortgage, there being nothing in that act showing an intention to open the foreclosure or to treat the land as only security for an existing debt. *Learned v. Foster*, 117 Mass. 365.

3. Thus the mortgagee, after entering to foreclose, suspends foreclosure by giving a bond, just before the statutory time for redemption is to expire, to discharge the mortgage upon payment

of the debt at a future day, thereby extending the time for redemption. *Joslin v. Wyman*, 9 Gray (Mass.) 63; or by agreeing that if the debt be paid by a certain day no advantage shall be taken of foreclosure, the effect of such agreement being to keep the foreclosure open until the time agreed upon. *McNeil v. Call*, 19 N. H. 416; 51 Am. Dec. 188; or by promising to allow six months for redemption after the expiration of the statutory period, such promise keeping the mortgage open for that time, but not beyond it. *Chase v. McLellan*, 49 Me. 375; or by agreeing to reconvey whenever the debt is satisfied out of the rents and profits or in any other way. And the mortgagor may redeem, although more than three years (the statutory period for redemption) have elapsed since the entry. *Quint v. Little*, 4 Me. 495. And see REDEMPTION, vol. 20, p. 628.

4. *Smalley v. Hickok*, 12 Vt. 163; See *Clark v. Robinson*, 15 R. I. 231.

In *Massachusetts*, recovery of a judgment for any part of the mortgage debt after foreclosure, opens the foreclosure on the ground that the value of the premises was less than the sum due. *Massachusetts Pub. Stat.*, ch. 181, § 42.

But suing for the balance of the debt beyond the amount of the mortgaged property, is not such an unequivocal act as will waive the foreclosure. *Smalley v. Hickok*, 12 Vt. 163.

5. *Batchelder v. Robinson*, 6 N. H. 12; *Gould v. White*, 26 N. H. 178; *Green v. Cross*, 45 N. H. 577; *Griswold v. Mather*, 5 Conn. 435; *Converse v. Cook*, 8 Vt. 164; *Smalley v. Hickok*, 12 Vt. 153. The last three cases being cases of foreclosure by decree. So, also, by accepting part payment. *Deming v. Comings*, 11 N. H. 483; *Scott v. Childs*, 64 N. H. 566; *Dow v. Moor*, 59 Me. 118; *Smalley v. Hickok*, 12 Vt. 153.

See, however, *Lawrence v. Fletcher*, 8 Met. (Mass.) 153; *Lawrence v. Fletcher*, 10 Met. (Mass.) 344, to the effect

rendering an account for the rents and profits, are acts showing an unequivocal intent to waive the foreclosure,¹ but the right of the mortgagee to sue upon the mortgage debt and to foreclose the mortgage, is concurrent.² Bringing an action to obtain possession of the land, waives an entry to foreclose,³ but the assign-

that the mere receipt, after foreclosure, of part of the money, is not in itself sufficient evidence of a waiver of the foreclosure, for the reason that the part payment may have been made in payment of the balance due upon the mortgage debt after crediting the value of the foreclosed premises, and not under an agreement to open the foreclosure. See also *Thompson v. Tappan*, 139 Mass. 506.

1. *Smalley v. Hickok*, 12 Vt. 163.

2. A mortgagee may proceed concurrently with an action upon the mortgage debt, and with proceedings to foreclose the mortgage, until the debt is paid. *Ely v. Ely*, 6 Gray (Mass.) 439; *Draper v. Mann*, 117 Mass. 439; *Burtis v. Bradford*, 122 Mass. 129.

The pendency of a writ of entry to foreclose is no bar to an action upon the mortgage note, *Ely v. Ely*, 6 Gray (Mass.) 439; nor is a writ of entry to foreclose barred by action and judgment upon the note, without payment. *Torrey v. Cook*, 116 Mass. 163.

Pending an action upon the mortgage note, the mortgagee may proceed to sell under the power of sale contained in the mortgage. But he may recover in his action only the balance due after deducting the proceeds of the sale. *Draper v. Mann*, 117 Mass. 439.

Proceedings to foreclose under a power of sale are not waived or suspended by bringing suit upon the mortgage note, and attaching a debt due the mortgagor of equal or greater amount than the note. *Benjamin v. Loughborough*, 31 Ark. 210.

The right to sell under the power is not waived by an entry to foreclose, and the taking of rents and profits which are insufficient to pay the debt. *Montague v. Dawes*, 12 Allen (Mass.) 397.

3. A mortgagee, by commencing and prosecuting an action upon the mortgage to secure a conditional judgment for the possession of the premises, waives a previous entry to foreclose. *Smith v. Kelley*, 27 Me. 237; 46 Am. Dec. 595.

A mortgagee, by prosecuting an action to obtain conditional judgment for possession to judgment and execution,

waives foreclosure in any other method, and the mortgagor's right to redeem will be extended accordingly. *Tufts v. Maines*, 51 Me. 393.

A mortgagee, after having recovered conditional judgment for the possession of the premises in an action for possession, entered for condition broken. Subsequently, and before she had been in possession under her entry three years (the time required to render the foreclosure under her entry absolute), she took out a writ of possession under the judgment, which was executed. On a bill to redeem by the owner of the equity, the court held that the mortgagee had waived her right to foreclose under her intermediate entry *in pais*. *Fay v. Valentine*, 5 Pick. (Mass.) 418. In this case *Parker, C. J.*, said: "We think the entry of the mortgagee to foreclose must be considered as having taken place at the time of the execution of her writ of possession, on her judgment upon the mortgage. . . . Her intermediate entry *in pais*, though avowedly for condition broken, cannot be considered as intended for the purpose of foreclosure, while her suit for recovery of possession was pending. Had she discontinued that suit, it might have been otherwise; but to pursue that at the cost of the mortgagor should be construed to be a waiver of her right to foreclosure under that entry, and is similar in principle to the receipt of rent after a notice to quit. . . . Why should the mortgagee obtain her conditional judgment, and eventually her execution, if she was already in possession for foreclosure? The law will consider this act as an acknowledgment that, though in possession, she had not begun to foreclose, notwithstanding the formality of her entry."

A mortgagee, after having entered to foreclose, brought a writ of entry against a tenant at will of the mortgagor, obtained judgment for possession, and more than three years after his entry, caused the writ of possession to be served. It was held that he had not waived his entry, the court saying that a mortgagee did not waive the benefit

ment of a mortgage after entry for the purpose of foreclosure, does not waive the entry or stay the foreclosure.¹

(2) *Waiver of Irregularities in Sale*.—The unexplained acquiescence for any considerable time, in a voidable sale of mortgaged premises, will be deemed a waiver of irregularities, and a confirmation of the sale.²

of his formal entry, so far as the owner of the equity was concerned, by bringing a writ of entry against a mere stranger and intruder, and *distinguish* *Fay v. Valentine*, 5 Pick. (Mass.) 418; *Fletcher v. Cary*, 103 Mass. 475.

1. The assignee takes the benefit of the entry and possession. *Deming v. Comings*, 11 N. H. 474; *Hill v. More*, 40 Me. 515; *Hurd v. Coleman*, 42 Me. 182; *Capen v. Richardson*, 7 Gray (Mass.) 364; *Thompson v. Kenyon*, 100 Mass. 108.

In *Deming v. Comings*, 11 N. H. 474, *Parker, C. J.*, said: "If an assignment is made just before the expiration of the right to redeem, with a view of preventing the redemption, that may be regarded as a fraud, of which the party shall not take advantage to foreclose the mortgagor, or his grantee, until he have a reasonable time to make a tender to the assignee. If made a short time before the expiration of the right to redeem, without fraud, it may keep the equity open, until the mortgagor, or those claiming under him, by the exercise of reasonable diligence, can find the assignee, and offer to perform the condition."

2. *Bush v. Sherman*, 80 Ill. 160; *Sloan v. Frothingham*, 65 Ala. 593. See also FORECLOSURE OF MORTGAGE, vol. 8, p. 260. And ignorance of the facts is not a sufficient explanation of such acquiescence, if due to the voluntary conduct of the party in going into the military service of the southern states in the late war. *Bush v. Sherman*, 80 Ill. 160.

The owner of land sold under a power in the mortgage, who attends the sale and bids upon the same, and allows it to be sold to another, will not be permitted, years after, to complain that the land was sacrificed, or sold for less than its true value. *Watson v. Sherman*, 84 Ill. 263.

In *Landrum v. Union Bank*, 63 Mo. 48, *Wagner, J.*, said: "Viewed in any manner there has been an utter lack of personal diligence in this case. The activity of equity powers cannot be in-

voked where a party has negligently slept upon his rights and induced others to act (in this case by spending money upon the property) upon the confident belief that he has abandoned them. Laches is an equitable defense, and there is no artificial, fixed, or determinate rule on this subject; but each case as it arises must be decided according to its own particular circumstances. Courts of equity never give encouragement to the enforcement of stale or antiquated demands. In certain cases a comparatively brief period will be sufficient to bar a claim on the ground of laches, whilst in others, courts will not stop short of the time of the Statute of Limitations. It all depends on the character of the property, the knowledge and actions of the parties."

A mortgagor, having the right to disaffirm a voidable sale made under a power, must exercise it within a reasonable time, and before innocent parties have invested money and labor upon the faith of its validity; and where the mortgagor, with knowledge of the objections to the sale, makes an agreement with the purchaser for time in which to procure a party to buy the property for the amount of the debt, interest, and expenses, this agreement is an election to treat the sale as valid. *Jenkins v. Pierce*, 98 Ill. 646.

A bill filed nearly ten years after the sale to set aside a sale under a power, because the mortgagee became the purchaser, and the delay not being satisfactorily explained, comes too late. *Askew v. Sanders*, 84 Ala. 356.

Knowledge of Irregularities.—There can be no waiver without a knowledge of the irregularities. *Meriwether v. Craig*, 118 Ind. 301. See *Bush v. Sherman*, 80 Ill. 160.

Receipt of Surplus Proceeds of Sale.—Whether a Waiver of Objections to Validity of Sale.—In *Candee v. Burke*, 1 Hun (N. Y.) 546, *Multon, P. J.*, said: "It was said by the chancellor in *Wood v. Jackson*, 8 Wend. (N. Y.) 9, that the receipt of the surplus moneys, arising from a sale of land on execution, did

(3) *Waiver of Right of Redemption*.—The right to redeem, being an inseparable incident of the mortgage created by law, cannot be waived by agreement made simultaneously with the mortgage.¹

6. *Pledgor and Pledgee*.—See PLEDGE, vol. 18, pp. 720, 726 *et seq.*

7. *Waiver by Sureties and Guarantors*—*a. WAIVER OF RIGHT OF SUBROGATION*—(See also SUBROGATION, vol. 24, p. 320).—A surety may waive his right of subrogation impliedly,² or by express agreement.³ As a general rule, it would seem that the taking of security by the surety, or other persons entitled to the right of subrogation, would not operate as a waiver of such right,⁴

not preclude the owners from questioning the validity of the sale, as they had done nothing to encourage the purchasers to bid. I am unable to perceive any reason why the same principle should not be applied to the receipt, by the mortgagor or his representatives, of surplus money arising on the sale of the mortgaged premises. Although the receipts of the surplus may not estop the party, it would seem to be evidence to be considered in passing on the question of the regularity of the proceedings. If the owner retain the surplus money, no court would set aside the foreclosure, without requiring him to refund what he had received."

A mortgagee purchased the mortgaged premises at a sale under the power, the mortgagor being present at the sale and not objecting. Thereafter the mortgagor, by agreement, retained possession of the land as tenant of the mortgagee until certain crops were gathered, when both parties met and adjusted the matter, the mortgagor receiving the surplus proceeds of the sale, less a certain sum allowed as rent, and yielded possession to the mortgagee. It was held, in a suit by the mortgagor to set aside the sale on the ground that the mortgagee had purchased, that the sale should be set aside and the land resold. The court did not discuss the question of the mortgagor's conduct as an affirmation of the sale, though the point was made by the counsel. *Joyner v. Farmer*, 78 N. Car. 196. But see *Bennett v. Bailey*, 150 Mass. 257; *France v. Haynes*, 67 Iowa 139, to the effect that the receipt of the surplus proceeds is an affirmation of the sale.

A mortgagor waives irregularities in a sale, and ratifies the sale, by paying a sum toward a deficiency, and accepting a receipt so crediting it. *Zable*

v. Masonic Sav. Bank (Ky. 1891), 16 S. W. Rep. 588.

Void Sales.—When a void sale is made—a sale which cannot operate a dissolution of the relation of mortgagor and mortgagee, nor cut off the equity of redemption—acquiescence in it, or the failure to seek redemption for a less period than will form a bar under the Statute of Limitations, is not a waiver of the invalidity, or a confirmation of the sale. *Sloan v. Frothingham*, 65 Ala. 599; *Sanders v. Askew*, 79 Ala. 433.

1. *Bayley v. Bailey*, 5 Gray (Mass.) 510; *Parmer v. Parmer*, 74 Ala. 285; *Baxter v. Willey*, 9 Vt. 276; 31 Am. Dec. 623; *Wing v. Cooper*, 37 Vt. 181; *Wamsley v. Cook*, 3 Neb. 351; *Quartermous v. Kennedy*, 29 Ark. 544. And see MORTGAGES, vol. 15, p. 782; REDEMPTION, vol. 20, p. 609.

2. See *Cooper v. Jenkins*, 32 Beav. 337; *Watts v. Eufaula Nat. Bank*, 76 Ala. 474; *Cornwell's Appeal*, 7 W. & S. (Pa.) 305.

A junior incumbrancer who pays off a prior lien, waives his right to be subrogated to such lien by agreeing that the property shall be otherwise appropriated. *U. S. Bank v. Peter*, 13 Pet. (U. S.) 123.

3. *Ex p. Hope*, 3 M. D. & De G. 720; *Earle v. Oliver*, 2 Exch. 71; *Midland Banking Co. v. Chambers*, L. R., 4 Ch. 398; *Ex p. National Provincial Bank*, 17 Ch. Div. 98; *Ex p. Miles*, 1 De G. 623. In this last case, the surety, by express agreement in the contract between himself and the creditor, waived his right of subrogation in favor of the latter, upon the bankruptcy of the principal debtor.

4. A mortgagee, entitled to be subrogated to a prior lien upon the premises, which he has discharged, will not lose

the right by taking a new mortgage upon the same premises for the amount of his payment. *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Eagle F. Ins. Co. v. Pell*, 2 Edw. Ch. (N. Y.) 631. See *Burchard v. Phillips*, 11 Paige (N. Y.) 66.

In *Peterson v. Birdsall*, 64 N. Y. 294, the plaintiff, who held a junior incumbrance upon the defendant's premises, entered into an agreement with the defendant to advance money to pay off a prior mortgage, upon the defendant's executing a new mortgage of the premises to the plaintiff. His agreement was carried into effect, and the new mortgage afterward held void for usury. The court held that the plaintiff had not lost his right to be subrogated to the prior mortgage, and might enforce it against the defendant.

The taking of a mortgage by a surety of a collector as indemnity against loss, is no waiver of any right of subrogation to a lien upon the collector's lands in favor of the state. *Crawford v. Richeson*, 101 Ill. 351. Compare *Watts v. Eufaula Nat. Bank*, 76 Ala. 474, in which case it was held that the acceptance, by the sureties upon the bond of a defaulting public officer, of a mortgage embracing all the property of such officer upon which the lien of the bond existed, as well as property of his wife, was *prima facie* a waiver of their rights of subrogation to this lien, as against the sureties upon a prior bond which did not constitute a lien upon the debtor's property. In this case the court, by Clopton, J., said: "Subrogation, being an equity springing from the relation between the parties, and created and enforced for the benefit and protection of the one in whose favor it is originated, may be asserted or waived at pleasure. It may be that it is a question of intention, with the presumption that the surety intends to keep the debt alive and claim the right of subrogation; but, if it clearly appears that the intention was to satisfy and extinguish the debt or demand, not only as to the creditor, but as between the surety and the principal debtor, the right of subrogation is waived. (Citing *Houston v. Huntsville Branch Bank*, 25 Ala. 250; *Croft v. Moore*, 9 Watts (Pa.) 451.) Any positive act done by the surety, at the time of or subsequent to payment, inconsistent with the enforcement of the right, will be considered as a waiver. Accepting an independent security, which is not

cumulative merely, and the enforcement of which is not consistent, and cannot be concurrent with the enforcement of the right of subrogation, 'displaces and defeats the latter right.' The court, while reversing the decree of the court below and remanding the case, said: "We refrain from rendering a decree in the present condition of the case, as, possibly, the attendant facts and circumstances may be such as to show no intention to extinguish the original claim, or to waive any right of subrogation, and that the mortgage was intended as cumulative security; though we are unable at this time to conceive such state of facts."

In *Cooper v. Jenkins*, 32 Beav. 337, A was tenant for life of lots 1 and 2, to which B was entitled in remainder. B, with A as his surety, mortgaged lot 2, B alone covenanting to pay. By a contemporaneous deed, B conveyed his interest in lot 1 on trusts to indemnify A as his surety. A paid large sums for interest on the mortgage. It was held that A was not entitled to be subrogated to the mortgage on lot 2. The Master of the Rolls said: "If a surety pays off the mortgage, he is entitled to the benefit of all the securities. But here the plaintiff has contracted with the mortgagor, for whom he is surety, that he should receive a particular species of indemnity, if he pays off any part of the principal or interest of the mortgage. That indemnity he is entitled to, and not to the benefit of the mortgage paid off."

A surety will not lose the right of subrogation to a mortgage held by the creditor, merely by taking other security from the principal and by failing to ask for an assignment of the mortgage immediately upon payment of the debt. *Gossin v. Brown*, 11 Pa. St. 527. And *Bell, J.*, in delivering the opinion in this case, said: "It is true that payment by a surety, with intent to discharge the security, may operate to extinguish it in equity as well as at law; yet such an intent is not to be presumed without proof of its existence. It is difficult in any case to conceive the object of a surety to be extinguishment, in detriment of his own interests, and therefore payment by him is *prima facie* to be accepted as intended for personal relief, leaving his remedies untouched. To this effect are all our authorities; and from them has been deduced the general rule that where there are no special circumstances manifesting a

which, however, would be forfeited by the surety by a failure to claim it before the remedy at law against the principal debtor had been barred by lapse of time.¹

b. **WAIVER OF DISCHARGE BY NEW PROMISE.**—A surety who has been discharged from liability by the act of the creditor, may waive such discharge, and revive his liability by a subsequent promise to pay, unsupported by any new consideration.²

determination to obliterate the original obligation, and to destroy the securities taken for its payment, equity will regard the duty as still existing at the option of the surety. (*Citing Croft v. Moore*, 9 Watts (Pa.) 451; *Morris v. Oakford*, 9 Pa. St. 498.) Now what has Brown done or omitted to do, which, as sufficient evidence of intent, can operate to withdraw his pretensions from the influence of this rule? Certainly such an effect is not to be imputed to his acceptance of the choses in action, transferred by Gossin as collaterals. This can scarcely be pretended. In accepting additional means of safety, it is not to be supposed he intended to extinguish those already possessed."

But it has been held that if after a surety for two principals has paid the debt, he takes from one a bond or other security for his reimbursement, he thereby waives his right to the benefit of a security previously given by the principal to the creditor. *Cornwell's Appeal*, 7 W. & S. (Pa.) 305.

Where A borrowed money for B's use at B's request, and took a mortgage from C as counter security, it was held that the mortgage was cumulative and not exclusive, and that by taking it A had not waived his right of indemnity against B. *Wesley Church v. Moore*, 10 Pa. St. 273.

No Positive Act of Election by Surety at Time of Payment Necessary.—The surety need not, at the time of payment, signify his election and acceptance of the right of subrogation. Suretyship and payment *ipso facto* create the right. *Watts v. Eufaula Nat. Bank*, 76 Ala. 479. See also *Gossin v. Brown*, 11 Pa. St. 533.

Waiver Between Sureties.—Where one surety consented that another surety might receive an indemnity from the principal for his sole benefit, it was held that the surety so consenting could not afterward share in such indemnity, but was bound by his waiver, though no consideration passed be-

tween the parties. *Tyus v. De Jarnette*, 26 Ala. 280. Compare *Steel v. Dixon*, 17 Ch. Div. 832. Waiver of the right of contribution should be fully and clearly proved. *Tyus v. De Jarnette*, 26 Ala. 280.

1. *Rittenhouse v. Levering*, 6 W. & S. (Pa.) 190; *Fink v. Mahaffy*, 8 Watts (Pa.) 384; *Joyce v. Joyce*, 1 Bush (Ky.) 474. See *Rucks v. Taylor*, 49 Miss. 552.

In *Watts v. Eufaula Nat. Bank*, 76 Ala. 479, *Cloplin, J.*, said: "On reason, however, it seems that the surety should be allowed the same time in which to enforce the lien or security, that the law would have allowed to the creditor, to whose rights and remedies he succeeds."

2. *Mayhew v. Crickett*, 2 Swanst. 185; *Merchant Ins. Co. v. Hauck*, 83 Mo. 21; *Fowler v. Brooks*, 13 N. H. 240; *Hinds v. Ingham*, 31 Ill. 400; *Porter v. Hodenpuyl*, 9 Mich. 11; *Bramble v. Ward*, 40 Ohio St. 267.

In *Mayhew v. Crickett*, 2 Swanst. 185, the Lord Chancellor said: "I always understood, that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle which prevails both in courts of law and in courts of equity. On the other hand, if the surety afterward makes a promise to pay, he cannot object to that as a promise without consideration; the promise is valid, not as the constitution of a new, but the revival of an old, debt."

A surety upon a note, induced to become such by fraud, waives his defense by requesting the payee to extend the time and promising to pay with knowledge of the facts, even though he may have been ignorant of the fact that the fraud constituted a defense. *Rindskoff v. Doman*, 28 Ohio St. 516.

A surety discharged by failure to present the note as a claim against the estate of the principal debtor within two years after the granting of letters of administration, waives his discharge by a promise to pay made after the ex-

But such promise must be made with full knowledge of the facts.¹

c. WAIVER OF STATUTORY NOTICE TO SUE.—Where a surety is given the right by statute to require the creditor to put his claim in suit, he may waive his rights under the notice to sue, by withdrawing it, and notifying the creditor not to sue.² And the creditor may waive his right to require the notice to be in writing, by accepting an oral notice, and agreeing to sue.³

d. WAIVER OF DUE DILIGENCE ON PART OF CREDITOR.—A guarantor may waive his right to require the creditor to use due diligence against the one primarily liable, either orally,⁴ or in writing;⁵ and a guarantor discharged from liability by the laches of

piration of the two years, and no new consideration is necessary. *Brockman v. Sieverling*, 6 Ill. App. 512. In this case it was said that the mere payment of interest would not revive the original obligation.

A written assent to the creditor's signing a deed giving the debtor an extension, although given after the deed had been signed by the creditor, and unsupported by consideration, revives the liability of the surety. *Smith v. Winter*, 4 M. & W. 467.

A surety paying the debt after his discharge, voluntarily and with full knowledge of the facts, cannot recover the sum so paid. *Geary v. Gore Bank*, 5 Grant's Ch. (Ont.) 536.

1. *Hinds v. Ingham*, 31 Ill. 400; *Merchant Ins. Co. v. Hauck*, 83 Mo. 21; *Porter v. Hodenpuy*, 9 Mich. 11.

2. *Gillilan v. Ludington*, 6 W. Va. 128.

A surety who gives the creditor written notice to sue, but at the same time orally requests him to see the principal and try to get the money before suing, and also, after the statutory period has elapsed, gives him notice in writing not to sue, cannot rely upon the delay of the creditor to avoid payment. *Simpson v. Blunt*, 42 Mo. 542.

If the surety, after giving notice to sue and before the expiration of the statutory period for suing, asks the creditor to indulge the principal, he waives the notice; but a request for such indulgence made after the surety's discharge by failure to sue within the required time is no waiver. *Bailey v. New*, 29 Ga. 214.

3. Where the surety orally notifies the creditor to sue, and the creditor promises to do so, the latter waives his right to notice in writing, and the oral notice will be effectual. *Taylor v. Davis*,

38 Miss. 493; *Smith v. Cloplin*, 48 Miss. 66. *Contra* *Chrisman v. Tuttle*, 59 Ind. 155. *Compare* *English v. Bourn*, 7 Bush (Ky.) 138, in which case the surety claimed exoneration because, "although his son told the appellee that his father 'wanted him to sue' and that written notice would be given if he should require it, he said he would sue, yet failed to do so." The court held the above facts no defense, on the ground that there was no express and certain acceptance of the son's suggestion as a formal notice to sue, or as a substitute of an explicit and peremptory notice in writing, as in *Hamblin v. McCallister*, 4 Bush (Ky.) 418, in which case it was held that an express waiver, in so many words, of notice in writing was binding upon the creditor.

The creditor does not waive his right to insist that the notice must be in writing to bind him, by failing to object to oral evidence showing that the surety requested him to sue. *Davis v. Payne*, 45 Iowa 194.

4. *Day v. Elmore*, 4 Wis. 190; *Goodwin v. Buckman*, 11 Iowa 308. In these cases the guarantors of promissory notes waived the use of due diligence by requesting the holder to delay suit.

5. *Bickford v. Gibbs*, 8 Cush. (Mass.) 154; *Worcester County Sav. Inst. v. Davis*, 13 Gray (Mass.) 531; *Bray v. Marsh*, 75 Me. 452; 46 Am. Rep. 416; *Osburn v. Lawson*, 26 Mo. App. 549; *Star Wagon Co. v. Swezy*, 63 Iowa 520; *Murphy v. Victor Sewing Mach. Co.*, 112 U. S. 688. In these cases the guaranty contained an express waiver of demand and notice.

An express waiver of demand and notice, contained in a guaranty of a promissory note, cannot be contradicted by evidence of a contemporaneous

the creditor, may waive such discharge, and revive his liability by a subsequent promise to pay, or other acknowledgment of liability.¹ But such promise or acknowledgment must be made with a full knowledge of the fact of laches.²

c. **WAIVER OF NOTICE OF ACCEPTANCE OF GUARANTY.**—The right of the guarantor to require notice of the acceptance of the guaranty may be waived in the guaranty itself,³ or by a subsequent promise to pay, or acknowledgment of liability.⁴ But a promise to pay or acknowledgment of liability made under a mistake of fact, will not amount to such waiver.⁵

8. Bills and Notes—*a.* WAIVER OR RENUNCIATION OF BILLS AND NOTES.—In *England*, the holder of a bill or note may discharge the obligation of the acceptor, maker, or other party, by a parol waiver or renunciation, without consideration and without surrender of the instrument;⁶ but in some, at least, of the states

oral agreement to collect the note from the principal, and of laches in pursuing him. *Worcester County Sav. Inst. v. Davis*, 13 Gray (Mass.) 531.

Where the obligee of a bond assigned it and guarantied its payment, and after it became due requested the holder in writing not to sue, it was held that he had waived due diligence in prosecuting the suit, and that he could not revive the duty by a subsequent notice to sue, given at a time when the obligor had left the state. *Ege v. Barnitz*, 8 Pa. St. 304.

1. *Sigourney v. Wetherell*, 6 Met. (Mass.) 553. See *Gamage v. Hutchins*, 23 Me. 565. In *Sigourney v. Wetherell*, 6 Met. (Mass.) 553, the acknowledgment of liability took the form of payment of interest upon the notes guarantied.

2. The acknowledgment or promise must be with knowledge of the laches of the holder, who must prove such knowledge. *Gamage v. Hutchins*, 23 Me. 565.

3. Notice is waived where the guarantor agrees to indemnify "unconditionally at all times," *Davis v. Wells*, 104 U. S. 159; or undertakes to make payment or reasonable notice of the principal's default, *Wadsworth v. Allen*, 8 Gratt. (Va.) 174; 56 Am. Dec. 137; or guaranties payment for goods to be sold "from time to time," and waives notice of the times, or amounts of sales and of defaults, or delay in payment. *Crittenden v. Fiske*, 46 Mich. 70; 41 Am. Rep. 146. The guarantor cannot complain of want of notice of acceptance, when his acts and declarations amount to a waiver of such notice. *Trefethen v. Locke*, 16 La. Ann. 19.

4. *Farwell v. Sully*, 38 Iowa 387; *Reynolds v. Douglass*, 12 Pet. (U. S.) 497; *Louisville Mfg. Co. v. Welch*, 10 How. (U. S.) 476. A verbal acknowledgment of liability and a promise to pay supersede the necessity of proving notice of acceptance. *Peck v. Barney*, 13 Vt. 93.

5. *Reynolds v. Douglass*, 12 Pet. (U. S.) 497; *Louisville, etc., Co. v. Welch*, 10 How. (U. S.) 476.

6. *Foster v. Dawber*, 6 Exch. 839; *Whatly v. Tricker*, 1 Campb. 35; *Black v. Peele*, 1 Doug. 249n; *Walpole v. Pulteney*, 1 Doug. 249n; *Ellis v. Galindo*, 1 Doug. 250n; *Aston v. Pye*, 5 Ves. Jr. 350n; *Wintermute v. Post*, 24 N. J. L. 420. See *Nolan v. Bank of New York Nat. Banking Assoc.*, 67 Barb. (N. Y.) 34; *Miller v. Tharel*, 75 N. Car. 148; *Dingwall v. Dunster*, 1 Doug. 247; *Farquhar v. Southey*, 2 C. & P. 497; 12 E. C. L. 232; *Stevens v. Thacker*, Peake 187; *Parker v. Leigh*, 2 Stark. 228; *Kemp v. Watt*, 15 M. & W. 672, 681. See also *CONTRACT*, vol. 3, p. 890.

As to the form of the waiver or renunciation, there is authority holding that it should be express. *Parker v. Leigh*, 2 Stark. 228; *Dingwall v. Dunster*, 1 Doug. 247; *Kemp v. Watt*, 15 M. & W. 681.

What Amounts to a Waiver or Renunciation.—An agreement to consider the acceptance at an end is a waiver. *Walpole v. Pulteney*, 1 Doug. 249n. And a message sent to the acceptor by the holder, who had taken security from the drawer, "that he had settled with Dallas (the drawer), and he need not trouble himself any further, has been held to constitute a waiver." *Black*

of the Union, the rule seems to be otherwise than that recognized in *England*.¹

v. Peele, 1 Doug. 249n. But see *Adams v. Gregg*, 2 Stark. 531.

So, also, an entry by the payee of a note, found after his death. "H. J. P. (the maker) pays no interest, nor shall I ever take the principal unless greatly distressed;" *Aston v. Pye*, 5 Ves. Jr. 350n.

And the same is true of a statement by the holders, made at a meeting of the creditors of the acceptors, that "they looked to the drawer and should not come upon the acceptors of the bill," if intended as an absolute unconditional renunciation, and not as a promise to look to the drawer in the first instance. *Whatly v. Tricker*, 1 Campb. 35.

Mere delay in proceeding against the acceptor will not discharge him, *Anderson v. Cleveland*, 13 East 430n; nor the receipt of interest from the drawer, and a delay for a long time to apply for payment to the acceptor. *Dingwall v. Dunster*, 1 Doug. 247; *Farquhar v. Southey*, 2 C. & P. 497; 12 E. C. L. 232.

A statement by the holder, on being informed by the acceptor that the bill was not good, that he must look to the drawer, together with receipts given by the holder to the acceptor subsequently to the date of the acceptance, acknowledging payment in full of all accounts to their several dates, are evidence to go to the jury upon the question of waiver, which is a question for the jury. *Wintermute v. Post*, 24 N. J. L. 420.

Consideration.—In *McManus v. Bark*, L. R., 5 Exch. 65, it appeared that the defendant gave J. M. his note payable to J. M. or order on demand. Afterward a written agreement was entered into by J. M. and the defendant that the principal sum of the note should be repaid by quarterly installments. In a suit by the administrator of J. M., the defendant claimed that the agreement was a waiver or discharge of the note, relying upon *Foster v. Dawber*, 6 Exch. 839; and it was held that the agreement was no defense, on the ground that it lacked consideration, without discussion, however, of any prior cases upon this point. *Compare Crawford v. Millspaugh*, 13 Johns. (N. Y.) 87.

Cancellation by striking out the acceptor's signature, is a waiver of the

acceptance and discharges the bill. *Sweeting v. Halse*, 9 B. & C. 369; 17 E. C. L. 394.

But cancellation by mistake is no discharge. *Wilkinson v. Johnson*, 3 B. & C. 428; 10 E. C. L. 140; *Raper v. Birkbeck*, 15 East 17; *Novelli v. Rossi*, 2 B. & Ad. 759; 22 E. C. L. 176.

And if the cancellation is not apparent, and the bill is negotiated to an innocent holder for value before maturity, such holder may enforce the bill. *Ingham v. Primrose*, 7 C. B. N. S. 82; 97 E. C. L. 82, in which case a bill torn in half with intent to cancel, was rejoined in such a way that its appearance was as consistent with its having been divided for the purpose of safe transmission by mail as with its having been torn for the purpose of destroying it.

1. In *Bragg v. Danielson*, 141 Mass. 195, an action upon a promissory note made by the defendant for the accommodation of L., who was not a party to the note, the defendant set up that when the note fell due, the plaintiff agreed with the defendant that if the defendant would pay another note made by the defendant and held by the plaintiff, "the plaintiff would undertake to see, and would see, L., and collect the note now sued upon from him, and release the defendant from liability thereon and deliver said note to him," and that the defendant paid the other note and omitted to take steps to secure payment by L., relying upon the plaintiff's agreement. The court held that these facts constituted no defense. *Holmes, J.*, after saying that it was not clear that the plaintiff's promise meant anything more than that he would do his best to collect of L., said: "But if the words used imported a present discharge, they were inoperative. There was neither a release nor an accord and satisfaction. In *England*, it has been said that the law merchant has introduced an exception, in the case of bills and notes, to the rule that, after breach, a simple contract can only be discharged by deed, or upon sufficient consideration. *Citing Foster v. Dawber*, 6 Exch. 839; *Dingwall v. Dunster*, 1 Doug. 247; *Farquhar v. Southey*, 2 C. & P. 497; 12 E. C. L. 232. But no such exception is recognized in this commonwealth, when the note is not surrendered.

b. WAIVER OF PRODUCTION UPON DEMAND OF PAYMENT.—Actual production of the bill or note upon presentment for payment, may be waived by a refusal to pay for other reasons than the fact that the paper was not produced.¹

Smith v. Bartholomew, 1 Met. (Mass.) 276; 25 Am. Dec. 365; Shaw v. Pratt, 22 Pick. (Mass.) 305.²

The payee and holder of two notes, about ten days before his death, said to a third person that he did not want the maker to pay them. Some forty-eight hours before his death, he sent for the maker to draw his will. He directed the maker to deduct the notes from an estimate of his personalty, and told him that the notes were his, also telling him where the notes were and directing him to get them. After the maker's departure, he told his housekeeper that he had given the notes to the maker. Four or five days after his death, the maker took possession of the notes. The court held that there was no delivery of the notes to render the gift complete, and that the maker, who was executor of the holder's will, should be charged with the notes as part of the estate. Horner's Appeal, 2 Penny. (Pa.) 289.

The payee and holder of certain promissory notes, before his death and while distributing his estate, directed that the notes should be burned or given to the maker. After his death the notes were delivered to the maker. The court held that the maker should be charged with the notes as administrator of the payee, the court saying that the directions of the intestate were a mere authority which expired with him. *In re Campbell's Estate*, 7 Pa. St. 100; 47 Am. Dec. 503.

An allegation in the answer to a suit upon a note, that the intestate, before his death "gave the note to the defendant and made arrangements to have it delivered up to him, which was neglected to be done," is no defense, the facts constituting neither a *donatio causa mortis*, nor a valid gift, nor an equitable release. Henderson v. Henderson, 21 Mo. 379.

In *England*, by the Bills of Exchange Act of 1882, the renunciation must now be in writing, unless the bill is delivered up. For a case arising under this act, see Francis v. Bruce, 44 Ch. Div. 627.

1. Lockwood v. Crawford, 18 Conn. 373; King v. Crowell, 61 Me. 244; 14 Am. Rep. 560; Etheridge v. Ladd, 44

Barb. (N. Y.) 72; Gilbert v. Dennis, 3 Met. (Mass.) 497; 38 Am. Dec. 329. See DEMAND, vol. 5, p. 528 ²¹⁰⁰, where Gilbert v. Dennis, 3 Met. (Mass.) 497, is cited and quoted from, at length. In Lockwood v. Crawford, 18 Conn. 373, it does not appear that the holder had the note with him when he made the demand, as was the case in Etheridge v. Ladd, 44 Barb. (N. Y.) 72, and King v. Crowell, 61 Me. 244; 14 Am. Rep. 560. In this last case, Virgin, J., said: "It is true that the rule requiring the persons making the demand to exhibit the evidence of debt is well settled, and well grounded in reason; and, although applicable to all written contracts on which a demand is necessary, it is, as has been well said, especially applicable to negotiable securities, which may be legally transferred to another at the very time the original payee makes the demand. But the reasons applicable to cases in which the maker offers to pay, cannot apply to cases in which he not only does not offer, but absolutely refuses, to pay, and does not even express any desire to see the note."

In Fall River Union Bank v. Willard, 5 Met. (Mass.) 216, the cashier of a bank holding a draft met the drawee and informed him that the bank had the draft, upon which the drawee told the cashier that he should not accept or pay it. It was held that there was no due presentment of the draft for acceptance. Hubbard, J., said: "The term presentment imports, not a mere notice of the existence of a draft which the party has in his possession, but the exhibiting of it to the person on whom it is drawn; that he may see the same, and examine his accounts or correspondence, and judge what he shall do; whether he shall accept the draft or not. Here there appears to have been nothing more than a casual meeting of the parties, and the conversation on the subject of the draft ensued. . . . With this view of the case we are not satisfied with the instruction given to the jury (that if the drawee was informed by the cashier that the plaintiff had such a draft on him, and he thereupon informed the cashier that he should not accept nor pay it, and if no notice thereof was

c. **WAIVER, IN NOTES, OF LEGAL RIGHTS, AS AFFECTING THEIR NEGOTIABILITY.**—The insertion, in a promissory note, of a waiver of rights arising from exemption, valuation, and appraisement laws, will not destroy the negotiability of the note.¹

d. **ACCEPTANCE OF BILL OR NOTE AS WAIVING LIEN.**—As a general rule, the acceptance of a negotiable security on account of a claim secured by a lien, will not operate as a waiver of the lien.²

e. **WAIVER OF DEMAND AND NOTICE.**—See **BILLS AND NOTES**, vol. 2, p. 419 *et seq.*; **DEMAND**, vol. 5, pp. 528³⁰, 528¹⁰⁰; **PROTEST**, vol. 19, p. 297.

9. **Waiver In Contracts of Insurance.**—See **ESTOPPEL**, vol. 7, p. 32; **FIRE INSURANCE**, vol. 7, p. 1054 *et seq.*; **FORFEITURE**, vol. 8, p. 446; **INSURANCE**, vol. 11, p. 331 *et seq.*; **LIFE INSURANCE**, vol. 13, p. 658 *et seq.*; **MUTUAL INSURANCE**, vol. 16, p. 83 *et seq.*

10. **Waiver of Conditions and Forfeitures**—a. **GENERALLY.**³—See **CONDITIONAL SALES**, vol. 3, p. 435; **ESTATES**, vol. 6, p. 904; **FORFEITURE**, vol. 8, pp. 446, 451; **GRANTS**, vol. 9, p. 59; **INSURANCE**, vol. 11, pp. 331–336 *et seq.*; **LACHES**, vol. 12, p. 597; **LANDLORD AND TENANT**, vol. 12, p. 758 *et seq.*; **LIMITATIONS IN INSTRUMENTS**, vol. 13, p. 779 *et seq.*; **MUTUAL INSURANCE**, vol. 16, p. 83 *et seq.*; **SALES**, vol. 21, p. 642 *et seq.*; *supra*, this title, *Vendor and Purchaser*.

given to the indorser, he was discharged). To confirm it would tend to introduce a looseness of practice on the subject of presenting bills for acceptance, which will lead to disputes and difficulties greater than now exist."

1. *Zimmerman v. Anderson*, 67 Pa. St. 421; 5 Am. Rep. 447; *Zimmerman v. Rote*, 75 Pa. St. 188; *Lyon v. Martin*, 31 Kan. 411; *Walker v. Woollen*, 54 Ind. 164; 23 Am. Rep. 639; *Woollen v. Ulrich*, 64 Ind. 120; *Kemp v. Klaus*, 8 Neb. 24; *Adams v. Addington*, 16 Fed. Rep. 89; *Hughitt v. Johnson*, 28 Fed. Rep. 865; *National Bank v. Gary*, 18 S. Car. 287.

In *Zimmerman v. Anderson*, 67 Pa. St. 421; 5 Am. Rep. 447, the note contained the words "waiving the right of appeal and all valuation, appraisement, stay, and exemption laws." Read, J., said: "They do not contain any condition or contingency, but, after the note falls due and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability it adds to it, and gives additional value to the note."

But see *Cayuga County Nat. Bank v.*

Purdy, 56 Mich. 6, in which case a note containing an agreement to pay exchange and all expenses, including attorney's fee, incurred in collecting, and waiving the benefit of all laws exempting real and personal property from levy and sale, and all benefit or relief from valuation and appraisement laws, was held not negotiable, without discussion, however, as to the effect of any particular clause.

As to the question of the validity of a waiver, in promissory notes, of the benefit of homestead and exemption laws, see *infra*, this title, *Waiver of Homestead and Exemptions*.

2. For cases and a further consideration of this subject, see **LIENS**, vol. 13, p. 623; **MECHANICS' LIENS**, vol. 15, pp. 105–107; **MARITIME LIENS**, vol. 14, pp. 451, 452; **PILOTS**, vol. 18, p. 455; **VENDORS' LIENS**, vol. 28, p. 156; and see *infra*, this title, *Waiver of Liens*.

3. **Waiver or License of Breach of Condition as Discharging the Condition.**—See **ESTATES**, vol. 6, p. 904. See also *Dumppois Case*, 1 Smith's Lead. Cas. (9th Am. ed.), p. 119; 7 Am. Law Rev. 616, for an article urging that the rule of *Dumppois Case* should no longer be considered good law.

b. WAIVER BY STATE OF FORFEITURE OF CHARTER.—The state may waive a forfeiture of the charter of a corporation, either expressly or impliedly, by a recognition of the continued existence of the corporation after the forfeiture.¹ But mere lapse of

Consideration to Support Waiver of Forfeiture.—As to the question whether a consideration is necessary to render binding a waiver of forfeiture, see *supra*, this title, *Essentials of Binding Waiver*.

1. Matter of New York, El. R. Co., 70 N. Y. 338; People v. Manhattan Co., 9 Wend. (N. Y.) 380; Central Crosstown R. Co. v. Twenty-third St. R. Co., 54 How. Pr. (N. Y. Super. Ct.) 186; Atty. Gen'l v. Petersburg, etc., R. Co., 6 Ired. (N. Car.) 456; State v. Real Estate Bank, 5 Ark. 595; 41 Am. Dec. 109. And see *ULTRA VIRES*, vol. 27, p. 351.

In Atty. Gen'l v. Petersburg, etc., R. Co., 6 Ired. (N. Car.) 456, Ruffin, C. J., said: "But on the other hand, if the sovereign—with us, the law-making power,—with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the legislature, or so clearly to be inferred from its own archives that the contrary cannot be, thinks proper by an act to remit the penalty or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default; such conduct must be taken, as in other cases of breaches of condition, to be intended as a declaration that the forfeiture is not insisted on, and, therefore, as a waiver of the previous defaults. It must be so in the nature of things; for, while the state insists on these stipulations in a charter, as conditions, express or implied, in a contract, the citizen has a right, that they shall be dealt with as other conditions, and that a breach shall not be insisted on, when, after it, the parties acted and dealt as if there had been no breach; for example, when a landlord receives rent after he might have entered for non-payment of it."²

The state recognizes the continued existence of the corporation, and waives the forfeiture by requiring the assent of the corporation to the charter of another corporation, and by authorizing a transfer of its charter and the rights and powers thereby granted to such other corporation, Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1, 127; or by requiring

the corporation to make alterations on its road and by thus inducing expenditure by the corporation, Atty. Gen'l v. Petersburg, etc., R. Co., 6 Ired. (N. Car.) 470; or by extending the time for the completion of the road, Milford, etc., Turnpike Co. v. Brush, 10 Ohio 111; 36 Am. Dec. 78; La Grange, etc., R. Co. v. Rainey, 7 Coldw. (Tenn.) 420; or by amending the act under which the corporation was organized, confirming its acquisitions, changing its powers, and conferring new ones, People v. Ottawa, etc., Co., 115 Ill. 281; see Central Crosstown R. Co. v. Twenty-third St. R. Co., 54 How. Pr. (N. Y. Supreme Ct.) 186; or by requiring a bank to resume specie payments by a certain date, thus waiving the forfeiture by reason of the previous suspension. Commercial Bank v. State, 6 Smed. & M. (Miss.) 623; 45 Am. Dec. 280; Atchafalaya Bank v. Dawson, 13 La. 497.

Where the charter of a turnpike corporation provided that the corporation should, at the end of every six years after setting up any toll gate, lay before the legislature an account of expenditures and profits, "under forfeiture of the privileges of the act in future," and gates were erected in 1806, but no account was laid before the legislature until 1830, when in that year and in 1836 and 1842 accounts were submitted which were received as "sufficient and satisfactory," and in 1833 an act was passed authorizing a change in route—it was held that the forfeiture had been waived. State v. Fourth N. H. Turnpike, 15 N. H. 162; 41 Am. Dec. 690.

But the appointment of a corporate officer by the governor and senate, under a power reserved, by the act of incorporation, to the legislature to appoint such officer annually, after the filing of an information to enforce a forfeiture, is not a waiver of the forfeiture. People v. Phoenix Bank, 24 Wend. (N. Y.) 431; 35 Am. Dec. 634.

In State v. Fourth N. H. Turnpike, 15 N. H. 162, 166, the court, by Gilchrist, J., said: "The doctrine of the waiver of a forfeiture by the legislature by subsequent legislative acts does not apply, if, by the terms of the char-

time is not a bar to the enforcement of a forfeiture by the state,¹ and the intent to waive it must be expressly declared or plainly to be inferred from some act of the granting power.²

c. **WAIVER OF FORFEITURE FOR BREACH OF CONDITION IN DEED.**—The grantor of an estate, upon condition, may waive a forfeiture for breach of condition by subsequent acts showing that he still holds the grantee to perform the things, to secure the performance of which the condition was created.³

11. **Waiving Tort and Suing in Assumpsit**—a. **MEANING OF PHRASE.**—"This phrase means no more than that by treating the matter as a contract he waives his right to pursue it as a tort with the peculiar remedies, penalties, and consequences belonging to it in that character."⁴

b. **WHEN THE RIGHT EXISTS.**—The right to waive the tort and sue in assumpsit exists only when the person committing the tort has received some benefit at the expense of the plaintiff.⁵

ter, the franchise absolutely determines on failure to perform the condition; for as in such case the corporation has ceased to exist, the doctrine of waiver is inapplicable." See also, to the same effect, *State v. Old Town Bridge Co.*, 85 Me. 31.

1. *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521; 94 Am. Dec. 123.

2. *London v. Vanacker*, 1 Ld. Raym. 496; *Angell and Ames on Corp.* (11th ed.), § 777, and cases in notes; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *People v. Kingston, etc., Turnpike Road Co.*, 23 Wend. (N. Y.) 193; 35 Am. Dec. 551; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 382.

3. *Hubbard v. Hubbard*, 97 Mass. 188; 93 Am. Dec. 75. See also *Ludlow v. New York, etc., R. Co.*, 12 Barb. (N. Y.) 440, where it was held that the grantor of an estate, upon the condition that the conveyance should be void if the railroad was not completed by a certain day, had waived the forfeiture by making no effort to assert his right to the estate until two years after the forfeiture, during which time he saw the company making large expenditures and extending its road, without making any objection, and also gave the company notice to perform a covenant in the deed in regard to division fences, thus recognizing himself and the company as owners of adjoining lands.

4. *Harway v. New York*, 1 Hun (N. Y.) 630. In this case it was said that "He by no means waives the right to give evidence of the transaction and of its true character, in order to raise the

implication upon which his demand in contract must rest, for that would be to waive all remedy. The waiver of the tort, therefore, is simply a declaration that, for the purposes of redress, the party elects to treat the facts as establishing an implied contract which he may enforce, instead of an injury by fraud or wrong for the committing of which he may demand damages, compensatory or exemplary." And see *Young v. Marshall*, 8 Bing. 43; 21 E. C. L. 215.

The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy; and in that sense may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. *Cooper v. Cooper*, 147 Mass. 370. And see *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Brown v. Holbrook*, 4 Gray (Mass.) 102; *Ferguson v. Carrington*, 9 B. & C. 59; 17 E. C. L. 330.

In *Phillips v. Homfray*, 24 Ch. Div. 439, *Bowen, L. J.*, said: "We do not believe that the principle of waiving a tort and suing in contract can be carried further than this, that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief."

5. *Webster v. Drinkwater*, 5 Me. 319; 17 Am. Dec. 238; *Hambly v. Trott*,

Where "there is a wrong, nothing more and nothing less," assumpsit will not lie.¹

c. EFFECT OF ELECTION OF REMEDIES.—(See also ELECTION, vol. 6, p. 247).—"A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and selecting again."²

Cowp. 371. See National Trust Co. v. Gleason, 77 N. Y. 400; 33 Am. Rep. 632.

1. Cooley on Torts (2d ed.), p. 110; *Alsbrook v. Hathaway*, 3 Sneed (Tenn.) 456. In *Hambly v. Trott*, Cowp. 371, Lord Mansfield said: "Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor, as, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." Thus, where damages have been committed by one's cattle to the crops and personal property of another, without the owner's participation in the trespass, or benefit therefrom, and in the absence of any promise, there is no remedy in assumpsit. *Tightmeyer v. Mongold*, 20 Kan. 90.

So, in *Phillips v. Homfray*, 24 Ch. Div. 439, it was decided that the defendant was not liable to make compensation to the plaintiffs, for the secret and tortious use of the plaintiff's roads by the defendant's testator in transporting coal and ironstone thereover, a majority of the court holding that the plaintiffs' claim would not support an action in assumpsit, and consequently did not survive as against the defendant. In this case, Bowen, L. J., said: "The deceased, R. Fothergill, by carrying his coal and ironstone in secret over the plaintiffs' road took nothing from the plaintiffs. The circumstances

under which he used the road, appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved his estate expense, but he did not bring into it any additional property or value belonging to another person."

And see *Ford v. Caldwell*, 3 Hill (S. Car.) 248, where Richardson, J., said: "The reason why the action of trespass does not survive the trespasser, is because the outrage committed is personal, and not beneficial to the offender. It hurts another, but brings no money to the trespasser; as where a man strikes you, or kills your negro. But if he takes your negro and sells or employs him, he then gets your money, which goes into his estate; and assumpsit of course lies to recover it, either of him or his representatives. . . . The essential principle of the action, upon the implied contract with the administrator, is no more than this, that the lawful property of the plaintiff has gone into the estate of the intestate. . . . If the trespasser commits a mere outrage, which cannot enrich him, although it make his neighbor poor, yet his executor or administrator is not responsible."

In *Fanson v. Linsley*, 20 Kan. 235, it was held that the defendant might recover in assumpsit, by way of set-off, the value of the use of a threshing machine wrongfully taken and used by the plaintiff, but not for the expense of repairing such machine and of getting it back to the place from which it was taken by the plaintiff.

2. See opinion in *Thompson v. Howard*, 31 Mich. 309; also *Smith v. Hodson* and notes, 2 Smith's Lead. Cas. 126; *Jewett v. Petit*, 4 Mich. 508; *Rodermund v. Clark*, 46 N. Y. 354; *Smith v. Baker*, L. R., 8 C. P. 350.

d. INSTANCES OF WAIVER OF TORT.—A master may recover in assumpsit for the work and labor of an apprentice or servant,¹

Where the plaintiff has sued one of two joint tort-feasors in tort, and recovered judgment, he cannot afterward sue the other for money had and received. *Buckland v. Johnson*, 15 C. B. 145; 80 E. C. L. 145. And conversely, where the plaintiff sues in conversion, the defendant may show that the plaintiff has already recovered judgment in a suit in assumpsit against two other persons on account of the same transaction, such judgment being admissible in evidence, not by way of estoppel, but for the purpose of showing that the plaintiff had elected to treat the taking of the property as a sale. *Terry v. Munger*, 121 N. Y. 161; 18 Am. St. Rep. 803. In this case the court, by Peckham, J., said: "Any decisive act of the plaintiffs, with knowledge of all the facts, would determine their election in such a case as this."

Suing in assumpsit, and prosecuting the suit down to submission to the jury, is a binding election precluding a subsequent action in tort for the same cause of action. *Thompson v. Howard*, 31 Mich. 309.

Commencing an action is a conclusive election. *Smith v. Baker*, L. R., 8 C. P. 350; *Terry v. Munger*, 121 N. Y. 167; 18 Am. St. Rep. 803. See *Conrow v. Little*, 115 N. Y. 393.

A plaintiff who has failed in an action of assumpsit for want of jurisdiction in the court in which the action was brought, cannot afterward sue in tort for the same cause of action. *Nield v. Burton*, 49 Mich. 53.

Receipt of Proceeds of Converted Property as Waiving Tort.—Acceptance of the proceeds of sale, or any part thereof, of converted property, is a conclusive waiver of the tort, and precludes the owner from afterward bringing an action for damages. *Brewer v. Sparrow*, 7 B. & C. 310; 14 E. C. L. 50; *Lythgoe v. Vernon*, 5 H. & N. 180. And after recovering the proceeds of sale, the owner cannot claim in trover for the value of the goods in excess of that amount. *Smith v. Baker*, L. R., 8 C. P. 350.

But an unsuccessful attempt to obtain the purchase-money of an unauthorized sale, from one to whom the vendee has paid it, is not a ratification of

the sale and will not prevent an action against the vendee. *Morris v. Robinson*, 3 B. & C. 196; 10 E. C. L. 49.

A mere demand by assignees, of payment for goods bought by the defendant of the bankrupt, after a notice of an act of bankruptcy, is not a waiver of the tort, and the assignees may bring trover for the goods after refusal. *Valpy v. Sanders*, 5 C. B. 886; 57 E. C. L. 886.

Waiver of the tort by taking the proceeds extends only to the claim for damages for the tortious act, and does not recognize the right of the vendor to convert the goods. Thus, where the master of a ship, upon the wreck of the ship, sold the cargo instead of forwarding it to its destination, it was held that the owner of the goods might claim the proceeds of the sale without deduction of freight *pro rata*, for which he would have made himself liable by consenting to the sale. *Hunter v. Prinsep*, 10 East 378.

But it has been held that where the owner of coal wrongfully taken and sold by adjoining mine owners, claims the proceeds as money had and received to his use, he is bound to allow a deduction from the price for the expense of raising and conveying the coal to market. *Powell v. Reese*, 7 Ad. & El. 426; 34 E. C. L. 136.

See *In re United Merthyr Collieries Co.*, L. R., 15 Eq. 46, where it was held that the trespasser must pay for the coal at the pit's mouth, less actual disbursements for severing and bringing to bank, so as to place the owner in the same position as if he had himself raised the coal. And see also, to the same effect, *Jegon v. Vivian*, L. R., 6 Ch. 742; *Phillips v. Homfray*, L. R., 6 Ch. 770; *Ashton v. Stock*, 6 Ch. Div. 719.

When it becomes necessary to choose between inconsistent rights and remedies, the election will be final, and cannot be reconsidered, even where no injury has been done by the choice, or would result from setting it aside. *Terry v. Munger*, 121 N. Y. 168; 18 Am. St. Rep. 803.

1. *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191; *Thompson v. Howard*, 31 Mich. 309.

Recovery may be had in assumpsit

wrongfully enticed away and harbored by the defendant. Assumpsit for money had and received will lie to recover the known and customary fees of an office, which the plaintiff holds or is entitled to hold, from one who has wrongfully usurped the office and received such fees,¹ or to recover money fraudulently or tortiously obtained,² or to recover the proceeds of goods converted, where the goods have been sold and converted into money.³ But assumpsit for the use and occupation of real estate will not lie against a trespasser.⁴

12. **Waiver of Liens.**—See generally LIENS, vol. 13, p. 621.

a. **WAIVER OF CARRIER'S LIEN.**—See FREIGHT, vol. 8, p. 978; LIENS, vol. 13, pp. 586, 588.

b. **WAIVER OF CORPORATION'S LIEN ON STOCK OF STOCKHOLDERS.**—See LIENS, vol. 13, p. 621; STOCK, vol. 23, p. 697.

c. **WAIVER OF FACTOR'S LIEN.**—See COMMISSION MERCHANTS, vol. 3, pp. 337, 338.

d. **WAIVER OF INN KEEPER'S LIEN.**—See INNS AND INN KEEPERS, vol. 11, pp. 47-49.

e. **WAIVER OF LANDLORD'S LIEN FOR RENT.**—See LANDLORD AND TENANT, vol. 12, p. 757*n et seq.*; LIENS, vol. 13, p. 622.

f. **WAIVER OF LIVERY STABLE KEEPER'S LIEN.**—See LIVERY STABLE KEEPERS, vol. 13, pp. 963-965.

for the work and labor of an apprentice, even though the person employing him did not know that he was an apprentice. *Bowes v. Tibbets*, 7 Me. 457; *James v. LeRoy*, 6 Johns. (N. Y.) 274. See *Ayer v. Chase*, 19 Pick. (Mass.) 558.

1. *Arris v. Stukely*, 2 Mod. 260. But such action will not lie to recover mere gratuities received by one tortiously discharging the duties of the office, such as fees voluntarily paid, for showing a church, to one usurping the office of sexton. *Boyter v. Dodsworth*, 6 T. R. 681. See *Spry v. Emperor*, 6 M. & W. 639.

So a gratuity paid by an insurance company to the holder of an invalid insurance policy, by assignment from a bankrupt, is not recoverable by the assignees. *Wills v. Wells*, 8 Taunt. 264.

2. *Neate v. Harding*, 6 Exch. 349; *Edmeads v. Newman*, 1 B. & C. 418; 8 E. C. L. 178; *Holt v. Ely*, 1 El. & Bl. 795; 72 E. C. L. 795; *Ramshire v. Bolton*, L. R., 8 Eq. 294; *Blake v. Albion L. Assur. Assoc.*, L. R., 4 C. P. Div. 94; *Boston, etc., R. Co. v. Dana*, 1 Gray (Mass.) 83; *Harway v. New York*, 1 Hun (N. Y.) 628; *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105; *Andrews v. Artisans' Bank*, 26 N.

Y. 298; *Chambers v. Lewis*, 2 Hilt. (N. Y.) 591; *Western Assur. Co. v. Towle*, 65 Wis. 254; *Burton v. Driggs*, 20 Wall. (U. S.) 125; *Walker v. Coleman*, 81 Ill. 390; 25 Am. Rep. 285; *McConnell v. Delaware, etc., Ins. Co.*, 18 Ill. 228; *Magoffin v. Muldrow*, 12 Mo. 512; *Johnson v. Continental Ins. Co.*, 39 Mich. 33. And see ASSUMPSIT, vol. 1, pp. 882, 887.

3. See *TROVER—Waiver of Tort* vol. 26, p. 792.

4. See ASSUMPSIT, vol. 1, p. 883; LANDLORD AND TENANT, vol. 12, p. 757.

It has been held that a trespasser pasturing cattle may be sued in assumpsit for the pasturage. *Welch v. Bragg*, 12 Mich. 42; *Norden v. Jones*, 33 Wis. 600; 14 Am. Rep. 782. But see, *contra*, *Stearns v. Dillingham*, 22 Vt. 624; 54 Am. Dec. 88.

Set-Off or Counterclaim.—The right to waive a tort and sue in assumpsit may be enforced by way of set-off or counterclaim. *Fanson v. Linsley*, 20 Kan. 235; *Challis v. Wyllie*, 35 Kan. 506; *Eversole v. Moore*, 3 Bush (Ky.) 49; *Fletcher v. Harmon*, 78 Me. 465; *Gordon v. Bruner*, 49 Mo. 570; *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105.

g. WAIVER OF MECHANIC'S LIEN.—See MECHANICS' LIENS, vol. 15, p. 104 *et seq.*; LIENS, vol. 13, p. 591.

h. WAIVER OF MARITIME LIENS.—See MARITIME LIENS, vol. 14, p. 447 *et seq.*

i. WAIVER OF SELLER'S LIEN FOR PURCHASE-MONEY.—See SALES, vol. 21, p. 606 *et seq.*; VENDOR'S LIENS, vol. 28, p. 156; VENDOR AND PURCHASER, vol. 28, p. 67.

j. WAIVER OF RIGHT OF STOPPAGE IN TRANSITU.—See CARRIERS OF GOODS, vol. 2, p. 856; STOPPAGE IN TRANSITU, vol. 23, p. 903.

k. WAIVER OF WAREHOUSEMAN'S LIEN.—See LIENS, vol. 13, p. 622; WAREHOUSEMEN, vol. 28; WHARVES AND WHARFINGERS, vol. 29.

l. WAIVER OF VENDOR'S LIEN.—See VENDOR'S LIEN, vol. 28, p. 156.

m. WAIVER OF BANKER'S LIEN.—See BANKS AND BANKING, vol. 2, p. 99.

n. WAIVER OF LIEN ON LOGS AND LUMBER.—See LOGS AND LUMBER, vol. 13, p. 1044.

o. WAIVER OF ATTORNEY'S LIEN.—An attorney may impliedly waive his lien for his fees by his acts and conduct,¹ or by

1. See ATTORNEY AND CLIENT, vol. 1, pp. 970, 973. The lien is waived by proving the claim in the bankruptcy of the client, voting in the choice of assignee, and signing the bankrupt's certificate. *Ex p.* Solomon, 1 Glyn & J. 25.

Where an attorney, who has a lien upon a judgment in favor of his client, directs the payment of the judgment to be made to the client, saying that he will look to her for payment, and payment is made as directed, and the judgment is discharged, the lien is waived, and cannot be enforced against the money received by the client, or against property purchased with such money. *Goodrich v. McDonald*, 112 N. Y. 157 (containing a valuable discussion of the character of the charging lien, and citing many cases). In this case the court, by Earl, J., said: "These authorities are all in harmony with the cases which have been decided in this state; and from them it appears to be clear that when, by acquiescence of the attorney, the money recovered has been paid to his client, or his client has received property in satisfaction of the judgment, he cannot enforce his lien against such money or property, but must look to his client alone for his compensation. Therefore, when this money, with the plain-

tiff's consent, was paid to Mrs. Graves, without any agreement that his lien should be transferred to the fund thus paid, or should follow it any further, the lien was lost, and his only remedy was against her. Before the judgment was paid, the court, upon his application, would have protected his lien by compelling payment to him, or authorizing him to enforce the judgment for his own benefit, so far as it was necessary to secure his compensation. If the defendants had paid the judgment without notice of the attorney's lien, they would have been protected, and the attorney could not have enforced his lien upon the moneys paid. If, however, they had paid after receiving notice of the lien, or in fraud of the rights of the plaintiff, the court would have canceled any satisfaction of the judgment and allowed him to enforce it for his own benefit."

An attorney who, after obtaining judgment in favor of his client and filing a claim for a lien thereon, procures the satisfaction of the judgment by perfecting in his client the title to land attached in the action, waives his lien as effectually as if he had collected the money upon the judgment and paid it over to his client without satisfying the amount of his lien. *Cowen v. Boone*, 48 Iowa 350.

parting with papers in his possession,¹ or taking security for his claim.²

Where an attorney, after procuring judgments for his client, enters notice of record of a claim of lien, but afterward, by agreement with the judgment debtor, and with the authority of his client, enters upon the record a discharge of land from the lien of the judgments, a purchaser of the land takes it free from the judgment lien and the lien of the attorney. *Wishard v. Biddle*, 64 Iowa 526.

1. An attorney loses his retaining lien by parting with the possession of the papers subject to the lien. *Nichols v. Pool*, 89 Ill. 491. And this is true although done by mistake; but if he is wrongfully deprived of such possession, his lien remains. *Dicas v. Stockley*, 7 C. & P. 587; 32 E. C. L. 643.

See also *Clark v. Gilbert*, 2 Bing. N. Cas. 343; 29 E. C. L. 357, in which case an attorney, who had sold a lease upon which he had a retaining lien and paid himself the amount of his claim out of the proceeds, was held liable in money had and received to the client's assignee in bankruptcy, such sale being a wrongful conversion of the lease.

2. Where an attorney, who had a lien upon certain papers of his client, took from his client two notes payable in three years from date with interest, for the amount of his claim, it was held by Lord Eldon, who laid especial emphasis upon the facts that the notes were payable *in futuro*, that the attorney had waived his lien. *Cowell v. Simpson*, 16 Ves. 275.

A solicitor who takes the demand note of his client and another person for the amount of his costs, and also later takes a bill of exchange, not for the whole amount of the costs, as additional security, waives his lien. *Robarts v. Jefferys*, 8 L. J. Ch. 137. In this case the Master of the Rolls, Sir John Leach, said: "I am of opinion that the taking of this promissory note was altogether a waiver of the lien of the solicitor; I am of opinion, it would have been a waiver if it had been a promissory note of the client alone, and upon this principle, a promissory note, payable on demand, bears interest from the time of the demand; the demand might have been made the moment after the promissory note was received, and interest would have run, therefore, upon the promissory

note from that day. Now, my opinion is, that, inasmuch as a solicitor has no claim to interest upon the amount of his bill of costs, if he takes a security for the amount of his bill of costs, which will, in fact, give him interest, as here, that security is a waiver of the lien; and, upon that ground, I am of opinion that Mr. Jefferys, taking the promissory note, did lose his lien, as solicitor upon these deeds."

A solicitor *prima facie* abandons his lien by taking the demand promissory note of his client and her husband, and a charge upon a policy as security for his costs. *In re Taylor* (1891), 1 Ch. Div. 590. In this case Lindley, L. J., said: "Whether a lien is waived or not by taking a security, depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case. In this particular instance, we are dealing with a solicitor and his client. It strikes me that if a solicitor takes from his client such a security as this solicitor took, the *prima facie* inference is that he waives his lien. That appears to me the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do. In the case of a banker, I should not draw the same inference, since a banker has not a similar duty towards his customer. Bearing in mind the position of the parties, and having regard to the decision of Sir John Leach, in *Robarts v. Jefferys*, 8 L. J. Ch. 137, we are justified in saying that, in the absence of evidence to the contrary, the true inference from the circumstances is that the lien was waived."

In *Dennett v. Cutts*, 11 N. H. 163, it was held that an attorney, by taking a note from his client for a general balance due him, did not waive his lien on papers of the client, on the ground that it did not appear that the note was given or received in payment.

The acceptance of a note by an attorney for his fee is not a waiver of the lien given by the code. *Davis v. Jackson*, 86 Ga. 138.

In *Renick v. Ludington*, 16 W. Va. 378, it was held that an attorney did not waive his lien, upon a judgment in favor of his client, by taking the bond of the client for his fees and a confes-

13. Waiver of Homestead and Exemptions—(See also EXECUTIONS, vol. 7, p. 141; HOMESTEAD, vol. 9, p. 487)—*a. PROSPECTIVE WAIVER*.—Whether exemption rights may be waived prospectively by the debtor at the time of contracting a debt, by a stipulation in an executory contract waiving such rights as to the particular debt contracted, is a question upon which the authorities differ. The weight of authority, resting upon considerations of public policy, seems adverse to any such right in the debtor;¹ in certain jurisdictions, however, exemption

sion of judgment upon such bond, and at the same time, an assignment of the judgment upon which the lien was claimed, the client being insolvent. The court, in this case, said that the taking of the bond was no waiver, that no intent to waive could fairly be inferred from the confession of judgment, as the client was at the time insolvent, and that finally any doubt, as to the intention of the parties, was removed by the assignment to the attorney, by the client, of the judgment upon which the lien was claimed. Green, P., said: "I have dwelt upon the circumstances which would be held to be sufficient to amount to a waiver of a vendor's implied lien, because, in my judgment, the circumstances in this case would be insufficient to justify the court in inferring that even such a lien was waived, and we may safely assume that the attorney's lien for his fees on the judgment he has obtained for his client, will not be held as waived by circumstances which do not indicate that it was the intention of the parties to waive such lien, at least, as strong as would be required to justify such inference in the case of a vendor's implied lien, which has ever been so much discountenanced by the courts. The true principle to be applied, in determining whether an attorney's lien for his fees, in a case on a judgment he has recovered for his client exists, is that stated by Lord Eldon, and is that the lien exists, unless an intention, and a manifest intention, that it shall not exist, appears."

1. *Kneetle v. Newcomb*, 22 N. Y. 249; 78 Am. Dec. 186; *Harper v. Leal*, 10 How. Pr. (N. Y.) 282; *Crawford v. Lockwood*, 9 How. Pr. (N. Y. Supreme Ct.) 547; *Carter v. Carter*, 20 Fla. 558; 51 Am. Rep. 618; *Stafford v. Elliott*, 59 Ga. 837 (Constitution of 1868); *Moxley v. Ragan*, 10 Bush. (Ky.) 156; 19 Am. Rep. 61; *Recht v. Kelly*, 82 Ill. 147; 25 Am. Rep. 301;

Phelps v. Phelps, 72 Ill. 545; 22 Am. Rep. 149; *Curtis v. O'Brien*, 20 Iowa 376; 89 Am. Dec. 543; *Branch v. Tomlinson*, 77 N. Car. 388; *Maxwell v. Reed*, 7 Wis. 582.

But a provision in a lease that the rent charges should be a lien on the crops and stock on the premises, "whether exempt from execution or not," is valid as a mortgage of the exempt property; nor is it material that the property mortgaged was not in existence at the time it was executed. *Fejavy v. Broesch*, 52 Iowa 88; 35 Am. Rep. 261.

Under the present constitution of Georgia, a waiver of homestead exemption in a promissory note, similar to that held void in *Stafford v. Elliott*, 59 Ga. 837, is valid. *Boroughs v. White*, 69 Ga. 842; *Flemister v. Phillips*, 65 Ga. 676.

In *Kneetle v. Newcomb*, 22 N. Y. 250; 78 Am. Dec. 186, Denio, J., said: "The statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity, which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intentions of the legislature. If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted

rights are regarded as mere personal privileges, and may be so waived.¹

would, therefore, be apt to object to a clause subjecting all his property to levy on execution in case of nonpayment. It was against the consequences of this overconfidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the legislature has undertaken to interpose."

On the same principle, a stipulation in a note waiving any relief from appraisement and valuation laws is void. *Levicks v. Walker*, 15 La. Ann. 245; 77 Am. Dec. 187.

A homestead right vesting by statute in the widow on the death of the husband, cannot be released in an antenuptial contract, because it is not in existence at the time of such contract. *Mann v. Mann's Estate*, 53 Vt. 48.

1. *Brown v. Leitch*, 60 Ala. 313; 31 Am. Rep. 42; *Adams v. Bachert*, 83 Pa. St. 524; *O'Neil v. Craig*, 56 Pa. St. 161; *Lauck's Appeal*, 44 Pa. St. 395; *Shelly's Appeal*, 36 Pa. St. 373; *Case v. Dunmore*, 23 Pa. St. 93; *McKinney v. Reader*, 6 Watts (Pa.) 40; *Smiley v. Bowman*, 3 Grant's Cas. (Pa.) 132; *Bowman v. Smiley*, 31 Pa. St. 225; 72 Am. Dec. 738; *Butt v. Green*, 29 Ohio St. 667; *Pratt v. Burr*, 5 Biss. (U. S.) 36.

The most usual case of prospective waiver, is that of a promissory note containing a waiver of homestead and exemption rights. As to the effect of such waiver upon the negotiability of the note, see *supra*, this title, *Bills and Notes*.

The agreement to waive the exemption must be expressed in clear and unequivocal language, and not rest upon conjecture. A note promising to pay a certain sum "for value received, or the homestead exemption law," was held not to contain a waiver of exemption. *O'Neil v. Craig*, 56 Pa. St. 161.

In the case of a note containing a waiver of statutory provisions exempting wages from attachment, the court declined to apply the general *Pennsylvania* rule allowing general prospective waiver, and held the waiver void. *Firmstone v. Mack*, 49 Pa. St. 387; 88 Am. Dec. 507. To the same effect, see also *Green v. Watson*, 75 Ga. 472; 45 Am. Rep. 479; *Burke v. Finley*, 50 Kan. 424.

A waiver of homestead and exemption contained in a note applies only to

the exemption laws of the state where the note is made, and does not deprive the debtor of the benefit of the laws of another state in which he is sued. *Seay v. Palmer*, 93 Ala. 381.

The waiver need not be alleged in the declaration, judgment, or execution, and is, after judgment, provable *aliunde*. *Flemister v. Phillips*, 65 Ga. 676.

The reasons for the *Pennsylvania* rule are thus expressed by Lewis, J., in *Case v. Dunmore*, 23 Pa. St. 93, "It has been repeatedly decided by this court that the exemption of goods from execution, under the Act of 1849, is a privilege for the benefit of the debtor, which he may waive even by the omission to claim it at the proper time, without any express contract for the purpose. But where at the time of contracting the debt he agrees to waive the benefit of the exemption, and this forms the ground of the credit given to him, the injustice of permitting him to violate his contract, and thus to defraud his creditor, is too palpable to need illustration, or to require the aid of precedents to discountenance it."

A waiver of exemptions contained in a judgment note is not revoked by the death of the maker. *Barrett v. Barrett*, 9 Pa. Co. Ct. Rep. 454.

Waiver as to One Creditor Waiver as to All.—In *Pennsylvania*, a preference of one creditor, by means of a general waiver of exemption rights in his favor, is not permitted, and the waiver inures to the benefit of all the creditors in the proper order of their liens. *Shelly's Appeal*, 36 Pa. St. 373; *Lauck's Appeal*, 44 Pa. St. 395; *Pittman's Appeal*, 48 Pa. St. 315; *Bowyer's Appeal*, 21 Pa. St. 214. *Black, C. J.*, in this last case, said: "It is easy to see how this statute might be perverted to purposes as far as possible from the intention of the legislature, if the courts would maintain the right of the debtor to claim its benefit against one creditor, and relinquish it in favor of another; or to assign his interest under it to other parties, who may or may not have paid him a consideration for it. The debtor in this case seems to have thought that the law was made, not to protect his family from want, but to give him the power of preferring those whom he chose to favor, at the expense of others whom he liked less, but whose

b. **WAIVER BY ALIENATION OF PROPERTY.**—The distinction between such general prospective waiver, and the waiver arising from the alienation of, or creation of, a present lien upon specific property of the debtor should be noted.¹ Thus, in the absence of constitutional or statutory provisions, a debtor may mortgage his homestead property, and thus free it, as to the mortgagee, from the homestead right,² which is waived by the conveyance itself, no express waiver being necessary.³

legal rights were superior. . . . Whatever he does not claim for himself and his family, he leaves in the general fund under the control of the court, to be distributed among those who are legally entitled to it; and such distribution is not to be regulated by any wish of his, no matter in what form he may choose to express it."

Most of the above cases relating to general prospective waiver have arisen with reference to exemption of personal property. The question is of little practical importance in the case of homestead exemption, for the reason that in most, if not all, of the states, statutory or constitutional provisions are found prescribing the manner in which homestead rights may be waived or released. Of course, when such provisions exist, any attempt to part with the homestead rights in any manner, other than that prescribed, is unavailing. *Boyd v. Cuddeback*, 31 Ill. 113; *Wing v. Cropper*, 35 Ill. 256; *Abbott v. Cromartie*, 72 N. Car. 292; *Beavan v. Speed*, 74 N. Car. 548; 21 Am. Rep. 457; *State Nat. Bank v. Lyon*, 52 Miss. 181; *Moran v. Clark*, 30 W. Va. 377; 8 Am. St. Rep. 66; *Drury v. Batchelder*, 11 Gray (Mass.) 214; *Connor v. McMurray*, 2 Allen (Mass.) 202; *Weymouth v. Sanborn*, 43 N. H. 171; 80 Am. Dec. 144; *Poole v. Gerrard*, 6 Cal. 71; 65 Am. Dec. 481. See *HOMESTEAD*, vol. 9, p. 475 *et seq.*

1. See *Moran v. Clark*, 30 W. Va. 368; 8 Am. St. Rep. 66.

2. *Moran v. Clark*, 30 W. Va. 376; 8 Am. St. Rep. 66; *In re Cross*, 2 Dill. (U. S.) 320; *Jones v. Yoakam*, 5 Neb. 265; *Rector v. Rotton*, 3 Neb. 171; *Gaines v. Casey*, 10 Bush (Ky.) 92; *Smith v. Mallone*, 10 S. Car. 39; *Godfrey v. Thornton*, 46 Wis. 677; *Stewart v. Mackey*, 16 Tex. 56; 67 Am. Dec. 609; *Jordan v. Peak*, 38 Tex. 429.

3. *Hall v. Fulgham*, 86 Tenn. 451. And see note to *Poole v. Gerrard*, 65 Am. Dec. 482, where it is said: "The power of alienation is not derived from

the statute relating to alienation of homesteads. It is an incident of the ownership of the property, independent of the homestead law, and the directions and prohibitions of the statute as to the alienation are mere restrictions upon this antecedent power. Without any such restriction, the property passes by a conveyance, as if there were no homestead. No express waiver of the homestead is essential, unless the statute requires it, because, the property having passed by the conveyance, the homestead necessarily ceases."

In *Louisiana*, under a statute exempting the property subject to it from seizure and sale, it has been held that a mortgage executed by a debtor upon the only land he owned, which in quantity and value was within the exemption of the statute, could not be enforced, and that the debtor might claim a homestead in the mortgaged property. *Van Wickle v. Landry*, 29 La. Ann. 330. In this case, *Manning, C. J.*, said: "If this were a *nova quaestio* in this court, whether the execution of a mortgage by a debtor is not of itself a waiver of the exemption of the property mortgage, we should be inclined to give to this deliberate act of mortgage a significance and effect in keeping with the express declaration of the mortgagor, but the scope and effect of the act providing for the exemption has been too often adjudicated by this court to permit its consideration as an original proposition, and it is in deference to the doctrine of *stare decisis* that we adhere to the ruling already made."

See also *Hardin v. Wolf*, 29 La. Ann. 333, in which case it was held that the fact that the mortgage contained an express waiver of all claim of homestead exemption, did not preclude the mortgagor from claiming homestead in the mortgaged premises. *Manning, C. J.*, dissenting.

Forced Sale.—The effect of a mortgage, in some jurisdictions, is in great measure nullified by the construction

c. **WAIVER BY ACTS, OR FAILURE TO ACT.**—The debtor, by his acts at the time of levy, may waive his exemption rights,¹ and he may also, where such rights depend on selection and demand,

placed upon statutory or constitutional provisions protecting exempted property from "forced sale." Thus, in *Wing v. Cropper*, 35 Ill. 256, it was held that a sale by decree of a court of equity, in a suit to foreclose a mortgage upon property exempt as a homestead under an order to a master to make the sale, was a forced sale within the meaning of a provision of the homestead law providing for exemption "from levy and forced sale under any process or order from any court of law or equity," the case being *distinguished* from *Smith v. Marc*, 26 Ill. 150, and *Ely v. Eastwood*, in 26 Ill. 107, that in these cases the sales were made under a power to sell, and not by order or decree of court. See, as recognizing the same doctrine and distinction, *Sampson v. Williamson*, 6 Tex. 102; 55 Am. Dec. 762; *Jordan v. Peak*, 38 Tex. 429; *Black v. Rockmore*, 50 Tex. 95; *Lanahan v. Sears*, 102 U. S. 318.

But see, *contra*, *Peterson v. Hornblower*, 33 Cal. 266, in which case it was held that the term "forced sale," as used in an article of the constitution providing that "the legislature shall protect by law from forced sale, a certain portion of the homestead and other property of all heads of families," and where used in the several statutes passed to give effect to this provision, meant a sale against the will of the owner. "We remarked," said Rhodes, J., "that where the owner of the homestead consents to a sale under execution or other legal process, it is not a forced sale. It makes no difference, in respect to its being forced or voluntary, whether he consents directly to the sale, or does the same indirectly by consenting to or doing those acts or things that necessarily or usually eventuate in a sale. A foreclosure sale, whether under the power of sale contained in the mortgage or in pursuance of a decree, is not a forced sale within the meaning of the constitution or the statute."

See also *Rector v. Rotton*, 3 Neb. 171, where it was held that a sale of a homestead, under a decree of foreclosure of a mortgage given thereon, did not come within the provision of the statute exempting such homestead from "at-

tachment, levy or sale, under execution or other process issuing out of any court."

An express waiver, in a mortgage of real estate, by an unmarried man, of all right to homestead in the mortgaged premises, will bar his right to homestead therein upon his subsequent marriage. *Broach v. Powell*, 79 Ga. 79. Otherwise, if the mortgage contains no such waiver. *Benedict v. Webb*, 57 Ga. 348.

Waiver in Mortgage Not General.—

A waiver contained in a mortgage of exempt real estate is made with reference to the mortgage debt, and the mortgagor is entitled to any surplus remaining upon foreclosure, to the extent of his exemption. *Swan v. Stephens*, 99 Mass. 7; *First Nat. Bank v. Briggs*, 22 Ill. App. 228; *Trodden v. Safford*, 21 Ill. App. 240; *McTaggart v. Smith*, 14 Bush (Ky.) 414; *Quinn's Appeal*, 86 Pa. St. 447; *Hill v. Johnston*, 29 Pa. St. 362; *Hall v. Fulham*, 86 Tenn. 451. See *Colby v. Crocker*, 17 Kan. 527.

Where land is purchased subject to an existing mortgage, and is sold to satisfy the mortgage debt, the homestead right will attach to any surplus in preference to all other claims. *People v. Stitt*, 7 Ill. App. 294.

1. As by pointing out or delivering specific property to the sheriff for execution, *People v. Johnson*, 4 Ill. App. 346; *Wallace v. Collins*, 5 Ark. 41; 39 Am. Dec. 359; or by assenting to the attachment of the exempt property. *Hewes v. Parkman*, 20 Pick. (Mass.) 90.

An execution debtor who stands by while the sheriff levies upon his exempt property, and does not then and there, in some manner, indicate to the officer his purpose to claim the property as exempt, is estopped to assert such claim afterward in a replevin suit brought against the officer to recover the property. *Moffitt v. Adams*, 60 Iowa 44.

See, to the same effect, *Angell v. Johnson*, 51 Iowa 625; 33 Am. Rep. 152, in which the court, by *SeEVERS, J.*, said: "We are of the opinion the debtor cannot stand by, see and know the levy is about to be made, and afterward claim the exemption. He must

at the time, in some manner, indicate to the officer his purpose to claim the property as exempt. That the exemption is personal there can be no doubt. That it may be waived is equally clear. By making the levy the officer incurs responsibility, and expenses are incurred. This can be avoided if the claim is made before the levy. . . . It being insisted that there is a difference between voluntary surrender of the property and an acquiescence in the levy and taking possession by the officer, the only distinction is that the one is active and the other passive. The same results, however, follow both, and they are equally within the law of estoppel."

But see *Lynd v. Pickett*, 7 Minn. 184; 82 Am. Dec. 79, in which case it is said: "Where exempt property is mingled with other of the same kind not exempt, or where the debtor's property is so situated that the party cannot know that it is exempt, there may be justification for a levy, and liability therefor only arises upon proper demand for the exempt property. But where, as in the case at bar, a separate and distinct article of property is taken, which is expressly exempt by statute, and the party holding or directing the service of the writ knows before, or at the time of, such service, that the property seized is exempt, there is no reason for claiming that the liability of the party attaching does not occur at the time of the levy, nor that a demand and refusal is necessary in order to make the party levying liable as a wrongdoer. In such circumstances, the wrong is committed at the instant of seizing the property, and the cause of action then accrues. A demand could not be necessary to inform the creditor of the rights of the debtor, for the statute fixes those, and a demand could only be an idle ceremony. The statute makes the exemption absolute, and not dependent upon selection or demand by the debtor."

See also *Coff v. Williams*, 135 Mass. 401, in which case the court, after holding that the omission of the owner to claim the property as exempt, and suffering the officer to remove it, may tend to show a waiver, but does not necessarily show it, goes on to say: "It has been held in several cases that, where goods, which are exempt from attachment, are so mingled with other similar goods, which are not exempt, that the officer cannot distinguish them,

and so is unable to determine whether the owner intends to claim any portion of the common stock or supply as exempt, it is the duty of the owner who sees the officer about to attach the whole, to give notice of his intention to rely upon the exemption authorized by law. In *Nash v. Farrington*, 4 Allen (Mass.) 157, provisions were kept both for the purpose of sale and for the use of the debtor's family; and the officer found the whole supply in the place where the owner kept them for sale. No portion had been set apart for the use of the family, or, at the time of the attachment, was claimed as held for that use; and it did not appear that the officer had any knowledge or reason to suppose that any portion was intended to be so held or kept. Under these circumstances, the officer was held to be justified in seizing the whole. In *Clapp v. Thomas*, 5 Allen (Mass.) 158, the corn that was attached, was part of a crop raised by the plaintiff, of which he sold a part, and with a part of which he fed his cattle and swine. He kept the whole of it together, in a building separate from his dwelling, without setting apart any portion of it for the use of his family; and he did not, when it was attached, claim any part of it as exempt. The case was held to come within the doctrine of *Nash v. Farrington*, 4 Allen (Mass.) 157. See also *Stevenson v. White*, 5 Allen (Mass.) 148; *Eager v. Taylor*, 9 Allen (Mass.) 156; *Woods v. Keyes*, 14 Allen (Mass.) 236; 92 Am. Dec. 766; *Dow v. Cheney*, 103 Mass. 181. This doctrine, however, is not applicable to articles of personal property, each of which is of such a kind as to have a separate identity, and to be easily distinguishable from all others. In the case of animals, for example, it is always understood that it is the duty of the officer to leave in the owner's possession as many of each kind as are exempt from seizure. *Savage v. Davis*, 134 Mass. 401. The omission of the owner to make an election which animals he will hold as exempt, is no waiver of the exemption. In the present case, the articles described in the declaration were household furniture, 'a black-walnut folding bed, three walnut chairs covered in red plush, one walnut sofa covered in red plush, two large walnut easy-chairs covered in red plush,' and soon, nearly all the articles being so described as apparently to be easily distinguished and identified.

waive or forfeit them by failure to make selection or demand at the proper time and in the proper manner.¹

These were, as is recited in the defendant's request (for instructions), in the plaintiff's house, and were so situated and used as clearly to show that they would, to the specified limit of value, fall within the provision of the statute exempting household furniture from execution. Such articles of furniture may be intermingled with other furniture not exempt, without being confused; they do not fall within the rule declared in *Clapp v. Thomas*, 5 Allen (Mass.) 158, and other similar cases. . . . If any of the articles were of such a kind as not to be readily distinguishable from others special attention should have been called to the fact."

Under a statute exempting to a householder his furniture to the value of two hundred and fifty dollars, and requiring the officer, when he makes a levy, to proceed to have it appraised and set out to the debtor, the latter need not claim the exemption when the levy is made, for the statute is all the notification the officer needs. *Vanderhorst v. Bacon*, 38 Mich. 669; 31 Am. Rep. 328.

The execution of a delivery bond for property exempt from execution, but levied upon, illegally, without the defendant's assent, is no recognition of the validity of the levy or waiver of the defendant's right. *Perry v. Hensley*, 14 B. Mon. (Ky.) 381; 61 Am. Dec. 164.

Where it appears that an attachment defendant, entitled to exempt property to the amount of three hundred dollars, did not have more than that amount of property, and where it does not appear that he was notified of his right of exemption by the officer levying on such property, it will not be presumed that he has waived his right, though he did not assert it until some time afterward, on the trial of a plea of abatement in the cause. *Holliday v. Mansker*, 44 Mo. App. 465.

1. *Bell v. Davis*, 42 Ala. 460; *Ross v. Hannah*, 18 Ala. 125; *Zielke v. Morgan*, 50 Wis. 560; *Illiff v. Arnott*, 31 Kan. 672; *Buzzell v. Hardy*, 58 N. H. 331; *Harlan v. Haines*, 125 Pa. St. 48; *Tasker v. Sheldon*, 115 Pa. St. 107; *Bittenger's Appeal*, 76 Pa. St. 105; *Bowyer's Appeal*, 21 Pa. St. 210; *Graves v. Hinkle*, 120 Ind. 157; *Pratt v. Burr*, 5 Biss. (U. S.) 36; *Butt v.*

Green, 29 Ohio St. 667; *Frost v. Shaw*, 3 Ohio St. 270. And see *EXECUTIONS*, vol. 7, p. 141.

The rule must be reasonably applied, however, and hence, if upon claim of exemption, the officer refuses to give the debtor an opportunity to make such selection, or denies his right to any exemption whatever, the actual selection is waived or excused, and the want of it will not be a waiver of the debtor's right. *Wicker v. Comstock*, 52 Wis. 319.

Where the defendant in an attachment execution was not served with the same, and made his claim for exemption as soon as he had notice of the execution, and before the plaintiff had taken any further steps to his detriment, it was held that his claim was in time, though made after the time when he would have been held to claim it, had he had notice. *Howard, etc., Assoc. v. Philadelphia, etc., R. Co.*, 102 Pa. St. 220.

If a debtor owning two cows is entitled, after the seizure and removal of one of them on an execution against him, to elect which cow shall be exempt from execution, he must make such election within a reasonable time, and if he fails so to elect, the officer may make an election for him, and he is bound by such election. *Savage v. Davis*, 134 Mass. 401.

It has been held that property exempt from execution cannot be levied upon and sold by consent of the defendant, on the ground that the exemption, being intended for the benefit of his family, was a privilege he could not waive. *Denny v. White*, 2 Coldw. (Tenn.) 283; 88 Am. Dec. 596. See also *Beecher v. Baldy*, 7 Mich. 506.

In *North Carolina*, it has been held that a debtor will not be precluded from claiming homestead rights, by declarations made at an execution sale, in the presence of the bystanders, denying title to the property, the court holding that the homestead right could be parted with or lost only in the manner prescribed by the constitution, that is, by deed with the consent of the wife. *Lambert v. Kinnery*, 74 N. Car. 350.

See also *Showers v. Robinson*, 43 Mich. 502, to the effect that, in consideration of her children's rights, a widow will not be estopped from claiming

14. Waiver of Dower.—See DOWER, vol. 5, p. 918 *et seq.*; ELECTION, vol. 6, p. 252 *et seq.*

15. Waiver of Rescission for Fraud, Infancy, Duress, etc.—The right of a party to rescind or avoid contracts and transactions on the grounds of fraud, infancy, duress, etc., and his power to waive such right, have been fully treated elsewhere.¹

16. Waiver of Statute of Limitations.²—See LIMITATION OF ACTIONS, vol. 13, pp. 706, 717, 748, 769.

17. Waiver of Statute of Frauds by Failure to Plead.³—See FRAUDS (STATUTE OF), vol. 8, pp. 746-748; SPECIFIC PERFORMANCE, vol. 22, p. 978.

18. Tender.—*a.* WAIVER BY REFUSAL TO RECEIVE.—The production of the money and the actual offer of it to the creditor are dispensed with by a declaration on the part of the latter that he will not receive it.⁴

homestead, even though she had desired the sale of the property for the payment of debts, and had requested the purchaser to buy it, and had received from the proceeds the amount of a claim allowed in her favor.

Infant.—An infant cannot, by act or declaration, waive or abandon his homestead rights. *Booth v. Goodwin*, 29 Ark. 633; *Altheimer v. Davis*, 37 Ark. 316.

1. See CONTRACT, vol. 3, p. 932; DESERT, vol. 5, p. 642; DURESS, vol. 6, p. 88; ELECTION, vol. 6, p. 247 *et seq.*; FRAUD, vol. 8, p. 651 *et seq.*; FRAUDULENT SALES, vol. 8, pp. 805-817, 819, 846-850 *et seq.*; GUARDIAN AND WARD, vol. 9, p. 150 *et seq.*; GRANTOR AND GRANTEE, vol. 9, pp. 27-30; INFANTS, vol. 10, p. 644 *et seq.*; INSANITY, vol. 11, p. 148; INTOXICATION AS A DEFENSE TO CONTRACT, vol. 11, p. 775; LACHES, vol. 12, pp. 583, 600 *et seq.*; LEASE, vol. 12, p. 993; MARRIED WOMEN, vol. 14, p. 619; MISTAKE, vol. 15, p. 634; RATIFICATION, vol. 19, p. 970; RESCISSION, vol. 21, p. 77 *et seq.*

2. As to the right of executors and administrators to waive the statute, see EXECUTORS AND ADMINISTRATORS, vol. 7, p. 282; LIMITATION OF ACTIONS, vol. 13, p. 707 *et seq.*

3. The plea of the statute is a personal privilege which the party may waive, and another cannot plead it for him, or compel him to plead it. *McCoy v. Williams*, 6 Ill. 584; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Richards v. Cunningham*, 10 Neb. 417; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Crawford v. Woods*, 6 Bush (Ky.) 200. See *Godden v. Pierson*, 42 Ala. 374; *Aicardi v. Craig*, 42 Ala. 314.

4. *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Peebles v. Boston*, etc., R. Co., 112 Mass. 509; *Banker v. Parkenhorn*, 2 Wash. (U. S.) 142; *Terrell v. Walker*, 65 N. Car. 91; *Dorsey v. Barbee*, Litt. Sel. Cas. (Ky.) 204; 12 Am. Dec. 296.

Tender is waived by the party's declaring, upon an offer to pay him, that nothing is due him, and that he will not accept any money; and he cannot afterward object that the money was not counted out and presented to him. *Lacy v. Wilson*, 24 Mich. 479.

Where the defendant, having money in his pocket sufficient to pay the debt and intending to pay, said to the plaintiff "I am now ready to pay you the \$17.85 which I owe you," and the plaintiff replied "there have been costs made, and you have got to settle with my attorney," it was held that the plaintiff had waived the right to have the money actually produced and presented, and that the offer to pay was a good tender. *Ashburn v. Poulter*, 35 Conn. 553.

A tender of stock under a contract of sale is not necessary where the purchaser declares that he will not receive it. *Vanpell v. Woodward*, 2 Sandf. Ch. (N. Y.) 143.

In *Hills v. Exchange Bank*, 105 U. S. 321, Miller, J., said: "It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused,—that payment or performance will not be accepted."

b. INSISTING ON SPECIFIC OBJECTION.—A creditor, by objecting to the tender on some particular ground, may waive other objections to the tender, not insisted upon by him, and may thus preclude himself from afterward setting up such other objections. Thus, where, upon a tender in a medium not legal tender, he objects to the tender, not on the ground of its quality but on the ground of its insufficiency in amount, he waives all objections to the character of the medium of the tender.¹

19. Bankruptcy and Insolvency—*a.* WAIVER OF DISCHARGE BY NEW PROMISE—(See also **INSOLVENCY**, vol. 11, pp. 230–232).—A debtor whose debt has been discharged under bankruptcy or insolvency laws, waives the benefit of such discharge by a subsequent promise to pay.² No new consideration is necessary to

An absolute refusal to do the act in consideration of which the money is to be paid, is a waiver of the tender. Thus, an absolute refusal to deliver goods renders a tender of the amount due for storage unnecessary. *Murray v. Roosevelt*, Anth. N. F. (N. Y.) 138.

Waiver by Debtor.—Though the debtor offers to pay a debt with ability to do so, yet if the creditor proposes to let it remain, and the debtor consents and retains the money, the latter thereby waives his tender, and he cannot afterward set it up. *Terrell v. Walker*, 65 N. Car. 91.

Evasion.—The evasion of the tender by one party excuses the other party from making it. *Gilmore v. Holt*, 4 Pick. (Mass.) 258; *Southworth v. Smith*, 7 Cush. (Mass.) 391.

1. *Polglass v. Oliver*, 2 C. & J. 15; *Jones v. Arthur*, 8 D. P. C. 442; *Ball v. Stanley*, 5 Yerg. (Tenn.) 199; 26 Am. Dec. 263. See *Snow v. Perry*, 9 Pick. (Mass.) 542; *Whelan v. Reilley*, 61 Mo. 565.

In *Polglass v. Oliver*, 2 C. & J. 15, Bayley, J., said: "If you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money and making a good and valid tender; but by not doing so, and claiming a larger sum, you delude him."

Actual production of the money is waived by the creditor's objecting to the insufficiency of the amount offered. *Thorne v. Mosher*, 20 N. J. Eq. 257.

Where a tender is made and a receipt is demanded, and the tender is refused because of its amount, the creditor cannot afterward object to the tender because the debtor required the receipt. *Richardson v. Jackson*, 8 M. & W. 298.

Where a right of action has accrued for the nondelivery of an article agreed to be delivered in a certain event, such right is not defeated by a subsequent tender. But if a tender be subsequently made, and the party to whom the property is tendered places his refusal to accept upon the ground that the article is not merchantable, he waives all other objections to the tender, which will bar a suit, if the objection taken is groundless. *Gould v. Banks*, 8 Wend. (N. Y.) 562; 24 Am. Dec. 90.

A covenant to pay B \$300 on a certain day. Four days before the day of payment, B agreed to receive the money in bank bills. On the day of payment, A tendered the \$300 in bank bills, but B refused them on the ground that they were not legal tender. A offered no other money, and it was held the tender was good by reason of the previous waiver. *Warren v. Mains*, 7 Johns. (N. Y.) 476.

Pleading.—Under an allegation of tender, evidence of a waiver of tender is admissible. *Holmes v. Holmes*, 9 N. Y. 525. See *Smith v. Poillon*, 87 N. Y. 594; 41 Am. Rep. 402; *Woolner v. Hill*, 93 N. Y. 581.

2. *Penn v. Bennet*, 4 Campb. 205; *Trueman v. Fenton*, Cowp. 544; *Lang v. Mackenzie*, 4 C. & P. 463; 19 E. C. L. 474; *Williams v. Dyde*, Peake 68; *Besford v. Saunders*, 2 H. Bl 116; *Fleming v. Horne*, 1 Stark. 370; *Lynbui v. Weightman*, 5 Esp. 198; *Kirkpatrick v. Tattersall*, 13 M. & W. 766; *Lerow v. Wilmarth*, 7 Allen (Mass.) 463; 83 Am. Dec. 701; *Cook v. Shearman*, 103 Mass. 21; *Williams v. Bugbee*, 6 Cush. (Mass.) 418; *Way v. Sperry*, 6 Cush. (Mass.) 238; 52 Am. Dec. 779; *Fitzgerald v. Alexander*, 19 Wend. (N. Y.) 402; *McNair v. Gil-*

render such subsequent promise effectual, the moral obligation to pay arising from the old debt being a sufficient consideration,¹ unless the debt has been discharged by act of the parties;² but the promise must be distinct and unequivocal,³ and not in general

bert, 3 Wend. (N. Y.) 344; *Dusenbury v. Hoyt*, 53 N. Y. 521; 13 Am. Rep. 543; *Sconton v. Eislord*, 7 Johns. (N. Y.) 36; *Kenyon v. Worsley*, 2 R. I. 341; *Baltimore, et c.*, R. Co. v. Clark, 19 Md. 509; *Smith v. Richmond*, 19 Cal. 476; *Earnest v. Parke*, 4 Rawle (Pa.) 452; 27 Am. Dec. 280; *Field's Estate*, 2 Rawle (Pa.) 351; *Bolton v. King*, 105 Pa. St. 78; *Turner v. Chrisman*, 20 Ohio 332; *Farmers', et c.*, Bank v. Flint, 17 Vt. 508; 44 Am. Dec. 351; *Kull v. Farmer*, 78 N. Car. 339; *Allen v. Ferguson*, 18 Wall. (U. S.) 1; and other cases cited below.

Statutes Requiring Promise to Be in Writing.—In some jurisdictions, by statute, the promise, to be binding, must be in writing. See *Massachusetts* Pub. Stat., ch. 78, § 3; *Maine* Rev. Stat. (1883), ch. 111, § 1; *New York* Laws, 1882, ch. 324; *New Jersey*, Statute of Frauds, 8.

1. *Penn. v. Bennett*, 4 Campb. 205; *Trueman v. Fenton*, Cowp. 544; *Second Nat. Bank v. Wood*, 59 N. H. 407; *Way v. Sperry*, 6 Cush. (Mass.) 238; 52 Am. Dec. 779; *Sconton v. Eislord*, 7 Johns. (N. Y.) 36; *McNair v. Gilbert*, 3 Wend. (N. Y.) 344; *Erwin v. Saunders*, 1 Cow. (N. Y.) 249; 13 Am. Dec. 520; *Graham v. O'Hern*, 24 Hun (N. Y.) 221; *Kull v. Farmer*, 78 N. Car. 339; *Farmers' et c.*, Bank v. Flint, 17 Vt. 508; 44 Am. Dec. 351.

But see *Jones v. Phelps*, 20 W. R. 92, in which *Bacon*, C. J., held that a promise to pay a debt barred by bankruptcy, is a mere *nudum pactum*. And see *Heather v. Webb*, L. R., 2 C. P. Div. 1, in which case a reply to a defense of discharge in bankruptcy setting up that the plaintiffs had had no notice of the liquidation proceedings until after their conclusion, and that the defendant had not inserted the names of the plaintiffs as his creditors or their debt in any part of the proceedings, and that subsequently to the close of the proceedings the defendant promised to pay the claim, was held bad on demurrer.

In *Jakeman v. Cook*, 4 Exch. Div. 26, a subsequent promise for a valuable consideration, was held to be binding upon the defendant and to be a waiver of the discharge.

2. Where the debt has been discharged by act of the parties, as by release, or accord and satisfaction, there remains no moral obligation to pay the debt, or any balance thereof, which will support a subsequent promise to pay the same. *Stafford v. Bacon*, 1 Hill (N. Y.) 532; 37 Am. Dec. 366; *Warren v. Whitney*, 24 Me. 561; 41 Am. Dec. 406; *Shepard v. Rhodes*, 7 R. I. 470; 84 Am. Dec. 573; *Snevily v. Read*, 9 Watts (Pa.) 396; *Montgomery v. Lampton*, 3 Metc. (Ky.) 519; *Valentine v. Foster*, 1 Met. (Mass.) 522; 35 Am. Dec. 377.

3. *McDougall v. Page*, 55 Vt. 187; 45 Am. Rep. 602; *Way v. Sperry*, 6 Cush. (Mass.) 238; 52 Am. Dec. 779; *Cook v. Shearman*, 103 Mass. 21; *Kenney v. Brown*, 139 Mass. 345; *Bolton v. King*, 105 Pa. St. 78; *Allen v. Ferguson*, 18 Wall. (U. S.) 1; *Fleming v. Horne*, 1 Stark. 370; *Kirkpatrick v. Tattersall*, 13 M. & W. 766.

In *Bigelow v. Norris*, 139 Mass. 12, *Holmes, J.*, said: "The strength of the plaintiff's case is in the words 'I will also pay something on account.' There is force in the suggestion that the words 'on account' recognize the debt as subsisting, and therefore imply a promise to pay it. But it is to be remembered that the defendant has as much right to his defense as the plaintiff once had to her recovery. The law cannot be supposed to look with disfavor upon a bar of its own creation. Hence, the defendant is not to be deprived of his right, unless he uses words that plainly mean to renounce it, or at least express a clear undertaking for the future, which is inconsistent with further reliance upon the discharge. This is the meaning of the often repeated statement, that a new promise, to avoid the effect of a discharge in bankruptcy, must be distinct and unequivocal. *Merriam v. Bayley*, 1 Cush. (Mass.) 77; 48 Am. Dec. 591, and *Elwell v. Cumner*, 136 Mass. 104. A statement which is equally correct in principle, whether the obligation, when revived, stands on the new promise as such, or on a waiver of the bar which the statute has given the defendant to use or renounce at his will. . . . It follows from what has been said, that an admission that the debt was

terms, and to no one in particular.¹ If it be conditional, the fulfillment of the condition must be proved.² The promise need

incurred, and has not been satisfied, or, in the language of Chief Justice Shaw, 'an acknowledgment of the existence of the debt' is not enough to prevent a defendant from relying on his discharge. *Pratt v. Russell*, 7 Cush. (Mass.) 464. Neither is a part payment an account. *Cambridge Sav. Inst. v. Littlefield*, 6 Cush. (Mass.) 213, and *Merriam v. Bayley*, 1 Cush. (Mass.) 77; 48 Am. Dec. 591. It stands on a different footing from part payment of a debt barred by the Statute of Limitations, which has been allowed a greater effect. We see no reason why a promise to pay a sum on account should do what an actual payment of it would not do."

That mere acknowledgments of the debt are not sufficient to waive the discharge, see also *Bolton v. King*, 105 Pa. St. 81; *Allen v. Ferguson*, 18 Wall. (U. S.) 3.

1. In *Lynbuy v. Weightman*, 5 Esp. 198, the plaintiff relied on a new promise, and gave evidence of general declarations by the defendant that he would pay everybody, and that his effects would pay twenty shillings on the pound, but proved no specific promise to the plaintiff. Lord Ellenborough said that to bind the bankrupt he should expect a positive and precise promise to pay, not given in such general terms as offered here.

But a promise by the maker of a promissory note, which is barred by a discharge in bankruptcy to pay the same to the payee, is a promise to pay him or his order, or bearer, according to the tenor of the note, and an indorsee succeeds to the rights of the payee. *Way v. Sperry*, 6 Cush. (Mass.) 238; 52 Am. Dec. 779. In this case, Metcalf, J., said: "But the defendant contends that if he is bound at all by his promise, he is bound only to the payee of the notes, to whom he made it, and that it did not revive or restore the negotiability of the notes. And his counsel cited *Deputy v. Swart*, 3 Wend. (N. Y.) 135; 20 Am. Dec. 673; *Moore v. Viele*, 4 Wend. (N. Y.) 420, and *Walbridge v. Harroon*, 18 Vt. 448, where it was so decided. Since the argument, a similar decision of the court of *Maine* has been published. *White v. Cushing*, 30 Me. 267. The grounds of these decisions, as stated in the report of the first of them, were, that 'the new promise

is the contract upon which the action must rest;' that 'the new promise does not renew the old contract,' and renovate the note given on that contract; that 'the existence of the note is destroyed by the discharge, and cannot be revived and restored to all its former properties by the maker's entering into a new contract, by which he becomes liable to pay what was due on the old contract' and that 'the defendant's liability, therefore, is on the new contract, and that the suit should be in the name of him with whom such contract is made.' We are not satisfied with these grounds of decision. For we take it to be well established that, in actions brought on promises made by infants, and ratified after they come of age; on promises which have been renewed after the Statute of Limitations has furnished a bar; and on unconditional promises by discharged insolvent debtors and bankrupts to pay debts from which they have been discharged; the plaintiff may declare on the original promise; and that when infancy, the Statute of Limitations, or a discharge in insolvency or bankruptcy, is pleaded or given in evidence, as a defense, the new promise may be replied or given in evidence, in support of the promise declared on; that a replication, alleging such new promise, is not a departure, and that evidence thereof is not irrelevant. And we do not hold that a note, promise or debt, is 'destroyed' by a discharge in bankruptcy. If it were, it not only could not be renewed or revived, but it could not be a consideration for a new promise; yet nothing is clearer, on authority, than that the old debt is a sufficient consideration for such promise. In all the cases above mentioned, the new promise operates as a waiver, by the promisor, of a defense with which the law has furnished him against an action on the old promise or demand." And see *Smith v. Richmond*, 19 Cal. 476.

2. *Allen v. Ferguson*, 18 Wall. (U. S.) 3; *Penn v. Bennett*, 4 Campb. 205.

So, a promise by the defendant to pay when he is able, is a conditional promise, and the plaintiff must show that the defendant is able to pay. *Besford v. Saunders*, 2 H. Bl. 116; *Sconton v. Eislord*, 7 Johns. (N. Y.) 36; *Randidge v. Lyman*, 124 Mass. 362.

not necessarily be made after discharge, a promise made after the commencement of the proceedings in bankruptcy or insolvency, but before discharge, being equally binding.¹ The suit may be upon the original claim,² though the contrary rule prevails in *Pennsylvania*.³

b. PROOF OF WHOLE DEBT BY SECURED CREDITOR.—Under the bankruptcy laws of *England* and the *United States*, it has been held that a secured creditor who proves his whole debt without reference to, and without disclosing, his security, thereby

1. *Roberts v. Morgan*, 2 Esp. 736; *Kirkpatrick v. Tattersall*, 13 M. & W. 766; *Otis v. Gazlin*, 31 Me. 567; *Stillwell v. Coope*, 4 Den. (N. Y.) 225; *Lerow v. Wilmarth*, 7 Allen (Mass.) 463; 83 Am. Dec. 701; *Cook v. Shearman*, 103 Mass. 21. But see *Ogden v. Redd*, 13 Bush (Ky.) 581.

In *Kirkpatrick v. Tattersall*, 13 M. & W. 766, Parke, B., said: "We are all of opinion that there is no distinction, in this respect, between the case of a promise made before certificate and one made after it. Both are equally binding, though the only consideration be the old debt. But then the promise must be one which binds the bankrupt personally to pay, notwithstanding his certificate; it must be a promise that he, and not his estate, would pay, for the mere acknowledgment of a debt, though implying a promise to pay, would amount to no more than an account stated, and, though in writing, would be a promise which the certificate would bar. The only distinction between a promise before and after the certificate is, that in the former it may be more doubtful whether the debtor meant to engage to pay, notwithstanding his discharge under the bankruptcy; but if it is clear that he did, the promise is equally binding."

Court and Jury.—There being no contradiction as to the facts, the question whether a new promise is proved is for the court. *Cook v. Shearman*, 103 Mass. 23.

Compounding Debtor.—A compounding debtor, pending the composition, is not in the same position as a discharged bankrupt, and an agreement entered into before the completion of the composition to pay a creditor's debt in full, though upon consideration, is not valid, being inconsistent with good faith to the other creditors. *Ex p. Barrow*, 18 Ch. Div. 464.

2. It seems to be the general rule, both in the *United States* and in *England*,

that the plaintiff may sue upon the original claim, and prove the new promise in avoidance of the discharge. *Williams v. Dyde*, Peake 68; *Kirkpatrick v. Tattersall*, 13 M. & W. 766; *Way v. Sperry*, 6 Cush. (Mass.) 238; 52 Am. Dec. 779; *Cook v. Shearman*, 103 Mass. 21; *Dusenbury v. Hoyt*, 53 N. Y. 521; 13 Am. Rep. 543; *Graham v. O'Hern*, 24 Hun (N. Y.) 221; *McNair v. Gilbert*, 3 Wend. (N. Y.) 344; *Wait v. Morris*, 6 Wend. (N. Y.) 394; *Fitzgerald v. Alexander*, 19 Wend. (N. Y.) 402; *Turner v. Chrisman*, 20 Ohio 332; *Smith v. Richmond*, 19 Cal. 476.

3. In *Pennsylvania*, the suit must be brought upon the new promise, on the ground that the original obligation is destroyed by the discharge. *Bolton v. King*, 105 Pa. St. 78. See *Earnest v. Parke*, 4 Rawle (Pa.) 452; 27 Am. Dec. 280; *Field's Estate*, 2 Rawle (Pa.) 351, in which latter case it was held that a subsequent promise to pay a specialty debt does not revive the original debt, so as to entitle the creditor to rank as a specialty creditor, the original debt being merely a valid consideration for the new promise.

In *Kull v. Farmer*, 78 N. Car. 339, the action was upon the new promise and was sustained, the court saying that, while the Statute of Limitations may be waived by a new promise made after the suit is brought, it is otherwise in the case of a debt discharged under the bankrupt act, in which latter case "the promise itself becomes or may become the cause of action."

In *Penn v. Bennett*, 4 Campb. 205, where the action was upon the original claim for goods sold and delivered, the evidence leaving it in doubt whether the new promise was absolute or conditional, Lord Ellenborough was of the opinion that if the promise was absolute, the action might be maintained, but that if it was conditional, the plaintiff should have declared specially and proved the fulfilment of the condition.

waives his security and relinquishes it to the assignee.¹ But when such proof is made by the creditor through ignorance, mistake, or inadvertence, without fraud, and no injury has thereby resulted to the other creditors, the court will allow the creditor

1. *Stewart v. Isidor*, 1 Nat. Bank Reg. 129; *In re Bloss*, 4 Nat. Bank Reg. 147; *In re Stansell*, 6 Nat. Bank Reg. 188; *In re Granger*, 8 Nat. Bank Reg. 30; *In re Jaycox*, 8 Nat. Bank Reg. 241; *Hoadley v. Caywood*, 40 Ind. 239; *Ex p. Rolfe*, 3 Mont. & A. 306; *Ex p. Ashworth*, L. R., 18 Eq. 705. See *Grugeon v. Gerrard*, 4 Y. & C. 119.

Where a second mortgagee, being ignorant of the value of his security, had elected to abandon it, and the security having turned out more valuable than was expected, applied to be remitted to the security, Lord Eldon, from the inconvenience that might arise from admitting such applications, refused to make the order. *Ex p. Downes*, 1 Rose 96.

Where solicitors had obtained an order to have their bill taxed and to prove for the amount, it was held that they had relinquished their lien upon the papers in their hands belonging to the bankrupt. *Ex p. Hornby*, Buck 351.

A creditor having a lien on property of the debtor, was held to be concluded by proving his debt, voting in the choice of assignee, and signing the certificate; and was ordered to give up the property, the court saying that where a creditor has done acts by virtue of his proof, which may affect the interests of the other creditors, he cannot retract his proof. *Ex p. Solomon*, 1 Gl. & J. 25. Compare *New Bedford Inst. for Savings v. Fairhaven Bank*, 9 Allen (Mass.) 175, where a creditor, who had proved his debt and had voted for, and thereby secured, the discharge of the debtor, was held to have lost his right to insist upon his security, on the ground that he had interfered materially with the rights of the other creditors.

In *Franklin County Nat. Bank v. Bank of Greenfield*, 138 Mass. 515, it was held that the creditor had not waived the right to the security by proving the debt and voting for and controlling the choice of assignee, on the ground that the plaintiff had not affected the rights of the other creditors injuriously, by controlling the election of an assignee, the court saying

that "the law is the same, and the rights of the creditors are the same, whoever is appointed assignee."

A creditor who proves his whole claim, notwithstanding it is partially secured by a mortgage, and receives a dividend upon the whole, waives his security. *Hooker v. Olmstead*, 6 Pick. (Mass.) 480.

Where the intention of all parties, in entering proof, appeared to be for the simple purpose of reserving the dividend until such time as the respective rights of the assignee and the creditor, in respect of the security held by the latter, were determined, the court did not construe such proof, without more, as an election on the part of the creditor to abandon his security. *In Re Axtell*, 14 L. T. N. S. 260.

Rule Where Security Has Been Given by Third Parties.—In case the creditor holds securities of third parties, he may prove his whole debt and resort to the security for any deficiency, not receiving, however, more than his claim in full. In case he realizes on the security before proving, he can only prove for the balance remaining unpaid. *Blumenstiel's Bankruptcy*, p. 287, citing *Ex p. Todd*, 2 Rose 202; *Ex p. Leers*, 6 Ves. 644; *Ex p. Taylor*, 3 Jur. N. S. 753; *Ex p. Rufford*, 1 Gl. & J. 41; *Ex p. Brunskill*, 2 M. & A. 220; *Ex p. Burn*, 2 Rose 55; *Ex p. Crossley*, 3 Bro. C. C. 237.

Partnership Cases.—Where a joint creditor has security on the separate estate of one of the firm, or an individual creditor's claim is secured by the joint property, the debt may be proved as unsecured, the security being deemed the security of third parties. *Blumenstiel's Bankruptcy*, p. 287, citing *In re Howard*, 4 Nat. Bank Reg. 571; *Ex p. Peacock*, 2 Gl. & J. 27; *Ex p. Adams*, 3 M. & A. 157; *Ex p. Bowden*, 1 D. & C. 135; *Ex p. Graves*, 2 Jur. N. S. 651. And see, to the same effect, *Ex p. Manchester, etc., Banking Co.*, L. R., 18 Eq. 249; *Ex p. West Riding Union Banking Co.*, 19 Ch. Div. 105; *Ex p. Shepherd*, 2 M. D. & D. 204.

In *Ex p. West Riding Union Banking Co.*, 19 Ch. Div. 105, Jessel, M. R., said: "The principles of the bank-

to withdraw or amend his proof and to pursue his rights as a secured creditor.¹

20. Waiver in Judicial Proceedings—*a.* **GENERALLY.**—"The doctrine of waiver is founded upon a useful and highly reasonable principle, and one of very extensive application. Whilst the law protects the rights of parties, even in minute and unimportant matters, it requires diligence and good faith in taking advantage of its rules, to accomplish those ends and not to work injustice."²

ruptcy law are plain enough. A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves. That is the principle of the whole thing. The only question is whether, if the security were given up, it would augment the estate. Of course, if the security was given by a stranger, and you were to cancel it, you would not augment the bankrupt's estate to the extent of one farthing, and consequently, such a security need not be given up. Then the question arose, in consequence of the very peculiar rules of bankruptcy in this country as regards the administration of partnership estates, by which a distinction is made between the partnership as a community and each individual partner as a separate entity, viz., whether the rules which applied to a security upon the assets of strangers would apply as between the separate estate of a partner and the joint estate as it is called, that is, the estate of the partnership firm. . . . The case soon arose where a man who had a joint debt had a security on the separate estate of a partner, and the question was whether that was within the rule which enabled a man to prove for the full amount of his debt, without giving up his security, when the property pledged was that of a stranger. It was held that it was, and for this very simple reason, that his giving up his security would not augment the joint estate. . . . The converse case afterward came to be argued, and it was decided in the same way."

1. *In re Parkes*, 10 Nat. Bank Reg. 82; *In re Jaycox*, 8 Nat. Bank Reg. 255; *In re Clark*, 5 Nat. Bank Reg. 255; *In re McConnell*, 9 Nat. Bank Reg. 387; *In re Hubbard*, 1 Low. (U. S.) 190; *Nichols v. Smith*, 143 Mass. 455.

Mistake, either of law or fact, is sufficient ground for the application to

the court. *Nichols v. Smith*, 143 Mass. 461; *In re Parkes*, 10 Nat. Bank Reg. 82.

In *England*, by the Bankruptcy Act of 1883, ch. 1, cl. 10, it was expressly provided that if the creditor "votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the court, on application, is satisfied that the omission to value the security has arisen from inadvertence."

2. *Shaw, C. J.*, in *Simonds v. Parker*, 1 Met. (Mass.) 511. In this case it was held "that a motion to dismiss, not founded on matter of exception which shows want of jurisdiction in the court, comes too late after a plea to the action; and that by such pleading, the party, who might take such exception, if taken seasonably, must be deemed to have waived it."

See also *Warren v. Glynn*, 37 N. H. 340, where, on a complaint for bastardy, it was held that the respondent had waived the objection that the magistrate before whom the complaint was made, and the preliminary examination had, was a citizen and tax payer of the complainant town, by designedly omitting to make any objection until after various proceedings in courts having jurisdiction of the cause. In this case, *Fowler, J.*, said: "It is a general rule, to which, if it be not universal, the present case does not seem to us to form any exception, that where general jurisdiction, or the power to act, exists, and the only objection to its exercise is one intended for the benefit and designed for the protection of the party complaining, such objection must be taken at the earliest practicable opportunity, after the party or his counsel become aware of the facts on which its validity depends, or it will be held to have been waived by the omission or neglect to urge it seasonably. The reason of the rule would seem to be that it is justly to be regarded as the

b. JURISDICTION BY WAIVER OR CONSENT.—See ACTIONS, vol. 1, p. 183 *et seq.*; CONFLICT OF LAWS, vol. 3, p. 611; FOREIGN CORPORATIONS, vol. 8, pp. 380, 384; JURISDICTION, vol. 12, p. 299 *et seq.*; JUSTICE OF THE PEACE, vol. 12, pp. 439, 487; PLEADING, vol. 18, p. 520.

c. WAIVER OF DEFECTS AND IRREGULARITIES IN NOTICE, PROCESS, OR SERVICE.—A party may waive defects and irregularities in notice, process, or service, by admission or acceptance of service,¹ or by appearing and taking part in the proceedings.²

d. WAIVER OF MISJOINDER, NONJOINDER, AND DEFENSE OF PARTIES.—See ERROR, WRIT OF, vol. 6, p. 818; JOINDER, vol. 11, p. 1014 *et seq.*; JUDGMENTS, vol. 12, p. 147*g*; MOTIONS, vol. 15, p. 890; PARTIES TO ACTIONS, vol. 17, pp. 607, 609 *et seq.*; PARTNERSHIP, vol. 17, p. 1237.

folly or misfortune of a party, if, knowing of a valid objection to a proceeding, he neglects to avail himself of it, but stands by and participates therein, unless he intends, as is the natural presumption, from his silence, to waive altogether any objection on that account. . . . Indeed, the authorities are too numerous for citation, where it has been held that a party cognizant, in the earlier stages thereof, of an objection that might be fatal to the validity of a proceeding before a tribunal otherwise competent, cannot be permitted to lie by and take his chances of a result in his favor, and, after one has been arrived at against him, avail himself of that objection to avoid the consequences of such adverse result."

Objections Waived at Trial Not Available on Appeal.—As a general rule, objections not presented or properly taken in the trial court by exceptions or otherwise, are regarded as waived, and are not available in the appellate court. APPEAL, vol. 1, p. 624; CRIMINAL PROCEDURE, vol. 4, pp. 764, 779, 886; FORCIBLE ENTRY AND DETAINER, vol. 8, p. 180; GARNISHMENT, vol. 8, p. 1261; HOMICIDE, vol. 9, p. 754; INDICTMENT, vol. 10, p. 502; INSTRUCTIONS, vol. 11, p. 265; MOTIONS, vol. 15, pp. 891, 901, 906 *et seq.*; NAME, vol. 16, p. 129; NEW TRIAL, vol. 16, pp. 610, 633 *et seq.*; PARTNERSHIP, vol. 17, p. 1237.

Waiver of Right to New Trial, and of Objections and Irregularities Connected Therewith.—See NEW TRIAL, vol. 16, p. 500.

Other Miscellaneous Instances of Waiver.—See ARREST, vol. 1, p. 728; ARBITRATION, vol. 1, p. 646; AUDIT-

ORS, vol. 1, pp. 1010, 1011; BILL OF EXCEPTIONS, vol. 2, p. 221; BILL OF PARTICULARS, vol. 2, p. 248; CRIMINAL PROCEDURE, vol. 4, p. 729; DEFAULT, vol. 5, p. 460; DEPOSITIONS, vol. 5, p. 616; ELECTIONS, vol. 6, p. 414; FOREIGN CORPORATIONS, vol. 8, p. 401; HUSBAND AND WIFE, vol. 9, p. 807; INSTRUCTIONS, vol. 11, p. 262; MASTER IN EQUITY, vol. 14, p. 946; MITTIMUS, vol. 15, p. 696; MOTIONS, vol. 15, p. 935; OPEN AND CLOSE, vol. 17, p. 196; PRIVILEGED COMMUNICATIONS, vol. 19, p. 133; REFEREES, vol. 20, p. 660; REMOVAL OF CAUSES, vol. 20, p. 1010; SERVICE OF PROCESS, vol. 22, p. 164; SHERIFF'S SALES, vol. 22, pp. 575, 582.

1. See SERVICE OF PROCESS, vol. 22, p. 172 *et seq.*

2. See ACTIONS, vol. 1, p. 183 *et seq.*; AUDITORS, vol. 1, p. 1011; JURISDICTION, vol. 12, p. 299 *et seq.*; JUSTICE OF THE PEACE, vol. 12, pp. 430, 436; MOTIONS, vol. 15, p. 915; NEW TRIAL, vol. 16, p. 639; NOTICE, vol. 16, p. 817; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 175 *et seq.*; REFEREES, vol. 20, pp. 663, 689; SERVICE OF PROCESS, vol. 22, p. 168 *et seq.*

As a general rule, a party not properly served with process, so as to give the court jurisdiction, does not waive the objection or confer jurisdiction by answering over, and going to trial on the merits after he has objected to the jurisdiction and his objection has been overruled. *Jones v. Jones*, 108 N. Y. 425; 2 Am. St. Rep. 447. And see *Harkness v. Hyde*, 98 U. S. 476; *Steamship Co. v. Tugman*, 106 U. S. 118; *Warren v. Crane*, 50

e. WAIVER OF MISNOMER.—See CRIMINAL PROCEDURE, vol. 4, p. 769; INDICTMENT, vol. 10, p. 484; NAME, vol. 16, p. 129; PARTIES TO ACTIONS, vol. 17, pp. 490, 491.

f. WAIVER OF JURY TRIAL—(1) *In Civil Cases*.—The right of trial by jury may be waived in civil cases,¹ but the waiver is binding only for the particular trial at which the stipulation is made;²

Mich. 301; *Dewey v. Greene*, 4 Den. (N. Y.) 94; *Walling v. Beers*, 120 Mass. 548. But see SERVICE OF PROCESS, vol. 22, p. 169.

In *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447, it was held that a decree of divorce by a *Texas* court was a valid adjudication, binding on the respondent, who had appeared for the special purpose of objecting to the jurisdiction, on the ground of insufficient service, and who, after his objection had been overruled, had gone to trial on the merits under a general denial of the allegations of the petition, on the ground that by going to *Texas* and filing an answer in the action, he became bound by the statute law of that state, which prescribed that the filing of an answer should be an appearance and submission to the jurisdiction, and for that reason could not invoke the general rule above set forth.

But a general appearance is not a waiver of the objection that jurisdiction was procured by the plaintiff's fraud, as by decoying a non-resident into the state for the purpose of getting service upon him. *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793. In this case, Lyon, J., said: "As already observed, courts have uniformly so proceeded in such cases, and we do not find that any court has ever stopped to inquire, under such circumstances, whether the appearance of the defendant is general or special. Such a case is entirely unlike one in which there has been a failure of proper service of process, for there the failure affects only the defendant, while here the fraud affects the integrity of the process of the court. Surely, a general appearance to the action ought not to bar the court from vindicating the integrity of its own process, and we have seen no case which gives that effect to a general appearance."

Where the state court's jurisdiction is based upon service of process, in violation of the defendant's privilege as a witness in another suit, the filing in the state court of a petition and bond for removal does not preclude an objection

to the service in the *United States* court after removal. *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 17 Fed. Rep. 865.

The right to avoid a judgment for want or insufficiency of service, is waived by pleading it in bar of an action upon the original demand. *Henderson v. Staniford*, 105 Mass. 504; 7 Am. Rep. 551.

1. *Vitrified Wheel & Emery Co. v. Edwards*, 135 Mass. 591; *Bailey v. Joy*, 132 Mass. 356; *Franklin v. McCorkle*, 11 Lea (Tenn.) 190; 57 Am. Rep. 244; *Coulter v. Weed Sewing Machine Co.*, 3 Lea (Tenn.) 115; *Cushman v. Flanagan*, 50 Tex. 389 (failure to claim jury trial in time or manner prescribed by statute); *Harris v. Shaffer*, 92 N. Car. 30; *Grant v. Reese*, 82 N. Car. 72 (reference by consent); *Baird v. New York*, 74 N. Y. 382 (not appealing from order of reference and proceeding with trial of reference, without objection); *Pasom v. Lineberger*, 90 N. Car. 159 (allowing judge to find facts without objection); *Crump v. Thomas*, 85 N. Car. 272 (allowing judge to find facts and arguing facts before him); *Gregory v. Lincoln*, 13 Neb. 352 (oral waiver in open court); *King v. Burdett*, 12 W. Va. 688 (consent entered of record); *Davidson v. Jersey Co.*, 71 N. Y. 333 (bringing an action of an equitable character, as shown by complaint, though facts may entitle to either legal or equitable relief); *Tharp v. Witham*, 65 Iowa 566 (failure to appeal, where a jury trial can be secured by appeal); *Heacock v. Hosmer*, 109 Ill. 245 (failure to demand a jury). And see CONSTITUTIONAL LAW, vol. 3, p. 724; JURY AND JURY TRIAL, vol. 12, p. 319 (jury of less than twelve); REFEREES, vol. 20, p. 663.

2. A stipulation that a jury may be waived and the case tried by the court, binds the parties only at the trial in which such stipulation is made, and when the case is on appeal remanded for another trial, both parties are restored to their original right of trial by jury. *Carthage v. Buckner*, 8 Ill.

and a waiver at one term does not preclude the party from claiming a jury at a succeeding term.¹ Where the parties agree to waive a jury upon certain "issues joined," and the plaintiff subsequently, by leave of court, files an additional count to the declaration, raising new issues, it is error to force the parties to trial without a jury, if demanded by either.²

(2) *In Criminal Cases*.—See CONSTITUTIONAL LAW, vol. 3, p. 733 *et seq.*; CRIMINAL PROCEDURE, vol. 4, pp. 813, 817, 827; ERROR, WRIT OF, vol. 6, p. 837; JURY AND JURY TRIAL, vol. 12, p. 319.

g. **WAIVER OF EXEMPTION FROM JURY DUTY.**—The right of exemption from jury duty is a personal privilege, and not a disqualification, and may be waived by the party entitled to it.³

h. **WAIVER OF RIGHTS IN CRIMINAL TRIAL.**—The defendant in a criminal trial may waive certain rights to which he is entitled; such as his right to be present at his arraignment and trial,⁴

App. 152. See also, to the same effect, *State v. Touchet*, 33 La. Ann. 1154; *Cross v. State*, 78 Ala. 430. In the latter of these cases, a criminal case, Somerville, J., said: "An agreement to waive the right of trial by jury must, ordinarily, be construed to apply only to the particular trial at which it is made. Such a waiver is a renunciation of a valuable constitutional right, and must be strictly construed. It may well be supposed that a defendant would be perfectly willing for a particular judge to try him, when he would not risk his successor; or, that he would be willing to be tried the first time by a judge, when he would not submit to a second trial by the same judge, after such officer had convicted him one or more times, so that the judicial mind might not afterward be perfectly free from the influence of a bias created by the circumstances of such previous conviction."

1. A waiver of jury trial at one term does not preclude a party from claiming a jury at a succeeding term. *Dean v. Sweeney*, 51 Tex. 242; *Brown v. Chenoworth*, 51 Tex. 469. But see *Heacock v. Lubukee*, 108 Ill. 641, in which case it was held that a party who had waived a jury at one term, without limitation or qualification as to time of trial, could not at a succeeding term, when the case came on for trial on the same issues, demand a jury, especially where the delay in trial was in conformity with his wishes.

2. *Gage v. Commercial Nat. Bank*, 86 Ill. 371. But where, at the close of the testimony, the case being tried by the court under a stipulation of the

parties, the plaintiff by leave of the court amended his declaration so as to avoid a variance between the pleadings and proof, neither the nature of the case nor the real issue as it had been tried being changed, it was held that the defendant could not, after filing a general denial to the amended declaration, demand a jury trial. *Bamberger v. Terry*, 103 U. S. 40. And see further, as to right to jury trial where new issues are raised, *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351, 365.

3. See CRIMINAL PROCEDURE, vol. 4, p. 828; GRAND JURIES, vol. 9, p. 10; JURY AND JURY TRIAL, vol. 12, p. 327.

4. See CONSTITUTIONAL LAW, vol. 3, p. 735; CRIMINAL PROCEDURE, vol. 4, pp. 761, 762, 815, 817; HOMICIDE, vol. 9, pp. 651, 657.

Where, upon the trial of an indictment for counterfeiting, the accused, being on bail, absconds, the trial may proceed, and a verdict of guilty be received in his absence. *Fight v. State*, 7 Ohio 181.

Where the accused, who was present at the commencement of the trial, voluntarily absented himself during the trial, the court held that it was not bound to discharge the jury, but might proceed to verdict. *State v. Wamire*, 16 Ind. 357. The character of the offense here involved does not appear. See also *McCorkle v. State*, 14 Ind. 39.

Where the defendant, in an indictment for perjury, being on bail and having been present in court through the progress of the trial up to the retirement of the jury, voluntarily absents himself from the court room, he can-

to have a copy of the indictment against him,¹ and a copy of the panel of the jury,² or to have counsel assigned him,³ and be confronted with witnesses against him.⁴ He may waive his right to poll the jury, by permitting the jurors to separate upon the rendition of the verdict without objection,⁵ or his right

not complain if the verdict is received in his absence. *Barton v. State*, 67 Ga. 653; 44 Am. Rep. 743.

The defendant may forfeit his right to remain in the court room, by unseemly behavior. See *U. S. v. Davis*, 6 Blatchf. (U. S.) 464, in which case it was held no error to remove the defendant to an adjoining room, where he remained during the conclusion of the government's opening.

1. A defendant waives his right to have a copy of the indictment, by going to trial without objection. *Lisle v. State*, 6 Mo. 426; *Smith v. State*, 8 Ohio 294; *State v. Johnson*, Walk. (Miss.) 392; *Loper v. State*, 3 How. (Miss.) 429. See *HOMICIDE*, vol. 9, p. 654.

2. So his right to a copy of the panel is waived by his failure to demand it. *Peterson v. State*, 45 Wis. 535; *State v. Klinger*, 46 Mo. 224; *State v. Hernandez*, 4 La. Ann. 379; *State v. Jackson*, 12 La. Ann. 679; *State v. Cook*, 20 La. Ann. 145.

Where the defendant, on October 6th, agreed that trial should be had on October 8th, and on October 7th made a formal demand for a list of jurors to be furnished "forty-eight hours before the trial," which list was delivered to him on the same day, it was held that he had waived the element of time in his right to a list, and could not demand a postponement because the list was not furnished forty-eight hours before trial. *State v. Waters*, 1 Mo. App. 7. And see *CRIMINAL PROCEDURE*, vol. 4, p. 815.

3. The right to have counsel assigned by the court, under a statute requiring the court, on the defendant's request, to assign counsel, is waived by the defendant by announcing himself ready for trial and going to trial without requesting an assignment. *State v. Serant*, 33 La. Ann. 979. See also *State v. Walker*, 39 La. Ann. 19, where it was held that error could not be assigned because the court failed to assign new counsel in place of counsel who had withdrawn on the day of trial, and proceeded with the trial, no request for counsel or application for

continuance or objection having been made by the accused.

But that a waiver will not necessarily be implied from a failure to employ or ask for counsel, see *Valle v. State*, 9 Tex. App. 57; 35 Am. Rep. 719.

4. An objection to a deposition taken by the state, on the ground that it was taken without the consent of the defendant, if not made at the trial, cannot be urged on appeal. *Boggs v. State*, 8 Ind. 463. See *CRIMINAL PROCEDURE*, vol. 4, p. 815.

The accused waives his right to be confronted by the witnesses, by accepting a right to take depositions in a foreign jurisdiction, under a statute requiring him to concede a like privilege to the state by consent entered of record. Such statute is constitutional, and after the defendant has acted upon the order of the court and taken depositions under it, he cannot withdraw his consent. *Butler v. State*, 97 Ind. 378.

He waives his right by allowing depositions to be put in, *People v. Murray*, 52 Mich. 288; or by reading, or allowing to be read, statements of what absent witnesses, if present, would testify to, *State v. O'Connor*, 65 Mo. 374; 27 Am. Rep. 291; *State v. Wagner*, 78 Mo. 644; 47 Am. Rep. 131; or by allowing to be read the testimony of witnesses taken at an inquest or former trial, as a substitute for the oral testimony of such witnesses. *Williams v. State*, 61 Wis. 281; *Hancock v. State*, 14 Tex. App. 392; *State v. Polson*, 29 Iowa 133.

5. If, when the verdict is received, the defendant permits the jury to separate without objection, he waives his right. *Joy v. State*, 14 Ind. 139.

Where the defendant agrees to a sealed verdict, and the jury files their sealed verdict with the clerk and separates, the right to poll is waived. *U. S. v. Bridges*, 10 Cent. L. J. 7. See also *Brown v. State*, 63 Ala. 97; *Smith v. State*, 59 Ga. 513; 27 Am. Rep. 393, where the defendant waived his right by consenting that the verdict be returned into court and that the jury disperse.

to object to particular jurors, or to misconduct of the jury, or irregularity in impaneling them.¹ The accused by becoming a witness in his own behalf may waive his constitutional privilege against giving testimony against himself;² and he may waive his right to object that he has been formerly in jeopardy for the same offense.³

i. WAIVER OF APPEAL AND IRREGULARITIES IN TAKING APPEAL.—The right of appeal is waived by acquiescing in the judgment,⁴ and irregularities in taking the appeal may be waived by failing to object at the proper time.⁵

WALKING.—Certain phrases in which this word occurs, have received judicial construction.⁶

1. See CRIMINAL PROCEDURE, vol. 4, p. 781, *et seq.*; EMINENT DOMAIN, vol. 6, p. 615; GRAND JURIES, vol. 9, pp. 5, 11; JURY AND JURY TRIAL, vol. 12, p. 318; NEW TRIAL, vol. 16, p. 634.

2. See CRIMINAL PROCEDURE, vol. 4, p. 870 *et seq.*; WITNESSES, vol. 29.

3. CRIMINAL PROCEDURE, vol. 4, p. 729; JEOPARDY, vol. 11, p. 959 *et seq.*; NEW TRIAL, vol. 16, p. 603.

4. *Stinson v. O'Neal*, 32 La. Ann. 947; *Church Wardens v. Perche*, 40 La. Ann. 201.

A party waives his right to appeal from a judgment of foreclosure in his favor, by selling the land under the judgment, *Clark v. Wright*, 67 Ind. 224; *Sterne v. Vert*, 111 Ind. 408; or by accepting payment of the judgment. *Moore v. Floyd*, 4 Oregon 260; *Alexander v. Alexander*, 104 N. Y. 643; *State v. Kamp*, 111 Ind. 56; *McCrasken v. Cabel*, 120 Ind. 266.

A party waives the right to appeal from an order, by accepting the costs awarded him as a condition of granting the order. *Smith v. Coleman*, 77 Wis. 343.

A garnishee by paying the judgment against him waives his right to appeal. *Borgalthous v. Farmers', etc., Ins. Co.*, 36 Iowa 250.

But a defendant, in order to save his property from sacrifice, may appoint appraisers, bid in the property at the sale, and perform like conservatory acts without acquiescing in the judgment or waiving his right to appeal. *Factors, etc., Ins. Co. v. New Harbor, etc., Co.*, 37 La. Ann. 233.

In the following cases it was held that payment by the defendant was no waiver of his right to appeal. *Chapman v. Sutton*, 68 Wis. 657; *Edwards v. Perkins*, 7 Oregon 149; *Belton v. Smith*, 45 Ind. 291; *Hill v. Stark-*

weather, 30 Ind. 434; *Dickensheets v. Kaufman*, 29 Ind. 154; *Armes v. Chapel*, 28 Ind. 469.

Payment by the defendant is no waiver of his right to appeal, unless made by way of compromise or under an agreement not to take or pursue an appeal. *Hayes v. Nourse*, 107 N. Y. 577; 1 Am. St. Rep. 891. And see further, as to waiver of appeal, APPEAL, vol. 1, p. 622 *et seq.*; JURISDICTION, vol. 12, p. 305; MOTIONS, vol. 15, p. 919.

Waiver of Appeal in Criminal Cases by Escaping from Custody and Becoming Fugitive from Justice.—See ESCAPE, vol. 6, p. 853*j*. And see *State v. Murrell*, 33 S. Car. 83; *Bonahan v. Nebraska*, 125 U. S. 692.

5. Irregularities in the notice of appeal and service, are waived by an appearance without objection. *Beck v. State*, 72 Ind. 250; *Deatley v. Potter*, 29 Mo. App. 222; *Bates v. Scott*, 26 Mo. App. 428; *Richardson v. Green*, 130 U. S. 104.

Where, on appeal, a cause is submitted by agreement, a motion to dismiss on the ground that the notice was not given to co-parties, comes too late. *Burk v. Simonson*, 104 Ind. 173; 54 Am. Rep. 307. And see further, as to waiver of irregularities in perfecting the appeal, APPEAL, vol. 1, p. 621 *et seq.*

6. **Walking Out of Bounds.**—A statute declared sureties for a prisoner liable "if the prisoner walk out of said bounds." In *Howard v. Blackford*, 3 N. J. L. 574, it was held that a mere casual stepping out of bounds was not within the provision, and the court said: "It has been insisted that the words of the act are express and positive, that if the prisoner walk out of the said bounds the bond shall be forfeited. They are so. But then, like all other

WALL—(See also PARTY WALL, vol. 18, p. 3).—See note 1.

words, they must have a construction according to the intent of the legislature, and suitable to the subject-matter under consideration. The question then will be, what is walking out of the bounds, according to the true meaning of the act? And I think the plainest rules of construction tell us that it can be no other than such walking out as, before the passing of the act, would have been an escape; a walking out by which the plaintiffs would have been damaged, for which they would have had their action against the sheriff, and he against the prisoner. And this is the import of the phrase in the act concerning sheriffs. There it is said if the sheriff suffer the prisoner to walk out of the prison, it shall be an escape. So that, by legislative constructions, the words walking out, etc., mean an escape, an escape as understood in law language. The voluntary return, therefore, may be pleaded to it, and it is a complete bar. That the words are not to be taken literally, but according to the principles of sound construction, is manifest from many cases that might be put; as the invasion of a public enemy, the imminent danger of the prisoner's own life, or that of others, from fire, etc. Nay, indeed, I think a hundred cases might be put, where even Shylock, himself, could not construe the walking out to be a forfeiture of the bond. Whether this be one of those cases, it will be well for the plaintiffs to consider."

Walking on the Railroad Track—Accident Policy.—A policy of insurance contained the condition that the insurance should not cover injuries happening to the insured while "walking or being on the roadbed or bridge of any railway." The insured stepped off a railroad train, when it came to a stop on a drawbridge at night, fell through a concealed hole in the bridge, and was killed. It was held that the case was not within the said condition, the obvious intent of which was to guard, not against a defective roadbed or railway bridge, but against danger of injury from trains passing thereon. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262. In this case the court said: "Was he walking or being on the roadbed or bridge of the railway? He certainly was not walking on the roadbed or bridge, and, strictly speaking, it is

doubtful whether he was being on either. The evidence indicates that without touching either he probably passed directly from the steps of the car through the hole in the bridge. We will not, however, put the case on the narrow ground that he did not come in contact with either roadbed or bridge. The language of the exception clearly implies two thoughts. One, that the insured must not be on the roadbed or bridge for any length of time; the other, that the prohibition is not to guard against injury resulting from a defective roadbed or defective railway bridge, but against the danger of injury, from trains passing thereon. If the design was to apply the language to bridges defectively constructed or out of repair, it would not have been restricted to railway bridges. It would have included all bridges, both foot and wagon. The purpose is not to avoid liability for injuries resulting from being on bridges unsafe in themselves. The manifest intent is to exempt from responsibility for damages caused by collisions with trains moving thereon. The present is not like a case between a passenger and a railway company, in which the company may be exempt from liability for damages arising from negligence of the passenger, not voluntary. Nor did the act of the insured prove such a reckless exposure of his person, nor obvious risk of danger, as to bring him within the application of the rule declared in *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush (Ky.) 535; *Lovell v. Accident Ins. Co.*, 3 Ins. L. J. 877; *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216, and kindred cases."

1. Party or Other Wall.—The *New York* statute making it the duty of one digging to a depth of more than ten feet below the curb line, to protect "party or other walls standing upon or near the boundary lines," was held not to apply to the foundations of a stoop, and, therefore, the liability for injuries to the stoop by such digging is to be determined by the rules of the common law, which do not make one digging with care on his own land liable for the fall of structures built upon the adjoining land. *Berry v. Todd*, 14 Daly (N. Y.) 451.

Ancient Wall.—In *Eno v. Del Vecchio*, 4 Duer (N. Y.) 63, the court said:

WANT.—The term "want" in itself is ambiguous, being commonly used to mean "wish" or "desire," and as frequently "need" or "require."¹

WANTON.—(See *LEWD AND LASCIVIOUS*, vol. 13, p. 274).—Reckless—without regard to the rights of others.²

"A party wall built to be used as such, and in fact used as such for more than twenty years, by the express permission and continuous acquiescence of the owners of the land on which it stands, is an ancient wall, within the meaning of the word 'ancient,' as applied to lights, ways, foundations, etc., which are treated in law as being ancient lights, ways and foundations. *Wright v. Freeman*, 5 Har. & J. (Md.) 477."

1. *Hull v. Culver*, 34 Conn. 403. In this case, the devise was as follows: "I give all my estate to my beloved husband, to use during his natural life, and if he should want, for his support, to sell any part or the whole of it for his maintenance, my will is that it shall be at his disposal." It was held, first, that the term "want" was to be construed as meaning "need;" second, that the devisee was not to be the judge of his need, but it was to be a case of actual necessity.

Wanted, as used in a statute authorizing the condemnation of land for railroad purposes, means necessary. In *Tracy v. Elizabethtown, etc., R. Co.*, 80 Ky. 267, the court said: "The mere fact that the appellee alleged that it desired the property was insufficient to show that there was a necessity for taking it, or that the purpose was public, as the word 'wanted,' as used in the charter, is not synonymous with desired, but it was used by the legislature in the sense of necessary, as shown by the ordinary and common sense reading of the section quoted, by its use in the twelfth and fourteenth sections of the charter, and by the substitution for it of the word required in the thirteenth section, which directs that the damages for 'the use and occupation of the property required by said company,' must be assessed under oath. The company is restricted to the taking of such and so much property as is reasonably necessary to the construction or repair of its road or works, and in order to prevent it from becoming its own judge, the issue presented by the appellants should have been heard and determined by the circuit court, and if

the company had failed to show the necessity, or the public nature of the use according to the rule herein laid down, the court should have refused to confirm the verdict."

2. *Tatum v. State*, 66 Ala. 467.

Wanton or Obscene Language.—A city ordinance provided a penalty, "if any person shall address any wanton or obscene language to another, or exhibit any wanton, lewd, or obscene gestures or conduct." It was held, that the expression "wanton or obscene language" is here equivalent to lewd or lascivious language; and that the words "long-legged son of a bitch," "long-legged-pup," and "damned son of a bitch," do not come within the ordinance. *Sutton v. McConnell*, 46 Wis. 269.

Wanton Killing of Animals.—Under the statute declaring a person guilty of a misdemeanor "who unlawfully or wantonly kills, disables, disfigures, destroys, or injures any horse," or other domestic animal particularly named (*Alabama Code*, § 4409), unlike the preceding section (4408), which relates to malicious injury to animals, malice towards the owner is not an ingredient of the offense. The statute is aimed against intentional acts, unlawfully or wantonly done, from which injury to the animal results, although there may not have been a specific intent to kill, disable, or injure it. In *Tatum v. State*, 66 Ala. 467, *Brickell, C. J.*, said: "The statute on which the accusation is founded, is not directed against malicious mischief, or malicious injuries to property. The preceding section of the code is aimed at injuries of that kind; and this section, at wanton or unlawful injuries to certain domestic animals. Of this offense, malice is not an element. If the wrong done was malicious—if it was with the intent to injure the owner of the animal, it would be of the class of injuries enumerated in the preceding section. Under this section, it is enough that the injury is inflicted unlawfully—in violation of, or contrary to, law; or wantonly—that is, without regard to the rights of the owner. It is not an

Definition.

accidental, or unintentional injury, proceeding from an act not directed against the animal, the statute denounces. But it is an injury proceeding from an unlawful or wanton act, directed against the animal, though there may not be a specific intent to destroy, disable, disfigure, or injure it. It is against intentional acts, wanton or unlawful, from which injury to the animal results, though the injury may not have been contemplated or intended, the statute is directed. The several charges requested were in conflict with this construction of the statute, and were properly refused."

The defense, in a prosecution for willfully and wantonly killing a cow, proposed evidence to show that the animals with which the cow was herded were breachy animals, and in the habit of trespassing upon crops. It was held that the evidence should have been admitted, to be considered by the jury in determining whether or not the killing was willful and wanton, or whether it was done under circumstances sufficient to negative such motives. *Reedy v. State*, 22 Tex. App. 272. In this case, the court said: "Appellant, under article 680, Penal Code, was indicted for willfully and wantonly killing a cow. On the trial, it was proposed by defendant to show by the witness, Wynn, that the animals with which the cow that was killed ran were breachy animals and in the habit of trespassing upon crops. This evidence was excluded on objection by the state. The ruling was erroneous. The evidence should have gone to the jury in order that they might have considered it in determining whether the killing was willfully and wantonly done without excuse, and under circumstances evincing a lawless spirit, or whether under the circumstances such facts negatived such motives, promptings, and wantonness. (*Branch v. State*, 41 Tex. 622; *Jones v. State*, 3 Tex. App. 228; *Lott v. State*, 9 Tex. App. 206; *Davis v. State*, 12 Tex. App. 11; *Thomas v. State*, 14 Tex. App. 200; *Lane v. State*, 16 Tex. App. 172; *Payne v. State*, 17 Tex. App. 40.)"

A wanton act is one committed in disregard of the rights of another, in a reckless spirit, or under circumstances which evince a lawless, wicked, or mischievous intent. *Thomas v. State*, 14 Tex. App. 201.

Where the defense, in an indictment for injury to stock, was that the stock

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law prevailed where the offense was committed, and the prosecutor did not keep his stock up, which trespassed on the crops of the defendant, it was held no defense, and on the defendant's own evidence he was guilty. *State v. Brigman*, 94 N. Car. 888. In this case *Smith, C. J.*, said: "The sole question then is, whether the shooting and killing the cow under the circumstances detailed, and for the purpose mentioned, is 'wanton and willful' within the contemplation of the statute, and more especially, was it 'wanton?' To be criminal, the act must possess both qualities. It was certainly willful, for it was a development of a preconceived purpose, not an impulse of anger, excited by unexpectedly seeing a repetition of the annoying trespass. But more is required to constitute the indictable offense. The act must not only be of purpose, but it must also be wanton. What does this qualifying adjective mean, when applied to the killing? Wantonness is defined by *Bouvier*, to be 'a licentious act of one man, towards the person of another, without regard to his rights,' and licentiousness, to be 'the doing what one pleases, without regard to the rights of others.' In *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55, *Butler, J.*, speaking for the court, says: 'Wantonness is action without regard to the rights of others.' Mr. Justice *Willes* declares that 'wantonly means not having a reasonable cause.' *Clark v. Hoggins*, 11 C. B. N. S. 545; 103 E. C. L. 543. In *Cobb v. Bennett*, 75 Pa. St. 326; 15 Am. Rep. 752, when the action was for an injury done to a fishing net, in the waters of the Delaware, in use by the plaintiff, Chief Justice *Agnew* uses this language: 'It is wantonness when a mariner, warned of the net, seeing the lights marking its position, and requested to avoid it, yet indifferent to the interests of the fisherman, keeps on his course, when a reasonable pursuit of his voyage would not be prejudiced by avoiding the net. Wantonness is reckless sport—willfully unrestrained action, running immoderately into excess. If a man will do an injury, when he may reasonably avoid doing so without inconvenience to himself, can he be said to be blameless?' This is, in our opinion, a fair exposition of the sense in which the word is used in the statute. The illegal act is wanton, when it is needless for any rightful

WANTONLY—(See INDICTMENT, vol. 10, p. 598).—In an indictment, the term “wantonly” has been held to imply turpitude; that the act done is of a willful, wicked purpose.¹ Wantonly

purpose—without adequate legal provocation—and manifests a reckless indifference to the interests and rights of others. It is such a wrong, which the law subjects to a criminal prosecution. To obviate the necessity of a resort to violence as a means of personal redress, or to avenge an injury done by straying stock, the law has made ample provision, and this is open to the injured party. It is made a misdemeanor for the owner to allow his stock to go at large in territory covered by the stock law, and he may be punished. The Code, § 2811. Stock found at large may be taken up and impounded, and if damage has been done to another, a summary mode of assessing its amount is given, and both the costs incurred and the damages ascertained, must be paid, before the owner can have possession of his property. Code, § 2816. With this means of remuneration for losses sustained from the incursions of stock upon land in cultivation, there can be no legal excuse for the defendant to destroy the unoffending and irresponsible animal, and it must be characterized as wanton as well as willful.” See also *Wright v. Clark*, 50 Vt. 130; 28 Am. Rep. 496.

Wanton Disturbance.—The mere fact of a man being instructed to deliver papers at the house of a third person, is no answer to a complaint against him, under 10 & 11 Vict. Stat., ch. 89, § 28, charging him with having “willfully and wantonly” disturbed the party and his family by violently knocking and ringing at the door at an unreasonable hour of the night. In *Clark v. Hoggins*, 11 C. B. N. S. 545; 103 E. C. L. 543, the court said: “The question submitted to us virtually is, whether he was absolved by his employment by Mr. Hiatt from the consequences of his acts. The answer to that question obviously must be in the negative. That the appellant acted willfully is clear. He rang so violently that he broke the bell-wire. The only element remaining is the wantonness. I agree with Mr. Smith that ‘wantonly’ means, not having a reasonable cause. Here we come to the kernel of the case—whether one, having a lawful right to come to another’s house, has a right to stop there at a late hour at

night, knocking and ringing violently, though he knows that the inmates do not choose to admit him, or to receive what he brings. That answers itself. Wantonness consists in the doing that which will annoy another and which the party doing it knows will produce no results to himself. I think the magistrates could come to no other conclusion than they have done; and that the question which they have put to us is capable of receiving only one answer.”

Wanton Distinguished from Willful.—A complaint alleged that the defendant’s conduct was “wanton.” This was held defective in that, having admitted contributory negligence, willfulness, or gross negligence should have been alleged. In *Lafayette, etc., R. Co. v. Huffman*, 28 Ind. 290; 92 Am. Dec. 318, the court, by Ray, J., said: “But children of tender years have no right to play about and upon railroad crossings, and engineers are not required to run their trains expecting to find them so engaged. To render the defendant liable in this case, therefore, the complaint must either charge knowledge of the fact that the child was so engaged, or such neglect in keeping a lookout as would have charged the company with negligence if a person of mature judgment had been upon the track. The complaint is fatally defective. After admitting facts which show negligence of the plaintiff contributing to the injury, it charges that the defendant, in a wanton and careless manner ran said locomotive, etc. The word ‘wanton’ does not mean willful. It is defined by Webster as follows: ‘Wandering or roving in gaiety or sport;’ ‘licentious;’ ‘lewd;’ ‘extravagant,’ etc. The word adds no force to the charge that the act was done in a careless manner. The demurrer should have been sustained to the complaint.”

1. *North Carolina v. Vanderford*, 35 Fed. Rep. 282; *State v. Massey*, 97 N. Car. 465.

Where a barrel of whisky is without the stamps and brands required by law, the mere possession of it gives no title; and a revenue officer who seizes such a barrel concealed on private premises; and in good faith destroys it, is not guilty of a misdemeanor under 1

means causelessly, without restraint, and in reckless disregard of the rights of others.¹

WANTONNESS—(See also RECKLESSNESS, vol. 20, 471).—Action without regard to the rights of others;² a licentious act of

North Carolina Code, § 1082, prohibiting "wanton and willful injuries to personal property." *North Carolina v. Vanderford*, 35 Fed. Rep. 282.

An indictment for a violation of *North Carolina* Code, § 985, as amended by ch. 66, Laws of 1885, which fails to allege that the act of the defendant was done "wantonly and willfully," is fatally defective, and the use of the words unlawfully, maliciously, and feloniously, will not supply the lack of the essential descriptive terms. *State v. Morgan*, 98 N. Car. 641.

Instruction to Jury.—In an action for assault and battery, the trial court instructed that to enable the plaintiff to recover he must have been "wantonly" assaulted. On appeal to the supreme court that court, by SeEVERS, J., said: "The court instructed the jury, in substance, as the defendant claims, that in order to entitle the plaintiff to recover they must find that he was unlawfully, wantonly and willfully assaulted; and it is insisted that the evidence does not justify the verdict. The evidence clearly shows that the shooting was willful, as distinguished from accidental. The defendant purposely fired the pistol. He so testifies; and if such act was not excusable it was unlawful. But it is said the word 'wanton' means 'malicious,' and that there is no evidence of malice. No such meaning can or should be given to the word 'wanton' as used by the court. At most, the jury were required to determine whether the assault was willful and intentional, or justifiable or excusable. In fact, the only question under the evidence was whether the assault was excusable, and this was fairly submitted to the jury, and with their finding we cannot interfere." *Brantz v. Marcus*, 73 Iowa 64.

1. *Trauerman v. Lippincott*, 39 Mo. App. 479.

2. In *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55, it was held that smart money may be allowed as damages in actions of tort founded on the malicious or wanton misconduct, or culpable negligence of the defendant. The court said: "It is not claimed that the act was intentional or malicious,

and it is denied that it was wanton. Although used in our reports in reference to that class of cases, 'wantonness' is not alone an apt word to describe one of the distinguishing elements of them. It is not found in the older authorities, and does not appear in Tomlin's L. Dict. Bouvier has it, but as applicable to criminal law; and and defines it thus: 'Criminal Law: A licentious act of one man toward another, without regard to his rights; as, for example, if a man should attempt to pull off another's hat against his will, in order to expose him to ridicule, the offense would be an assault, and if he touched him it would amount to a battery (q. v.). In such case there would be no malice, but the wantonness of the act would render the offending party liable to punishment.' Licentiousness is defined by him to be 'the doing what one pleases, without regard to the rights of others.' According to these definitions, wantonness is active—action without regard to the rights of others. But in *Linsley v. Bushnell*, 15 Conn. 225, the term was applied to an omission to act. In that case the owner of a cart, which had been taken from its place and upset in the highway by wrongdoers, left it there, and the plaintiff was injured by running against it. . . . In this case the defendant was guilty of wanton misconduct and culpable neglect. The latter is expressly found by the court and would justify the judgment, but the former is shown by the facts. The injury was a battery within the strictest definition. It resulted to the person of the plaintiff from a ball put in motion by the agency of the defendant without due care. It is an immaterial fact that the injury was unintentional, and that the ball glanced from the intended direction. Shooting at a mark is lawful, but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others; and if the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent."

one man towards the person of another, without regard to his rights.¹

WAR.—See INTERNATIONAL LAW, vol. 11, p. 431; MILITARY LAW, vol. 15, p. 390; MILITIA, vol. 15, p. 474.

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I. DEFINITION.—War is defined by Vattel to be that state in which we prosecute our right by force;² by Grotius, as an armed contest between nations.³ The latter writer divides war into

1. State v. Brigman, 94 N. Car. 888, quoting Bouvier's L. Dict.

In Cobb v. Bennett, 75 Pa. St. 330; 15 Am. Rep. 752, the court, by Agnew, C. J., said: "Indeed, the question upon the charge comes down to this. Is it wantonness when a mariner, warned of a net, seeing the light marking its position, and requested to avoid it, yet indifferent to the interests of the fisherman, keeps on his course, when a reasonable pursuit of his voyage would not be prejudiced by avoiding the net? Wantonness is reckless sport, willfully unrestrained action, running immoderately into excess. If a man will do an injury, when he may reasonably avoid doing so without inconvenience to himself, can it be said he is blameless? Is it not worse than wantonness, is it not rather malice, when he may, without prejudice to the reasonable enjoyment of his own right, desist from an injury to another, and yet will persist in committing it? Now, unless we deny this proposition we cannot reverse. If there were anything exceptional in the facts or contradictions of the evidence, it was in the power of the defendant to ask specific instructions upon the precise state of the facts, as appearing on either side."

2. Vattel's Law of Nations, p. 291.

War is defined by Bynkershoek as a contest carried on between independent persons, for the sake of asserting their rights. Bynkershoek on Law of War, p. 128. See U. S. v. Schooner Active, 3 Wheel. Cr. Cas. (N. Y.) 265.

"When, by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so that the courts of justice are, as it were, shut up, *et silent leges inter arma*, then it is said to be a time of war." Co. Litt. 249. See Mayfield v. Richards, 115 U. S. 137.

3. Grotius' de Jur. Bell., i. 1. ch. 1; Manning's Com. p. 61, note (h). And see U. S. v. Schooner Active, 3 Wheel. Cr. Cas. (N. Y.) 264.

The following definitions are stated by Washington, J., in Bas v. Tingy, 4 Dall. (U. S.) 37: "It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind, because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. . . . But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission."

A perfect war is that which destroys

three kinds: public, private, and mixed;¹ public, where the contest is by force between independent, sovereign states;² private, where it is carried on between private individuals;³ and mixed, where it is carried on between a nation on one side, and private individuals on the other.⁴ A civil war is one confined to a single nation.⁵

When authorized by the proper authorities, war is said to be lawful; if without such authority, unlawful.⁶

the national peace and tranquillity, and lays the foundation of every possible act of hostility; the imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals. *Miller v. The Resolution*, 2 Dall. (U. S.) 19.

1. Grotius, bk. 1, ch. 3, § 1.

2. To constitute a public war, at least two nations are essential parties in their corporate capacities. Grotius, bk. 1, ch. 3; *People v. McLeod*, 25 Wend. (N. Y.) 577; *Wheaton on International Law*, § 296.

Before the declaration of independence, the war between *Great Britain* and the American colonies was a civil war; after that event it became a public war between independent governments. *Ware v. Hylton*, 3 Dall. (U. S.) 199.

No private hostilities, however general, or however just, will constitute what is called a legitimate and public state of war. 1 *Ward's Law of Nations* 294.

3. A private war belongs to the law of nature, properly so called, and is unknown in civil society, except where it is lawfully exercised by way of defense between private persons. Grotius, bk. 1, ch. 3; *Vattel's Law of Nations*, p. 291.

"Where society does not exist—where there is no such institution as that which we call government, there individuals, being strictly independent persons, may carry on war against each other. But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law." *U. S. v. Schooner Active*, 3 Wheel. Cr. Cas. (N. Y.) 265; *Bynkershoek on Law of War*, p. 128.

In regard to individual hostilities, the court, in *Talbot v. Janson*, 3 Dall. (U. S.) 132, said, "that by a due consideration of the law of nations, whatever opinions may have prevailed formerly

to the contrary, no hostilities of any kind, except in necessary self-defense, can lawfully be practiced by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority. War can alone be entered into by national authority; it is instituted for national purposes and directed to national objects; and each individual on both sides is engaged in it as a member of the society to which he belongs." See also *Miller v. The Resolution*, 2 Dall. (U. S.) 1.

4. Grotius, bk. 1, ch. 3, § 1; *People v. McLeod*, 25 Wend. (N. Y.) 577.

May Be Treason.—Treason against the *United States* shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. *United States Const.*, art. 111, § 3. To constitute a levying of war, there must be an actual assemblage of men for a treasonable purpose. *Marshall, C. J.*, in *Ex p. Bollman*, 4 Cranch (U. S.) 75; *U. S. v. Mitchell*, 2 Dall. (U. S.) 348. See **TREASON**, vol. 26, p. 532. See also **INSURRECTION**, vol. 11, p. 356.

5. *Wheaton on International Law*, § 296; *Ware v. Hylton*, 3 Dall. (U. S.) 199.

"Insurrection against a government may, or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on." *Grier, J.*, in *Prize Cases*, 2 Black (U. S.) 635. In this case, it was also said that the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms, and that it exists whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts cannot be kept open.

6. *Vattel*, bk. 3, ch. 4, § 67; *People v.*

All public or national wars are of two kinds: war by public declaration, or war denounced without such declaration. The first is called solemn or perfect war, because it is general, extending to all the inhabitants of both nations. The second is called unsolemn or imperfect war, simply because it is not made upon general declaration.¹ Both are lawful, the only effect of a declaration being to make the war a general one.²

II. POWER TO MAKE—DECLARATION OF.—The right to make war belongs to the sovereign power alone,³ which in the *United States* is Congress, and in *England*, the Crown.⁴

In former times, a public declaration of war was usually sent to the opposite belligerent before commencing actual hostilities,⁵

McLeod, 25 Wend. (N. Y.) 483; 37 Am. Dec. 328. But a formal declaration by the contending power is not necessary to make war lawful. Review of the opinion of Judge Cowen, in the case of McLeod, by Judge Tallmadge, 26 Wend. (N. Y.) 663.

A mere private enterprise against a government will not be a lawful war; if such an enterprise be by the citizens of a state against the state, their acts will constitute treason; if by citizens of a foreign state and not authorized by the sovereign power of such state, the participants will be liable to punishment under the civil laws of the invaded state; capture of property, if on land, will be robbery; if upon the sea, piracy. An old writer, Sir Leoline Jenkins, has thus stated the law: "If subjects of the same state commit robbery upon each other on the high seas, it is piracy; if they are subjects of different states, if in amity, it is piracy; if in enmity, it is not." Vattel, bk. 3, ch. 4, §§ 67, 68; Grotius, bk. 3, ch. 4. Mr. Ward, in his *Law of Nations*, p. 294, says: "Although I am aware that there is a great authority for the contrary opinion, yet it is, upon the whole, settled that no private hostilities, however general or however just, will constitute what is called a legitimate and public state of war."

In *People v. McLeod*, 25 Wend. (N. Y.) 483; 37 Am. Dec. 328, Cowen, J., said: "To warrant the destruction of property or the taking of life on the ground of public war, it must be what is called lawful war by the law of nations, a thing which can never exist without actual concurrence of the war-making power. This, on the part of the *United States*, is Congress; on the part of *England*, the Queen."

1. *People v. McLeod*, 25 Wend. (N.

Y.) 577. Grotius says that, according to the law of nations, two things are requisite to constitute a sovereign or formal war—first, that it be on both sides made by the sovereign authority; secondly, that it be accompanied by certain formalities. These formalities consist in the demand of a just satisfaction, and in the declaration of war, at least on the part of him who attacks. Grotius' *de Jur. Bell.*, bk. 1, ch. 3, § 4. See Vattel's *Law of Nations*, p. 319.

2. Rutherford's *Inst. Nat. Law*, bk. 2, ch. 9, § 18. As to necessity for declaration, see *infra*, this title, *Power to Make—Declaration of*.

3. Vattel's *Law of Nations*, p. 292; Boyd's *Wheat. Int. Law*, § 294 *et seq.*; 1 Bl. Com. 257; *U. S. v. Schooner Active*, 3 Wheel. Cr. Cas. (N. Y.) 266.

4. *People v. McLeod*, 25 Wend. (N. Y.) 575; *United States Const.*, art. 1, § 8.

The power to declare war is exclusively vested in Congress. *Perkins v. Rogers*, 35 Ind. 124; 9 Am. Rep. 639.

The power to declare war includes the power to prosecute it by all means, and in any manner, in which war may be legitimately prosecuted. *Miller v. U. S.*, 11 Wall. (U. S.) 268.

5. Vattel says that, in order to justify a nation in taking up arms, it should have a just cause of complaint and reasonable satisfaction should have been denied it, and that it owes it, as a regard to humanity and to the lives and peace of the subjects, to declare to that unjust nation, or its chief, that it is at length going to have recourse to the last remedy, and make use of open force for the purpose of bringing it to reason. And a declaration of war thus being necessary, as a further effort to terminate the differences without effusion of blood, by making use of the principle of fear

but this is now generally considered unnecessary, and a state of war may exist without it.¹ The fact of the existence of war and the date of its commencement and close will be determined by the political power;² and the courts will take judicial notice of

in order to bring the enemy to more equitable sentiments, it ought, at the same time that it announces the settled resolution of making war, to set forth the reasons which have induced the nation making the declaration, to take up arms. Vattel's Law of Nations, p. 315.

1. INTERNATIONAL LAW, vol. II, p. 455; Vattel's Law of Nations (Am. ed. 1852), p. 316, note. And see observations of Sir Wm. Scott, in *The Nayade*, 4 Rob. Rep. 252; Chitty's L. Nat. 29, 3.

The war of 1812, between the *United States* and *Great Britain*, was declared by Act of Congress, June 18, 1812, though there had been some hostilities previously. *United States Laws* 1812, p. 227. And war had existed between the *United States* and *Mexico*, from March 4th until May 13th, 1846, without any formal declaration, the Act of Congress of May 13, 1846, declaring that "by the Act of the Republic of *Mexico*," war existed between the countries. *United States Laws* 1846, p. 14. Davis, J., in *Dole v. Merchants' Mut. Marine Ins. Co.*, 51 Me. 470, said: "Every forcible contest between two governments, *de facto* or *de jure*, is war. War is an existing fact and not a legislative decree. Congress alone may have power to declare it beforehand, and thus cause or commence it, but it may be initiated by other nations or traitors, and then it exists whether there is any declaration of it or not. It may be prosecuted without any declaration, or Congress may, as in the *Mexican* war, declare its previous existence." See also *The Tentonia*, L. R., 4 P. C. 171.

2. *Philips v. Hatch*, 1 Dill. (U. S.) 571; *U. S. v. Anderson*, 9 Wall. (U. S.) 56; *Grossmeyer's Case*, 4 Ct. of Cl. 1; *Perkins v. Rogers*, 35 Ind. 124; 9 Am. Rep. 639; *State v. Burgess*, 23 La. Ann. 225. But see *Nelson v. Manning*, 53 Ala. 549.

In the late civil war, no declaration of war was ever made, but the President recognized its existence by proclaiming a blockade. *Matthews v. McStea*, 91 U. S. 7.

In *Freeborn v. The Ship Protector*, 12 Wall. (U. S.) 700, the proclamation

of intended blockade, by President Lincoln, was held to give the date when the civil war began, and his proclamation that the war had closed, to give the date of its ending. The beginning, therefore, in the states of *South Carolina*, *Georgia*, *Alabama*, *Florida*, *Mississippi*, *Louisiana*, and *Texas*, was the 19th of April, 1861 (12 Stat. at L. 1258), and in the states of *Virginia* and *North Carolina*, the 27th of April, 1861 (12 Stat. at L. 1259), and the close was the 2d of April, 1866 (14 Stat. at L. 811), in the states of *Virginia*, *North Carolina*, *South Carolina*, *Georgia*, *Florida*, *Alabama*, *Mississippi*, *Tennessee*, *Louisiana*, and *Arkansas*; and the 20th of August, 1866, in *Texas*. Chase, C. J., in delivering the opinion of the court in this case, said: "Acts of hostility by the insurgents occurred at periods so various and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise date it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken." This decision was followed in *Adger v. Alston*, 15 Wall. (U. S.) 555; *Batesville Inst. v. Kauffman*, 18 Wall. (U. S.) 151. And see *Gooding v. Varn*, Chase's Dec. (U. S.) 286; *State v. Burgess*, 23 La. Ann. 225.

In *Chesapeake, etc., R. Co. v. U. S.*, 19 Ct. of Cl. 300, it was held that the State of *Virginia* engaged in war against the *United States* on April 17th, 1861, on which day the convention passed an ordinance requiring the governor to call out volunteers, and he issued his proclamation, and the state authorities took possession of the custom house in Richmond.

As between citizens of *Alabama*, in their relations to each other, peace with the *United States* must be held to have been declared not later than

its existence and the time of its commencement and close as so determined by the political power.¹

III. BELLIGERENT RIGHTS.—The rights of belligerents are those rights recognized by the law of nations, and accorded an enemy in a lawful, public war, to take, and if necessary, destroy, the persons and property of the enemy;² also, as a necessary consequence, the right of exemption from civil responsibility for acts done in pursuance of these rights.³

December 20th, 1865, the date when Provisional Governor Parsons surrendered his authority to the governor elected under the constitution of 1865. *Nelson v. Manning*, 53 Ala. 549.

1. *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; *Sutton v. Tiller*, 6 Coldw. (Tenn.) 593; 98 Am. Dec. 471. Also of facts of public history connected with its origin and process, *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; but not that civil law was suspended in a certain county. *Smart v. Mason*, 2 Heisk. (Tenn.) 223.

2. *Vattel*, bk. 3, ch. 7; 1 *Kent's Com.* (13th ed.) 90; *Gates v. Goodloe*, 101 U. S. 612.

In the Prize Cases, 2 Black (U. S.) 635, Grier, J., said: "The right of one belligerent, not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas." The court, in this case, decided that the belligerent party claiming to be sovereign might exercise both sovereign and belligerent rights; that the persons in the insurgent states, though not foreigners, would be treated as enemies, and their property on land or sea taken under the usual laws of war.

In *Smith v. Brazelton*, 1 Heisk. (Tenn.) 44; 2 Am. Rep. 678, the court said: "Among these sovereign rights of war may be classed the right to attack and capture or destroy the persons and property of the enemy; to destroy his commerce; to despoil and plunder his territory; to levy contributions; and to put in practice, against him, every method known in civilized warfare necessary to weaken him."

Private property may be seized and used for military purposes. *Mississippi, etc., R. Co. v. Wilson*, 10 Heisk. (Tenn.) 496. And what shall be the subject of capture, as against his enemy, is always within the control of every belligerent. *Lamar v. Browne*, 92 U. S. 187. See also *Haven v. Holland*, 2 Mason (U. S.) 230.

In regard to the right to take property, public or private, of the enemy, see *INTERNATIONAL LAW*, vol. II, p. 457; *infra*, this title, *Effect on Property*.

3. *McLaughlin v. Green*, 50 Miss. 453; *Cummings v. Diggs*, 1 Heisk. (Tenn.) 67; *Gunter v. Patton*, 2 Heisk. (Tenn.) 257; *Wright v. Winningham*, 2 Heisk. (Tenn.) 254; 5 Am. Rep. 35; *Henry v. Gardner*, 10 Heisk. (Tenn.) 420; *Sutton v. Tiller*, 6 Coldw. (Tenn.) 593; 98 Am. Dec. 471; *Western, etc., R. Co. v. Hurst*, 11 Heisk. (Tenn.) 625; *Jones v. Williams*, 41 Tex. 390; *Brown v. U. S.*, 8 Cranch (U. S.) 110; *Dow v. Johnson*, 100 U. S. 158; *Stoughton v. Taylor*, 2 Paine (U. S.) 655; *Lamar v. Brown*, 92 U. S. 187; *Ford v. Surget*, 97 U. S. 594; *Coleman v. Tennessee*, 97 U. S. 509; *McLeod v. Callicott*, Chase's Dec. (U. S.) 443; *Perrin v. U. S.*, 4 Ct. of Cl. 543. And see *MILITARY LAW*, vol. 15, pp. 436, 437.

The *United States* is not responsible for private property destroyed during the late civil war; nor are private parties chargeable with the cost of works constructed on their property by the *United States* in aid of the war. *U. S. v. Pacific R. Co.*, 120 U. S. 227.

An order issued by a regularly constituted military authority during the civil war, protected the citizen obeying it. It was not his duty nor his power, to call in question the legality of the order, or the authority of the officer to issue it. *Western, etc., R. Co. v. Hurst*, 11 Heisk. (Tenn.) 625.

In accordance with the doctrine of the text, individuals will not be liable in a public war for lawful acts of war

In civil war, the rights of belligerents are accorded those persons resisting or opposing the established government.¹

done under authority of the sovereign power. But Halleck says: "For anything in violation of the laws of war, the individual is liable to punishment. So also, for any act within the rules of war, not authorized or assumed by his government." See Halleck on International Law, p. 348; *Riggs v. State*, 3 Coldw. (Tenn.) 85; 91 Am. Dec. 272.

Property cannot, by the laws of war, be taken without compensation, for the purpose of feeding the inmates of an insane asylum, the directors and officers of which have left it, on the approach of the enemy, and not returned; and upon the termination of hostilities, the value of the property may be recovered from the asylum corporation. *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. (Va.) 163.

In regard to the responsibility of soldiers acting under the authority of martial law prevailing in their own state, for acts done in another state, see *Com. v. Blodgett*, 12 Met. (Mass.) 56. In this case, Shaw, C. J., said: "We do not mean to be understood as holding that soldiers and subordinate military officers, who are ordered by their sovereign to enter the territory of another state to pursue an enemy, and for any other purpose, may not rightfully claim impunity from the animadversion of the criminal laws of the country invaded. Such an invasion, however, must be deemed to be made *flagrante bello*, whether war have been declared or not; because it is in itself an act of war. But this could not be justified by an order of the subordinate military authorities of a state, in the exercise of their ordinary functions in the defense of a state. Nothing but the sovereign power of the state, by a previous order, directing such invasion, or by a subsequent ratification, when done in its name, will warrant such invasion, and excuse the subordinates engaged in it, because it emanates from the sovereign authority having the power to make war. The wrong done by such an invasion then becomes a question of negotiation between sovereigns, and the subordinate agents are entitled to immunity."

1. Vattel's Law of Nations, bk. 3, ch. 18, § 295; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610; *The Venice*, 2 Wall. (U. S.) 258; *Coolidge v. Guthrie*, 1 Flipp.

(U. S.) 97; *Mauran v. Insurance Co.*, 6 Wall. (U. S.) 1; *Coppell v. Hall*, 7 Wall. (U. S.) 542; *Thorington v. Smith*, 8 Wall. (U. S.) 1; *The Grapeshot*, 9 Wall. (U. S.) 129; *Beard v. Burts*, 95 U. S. 434; *Miller v. U. S.*, 11 Wall. (U. S.) 268; *Dole v. Merchants' Mut. Marine Ins. Co.*, 51 Me. 465; *Jones v. Williams*, 41 Tex. 390; *Smith v. Brazelton*, 1 Heisk. (Tenn.) 44; 2 Am. Rep. 678; *Cummings v. Diggs*, 1 Heisk. (Tenn.) 67; *Wright v. Winningham*, 2 Heisk. (Tenn.) 254; 5 Am. Rep. 35; *Gunter v. Patton*, 2 Heisk. (Tenn.) 257.

Belligerent rights were accorded insurgents in *Bolivar, United States of Colombia*, by the lawful government, and our government was notified of that fact. *The City of Mexico*, 24 Fed. Rep. 33. And in the war between *Spain* and her colonies, the belligerency of the latter was recognized by the *United States*. *The Santissima Trinidad*, 7 Wheat. (U. S.) 283; *The Divina Pastora*, 4 Wheat. (U. S.) 52; *U. S. v. Palmer*, 3 Wheat. (U. S.) 310; *The Nueva Anna*, 6 Wheat. (U. S.) 193.

"The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized status, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nations. They can obtain abroad loans, military and naval materials, and enlist men, as against everything but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a *quasi* political recognition. On the other hand, the parent government is released from responsibility for acts done in the insurgent territory; its blockade of its own ports is respected; and it acquires a right to exert against neutral commerce all the powers of a party to a maritime war." *Wheaton on Int. Law*. (8th ed.) 37, n.

The principles of public law regulating the conduct in foreign wars have been held applicable to the late civil conflict between the *United States* and the Confederacy, *Small v. Lumpkin*, 28 Gratt. (Va.) 832; and important belligerent rights were accorded the Confederacy. *Mitchell v. U. S.*, 21

IV. EFFECTS OF WAR—1. Suspension of Intercourse—*a*. GENERALLY.—During the continuance of war all commercial intercourse between the citizens of the contending powers is suspended;¹ for,

Wall. (U. S.) 350; *Coppell v. Hall*, 7 Wall. (U. S.) 542.

The adversaries in that conflict were states and commonwealths, each claiming to be sovereign in its own sphere, aggregated on either side into a belligerent nationality. They were belligerents in fact and belligerents in law, and the laws of war granted to them all the rights of belligerents, whether those rights were conceded or not to the seceded states. *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719.

The *United States* in that conflict sustained the double character of a belligerent and a sovereign, and had the rights of both. *Miller v. U. S.*, 11 Wall. (U. S.) 268; *Prize Cases*, 2 Black (U. S.) 673; *The Amy Warwick*, 2 Sprague (U. S.) 123; *Rose v. Himely*, 4 Cranch (U. S.) 272; *The Santissima Trinidad*, 7 Wheat (U. S.) 306; *U. S. v. Palmer*, 3 Wheat. (U. S.) 635; *Cheriot v. Fous-sat*, 3 Binn. (Pa.) 225; *Dobree v. Napier*, 3 Scott 225.

It is for the political department of the government to determine what rights shall be accorded the belligerents in case of civil war, and to what extent the acts of the rebellious government shall be recognized. *Latham v. Clark*, 25 Ark. 574.

The concession of belligerent rights to the Confederate States during the late civil war, sanctioned no hostile legislation against citizens of the loyal states, *Williams v. Bruffy*, 96 U. S. 176; *Stevens v. Griffith*, 111 U. S. 48; and established no rights except during the war. *Shortridge v. Macon*, Chase's Dec. (U. S.) 136.

In *Ford v. Surget*, 97 U. S. 605; *affirming Ford v. Surget*, 46 Miss. 130, it is said that "To the Confederate Army was, however, conceded, in the interests of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged, under the laws of nations, to the armies of independent governments engaged in war against each other—that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, 'on the footing of those engaged in the lawful war,' and exempting 'them from liability for acts

of legitimate warfare." And see, as supporting the doctrine of the text, *Coleman v. U. S.*, 97 U. S. 509; *Cummings v. Diggs*, 1 Heisk. (Tenn.) 67; *Smith v. Brazelton*, 1 Heisk. (Tenn.) 44; 2 Am. Rep. 678; *Gunter v. Patton*, 2 Heisk. (Tenn.) 257; *Wright v. Winingham*, 2 Heisk. (Tenn.) 254; 5 Am. Rep. 35; *Jones v. Williams*, 41 Tex. 390; *Broadway v. Rhem*, 71 N. Car. 195; *Bell v. Louisville, etc., R. Co.*, 1 Bush (Ky.) 404; 89 Am. Dec. 632. And see *Hawkins v. Filkins*, 24 Ark. 286; *Bland v. Adams Express Co.*, 1 Duv. (Ky.) 232; 85 Am. Dec. 623; *Christian County Ct. v. Rankin*, 2 Duv. (Ky.) 502; 87 Am. Dec. 505; *Prize Cases*, 2 Black (U. S.) 635.

Certain early *West Virginia* cases, viz. *Hedges v. Price*, 2 W. Va. 192; 94 Am. Dec. 507, and note; *Williams v. Freeland*, 2 W. Va. 306; *Echols v. Staunton*, 3 W. Va. 574; *Caperton v. Nickel*, 4 W. Va. 173; *Caperton v. Bowyer*, 4 W. Va. 176; *Carskadon v. Johnson*, 4 W. Va. 356; *Caperton v. Ballard*, 4 W. Va. 420, attempted to repudiate this doctrine; but in *Peerce v. Kitzmiller*, 19 W. Va. 554, this court fell into line with the current of authority, and severely criticized the doctrine of the early cases.

1. *Jecker v. Montgomery*, 13 How. (U. S.) 498; *The William Bagaley*, 9 U. S., 5 Wall. (U. S.) 377; *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *Planters' Bank v. St. John*, 1 Woods (U. S.) 588; *U. S. v. Six Boxes of Arms*, 1 Bond (U. S.) 446; *Shotwell v. Ellis*, 42 Miss. 439; *Mims v. Armstrong*, 42 Miss. 429; 97 Am. Dec. 472; *Huff v. Odom*, 49 Ga. 395. And see *Webster v. Mahoney*, 22 La. Ann. 593; *United States Rev. Stats.*, § 5301 *et seq.* See also *INTERNATIONAL LAW*, vol. II, p. 461.

But an insurrection is not in the legal sense war, so as to render all commercial intercourse and contracts between the antagonistic citizens illegal, until it is recognized as such by the established government. *Leathers v. Commercial Ins. Co.*, 2 Bush (Ky.) 296; 92 Am. Dec. 483.

Whether a person becomes an "inhabitant" or "resident" of a country to which he comes, within the meaning of a law prohibiting intercourse between

the inhabitants and residents thereof and those of another country, depends chiefly upon intention. *U. S. v. The Penelope*, 2 Pet. Adm. 438.

The *Tennessee* Act of May 8, 1861, by necessary implication, which gave to the citizens of all slaveholding states the right to collect their debts in *Tennessee* by attorneys, during the war, was applied to citizens of *Maryland*, in *Rice v. O'Keefe*, 6 Heisk. (Tenn.) 638.

Partnership.—All partnerships between citizens of the opposing states are dissolved by war. See **PARTNERSHIP**, vol. 17, p. 1105; *Small v. Lumpkin*, 28 Gratt. (Va.) 832; *Booker v. Kirkpatrick*, 26 Gratt. (Va.) 145; *Planters' Bank v. St. John*, 1 Woods (U. S.) 590; *Cramer v. U. S.*, 7 Ct. of Cl. 302; *Douglas v. U. S.*, 14 Ct. of Cl. 1; *Bank of New Orleans v. Matthews*, 49 N. Y. 12.

Agency.—But war does not revoke an agency established before the war began. See **AGENCY**, vol. 1, p. 448; *Botts v. Crenshaw*, Chase's Dec. (U. S.) 224; *Anderson v. Cape Fear Bank*, Chase's Dec. (U. S.) 535.

Limited agencies in the enemy's country may be continued, provided they can be exercised without intercourse or communication between the citizens or subjects of the contending powers; such as agencies to collect and preserve, but not to transmit money or property. But such agencies must be created before war begins, for it is said there is no power to appoint any agent for any purpose after hostilities have actually commenced. *Small v. Lumpkin*, 28 Gratt. (Va.) 832. And see *U. S. v. Quigley*, 103 U. S. 595; *Hale v. Wall*, 22 Gratt. (Va.) 424; *Bartow County v. Newell*, 64 Ga. 699; *Buford v. Speed*, 11 Bush (Ky.) 338; *McCormick v. Arnspiger*, 38 Tex. 569; *Sands v. New York L. Ins. Co.*, 59 Barb. (N. Y.) 556; *Stoddart v. U. S.*, 6 Ct. of Cl. 340; *Mayer v. U. S.*, 3 Ct. of Cl. 249; *Faulkner v. U. S.*, 5 Ct. of Cl. 612; *Queyrouze v. U. S.*, 7 Ct. of Cl. 402.

But see *U. S. v. Lapene*, 17 Wall. (U. S.) 601. In this case a firm in New Orleans, while that city was still in the possession of the confederate forces, sent an agent into the interior of the state to collect debts due them, the proceeds of which, together with other money sent him, he was to invest in the purchase of cotton and sugar. Shortly after, and before any purchases were made by the agent, the city of New Orleans fell into the hands of the

union forces, thus cutting off all communication with his principal. The agent afterward purchased several lots of cotton which he left at the places where purchased, and which were afterward captured by the federal forces and sold. In an action by the merchants for the net proceeds of the sale, it was held that the agency to purchase was terminated by the hostile position of the parties, and that the purchases made by the agent were illegal and there could be no recovery. This decision is contrary to the well settled rule previously stated, that an agency may be maintained in an enemy's country to collect debts and invest the proceeds, and it is to be observed that Justices Miller and Field dissented. And see *U. S. v. Quigley*, 103 U. S. 595. The court, in rendering its decision, relied on *Montgomery v. U. S.*, 15 Wall. (U. S.) 395, but that case is to be distinguished from the one under discussion. In *Montgomery's* case the property and the owner were both within the confederate lines, and the sale was made by an agent of the owner within the union lines; therefore payment and delivery involved intercourse between enemies. And see *Howell v. Gordon*, 40 Ga. 302. In *Conley v. Burson*, 1 Heisk. (Tenn.) 145, and *Blackwell v. Willard*, 65 N. Car. 555, it was held that a power of attorney is revoked by war.

An agent appointed before the commencement of hostilities cannot be held liable for property forcibly taken from him by a *vis major*. *Wilkinson v. Williams*, 35 Tex. 181.

Guardians.—Nor does war terminate the obligation of a guardian appointed before the beginning of hostilities, nor discharge him from liability to account to the ward, in the courts of the state where he was appointed, after the war has ceased. *Lamar v. Micou*, 112 U. S. 452; *affirmed*, on rehearing, in 114 U. S. 218.

Limitation of Actions.—War usually suspends the running of the Statute of Limitations against a debt. See **LIMITATION OF ACTIONS**, vol. 13, p. 738.

The existence of war excuses making demand so as to prevent the statute from running. *Kahnweiler v. Anderson*, 78 N. Car. 133.

Interest.—And also the running of interest. See **INTEREST**, vol. 11, p. 406; *Jackson Ins. Co. v. Stewart*, 1 Hughes (U. S.) 310. For it would be unjust to allow interest during the time

should such intercourse be permitted, it would tend to strengthen the enemy's facilities for conveying intelligence, and even traitorous correspondence, and the law will not permit the citizen to subject himself to such temptation to swerve from his duty to his country.¹ Trading with an enemy, therefore, without a license, is illegal,² and all contracts entered into with citizens or subjects of

the right of action is suspended. *Selden v. Preston*, 11 Bush (Ky.) 191.

But the suspension of intercourse between the North and South, consequent upon the recent war, did not prevent interest from accruing between citizens adhering to the respective parties thereto. *Shortridge v. Macon*, Chase's Dec. (U. S.) 136.

Insurance Contracts.—Contracts of insurance, entered into prior to the late civil war between parties afterward separated in domicile by the belligerent's lines, were not abrogated but only suspended by the war, and this suspension extended to the stipulation requiring the payment of premiums at dates falling within the period of such separation. *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Gratt. (Va.) 630; *New York L. Ins. Co. v. Hendren*, 24 Gratt. (Va.) 546. See *INSURANCE*, vol. 11, p. 310.

It is unlawful to remit or receive a premium on a policy during the war, as it involves an act of amicable intercourse. *Mutual, etc., L. Ins. Co. v. Hillyard*, 37 N. J. L. 444; 18 Am. Rep. 741. See also *Hillyard v. Mutual, etc., L. Ins. Co.*, 35 N. J. L. 415. But the premium may be paid to an agent in the hostile territory, appointed prior to the breaking out of hostilities. *Sands v. New York L. Ins. Co.*, 59 Barb. (N. Y.) 556. And certainly to the agent of an English company. *Robinson v. International L. Assur. Soc.*, 42 N. Y. 54; 1 Am. Rep. 400; 52 Barb. (N. Y.) 450.

1. *Swayne, J.*, in *Coppell v. Hall*, 7 Wall. (U. S.) 542; and *Strong, J.*, in *Matthews v. McStea*, 91 U. S. 7. In this latter case, *Strong, J.*, said: "The reasons for this rule are obvious. They are, that, in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent; and were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence. Hence, it has become an established doctrine, that war puts an end to all commercial dealing between the

citizens or subjects of the nations or powers at war. . . . Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend upon and follow a state of foreign war. Certainly this is so when civil war is sectional. Equally with foreign war, it renders commercial intercourse unlawful between the contending parties, and it dissolves commercial partnership." See also *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719.

2. See *CONTRACT*, vol. 3, p. 875; *Schooner Rapid*, 1 Gall. (U. S.) 295; 8 Cranch (U. S.) 155; *The Rugen*, 1 Wheat. (U. S.) 62; *Conner v. The Bark Coosa*, Newb. Adm. 393.

From the time war is declared or recognized as existing, all the people in the territory, and subject to the dominion of each belligerent, become, in contemplation of law, the enemies of all the people resident in the territory of the other belligerent; and all negotiation, trading, intercourse, or communication between them, unless licensed by the government, is unlawful. *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

Parties trading with the enemy acquire no rights which can be enforced by the courts. *Marchand v. Coyle*, 18 La. Ann. 632.

But where a loyal person domiciled within an insurrectionary district, crosses the line and becomes a refugee within loyal territory, without change of domicile, an antecedent agency established by him before he left his domicile is not terminated by his crossing the lines, and he may, through such agent, acquire a valid title to personal property within the insurrectionary district. In such case the domicile of all the parties remains the same, and the case is to be distinguished from one where there is trading between enemies, *i. e.*, between persons domiciled on loyal and disloyal territory. *Quigley v. U. S.*, 13 Ct. of Cl. 367.

Trading with an enemy renders the property liable to capture and condemnation. *The Thomas Gibbons*, 8 Cranch (U. S.) 421; *The Joseph*, 8

an enemy are void.¹ War closes the courts of each belligerent to

Cranch (U. S.) 451; 1 Gall. (U. S.) 545; Jecker v. Montgomery, 18 How. (U. S.) 110; The Mary, 1 Gall. (U. S.) 620; The Diana, 2 Gall. (U. S.) 93; The Lord Wellington, 2 Gall. (U. S.) 103; The St. Lawrence, 8 Cranch (U. S.) 434.

The charter of a vessel to be used in trading with an enemy, is null and void, and no action lies to enforce it. *Mansfield v. McLearn*, 22 La. Ann. 216.

Trade Under License.—Enemies may trade with each other under a license from the opposing powers, but only to the extent allowed. *Walker v. U. S.*, 106 U. S. 413; *Mitchell v. Harmony*, 13 How. (U. S.) 115, *affirming* 1 Blatchf. (U. S.) 549. And see INTERNATIONAL LAW, vol. 11, p. 463. If one goes beyond his license, the transaction is illegal and void. *Cones v. U. S.*, 8 Ct. of Cl. 421. Fraud, error, or mistake, will vitiate a license to trade across the lines. *U. S. v. One Hundred Barrels of Cement*, 3 Am. L. Reg. 735.

A contract to carry on trade in conformity with a license is lawful. *Graham v. Merrill*, 5 Coldw. (Tenn.) 622.

Trade with a neutral port is not illegal, notwithstanding the enemy derives benefit thereby, unless it be carried on in connection with, or subservient to, hostile interests and policy. The *Liverpool Packet*, 1 Gall. (U. S.) 512.

Trade with Neutral.—A contract between French subjects residing in *France* and persons residing in the Confederate States, is not a traffic between enemies forbidden by the law of nations, the President's proclamation, or the acts of Congress. *Devot v. Marx*, 19 La. Ann. 491.

1. *Coppell v. Hall*, 7 Wall. (U. S.) 542; *Philips v. Hatch*, 1 Dill. (U. S.) 571; *Brown v. U. S.*, 8 Cranch (U. S.) 110; *Shacklett v. Polk*, 51 Miss. 378; *Small v. Lumpkin*, 28 Gratt. (Va.) 832; *Fisher v. Krutz*, 9 Kan. 501; *Hill v. Baker*, 32 Iowa 302; 7 Am. Rep. 193; *Noblom v. Milborne*, 21 La. Ann. 641; *Noblom v. Swords*, 21 La. Ann. 647; *Hennen v. Gilman*, 20 La. Ann. 241; 96 Am. Dec. 396.

The rule is the same where the contract is between an alien domiciled in a country, and one of its enemies. *Harbricht v. Alexander*, 1 Woods (U. S.) 413; *Queyrrouze v. U. S.*, 7 Ct. of Cl. 402.

The payment of money by a subject

of one of the belligerents in the country of another is condemned, and all contracts and securities looking to that end are illegal and void. *Griswold v. Waddington*, 16 Johns. (N. Y.) 459.

It is not within the powers of a citizen within the *United States'* lines, to give to an enemy within the enemy's lines an evidence of debt which shall be valid on the return of peace. *Hart v. U. S.*, 15 Ct. of Cl. 414. Thus, where the purpose of a contract during the late civil war between the states was to place at the disposal of one resident in hostile territory funds within the *United States'* fixed lines of military occupation, no effect could be given to the contract in the courts of the *United States*. *Craft v. U. S.*, 12 Ct. of Cl. 178.

But a mortgage made in confederate territory to a loyal citizen is not necessarily prohibited. *Carson v. Dunham*, 121 U. S. 421. And the sale of cotton in confederate lines, between two parties in the union lines, is valid. *Briggs v. U. S.*, 143 U. S. 346, *reversing* 25 Ct. of Cl. 126.

The owner of a promissory note, being a resident citizen of *New York*, may lawfully transfer it there to another citizen of *New York*, although the note itself is in the hands of a sequestration receiver of the Confederate States in *Alabama*, where the maker lived, the states being at war with each other. *Morris v. Poillon*, 50 Ala. 403.

Contracts with an enemy made in trade carried on under a license are valid. And so, also, are contracts for subsistence made by prisoners of war in the enemy's country. *Crawford v. The William Penn*, 3 Wash. (U. S.) 484.

A contract was made for the sale of a plantation in *Tennessee*, the grantor being domiciled in *Athens, Alabama*, and the grantee in *Nashville, Tennessee*, each of these places being at the time within the lines of the military forces of the *United States*. A deed, made in pursuance of such contract, was held valid, although when the deed was executed, *Nashville* remained within the military lines of the *United States*, and *Athens, Alabama*, and that portion of *Tennessee* in which the plantation was situated, had been reoccupied by the confederate lines, both grantor and grantee actually residing within the

the citizens of the other, and prevents the payment or collection of debts between citizens of the hostile powers.¹

said lines. *Brown v. Gardner*, 4 Lea (Tenn.) 145.

A contract to export cotton by resisting the blockade is void; but the owner cannot escape liability to a carrier for transportation from one portion of the state to another, on the ground that he was engaged in an unlawful enterprise, where the carrier had no connection with, or interest in, such enterprise, if, indeed, he had any knowledge of the owner's intent. *Whitis v. Polk*, 36 Tex. 602; *House v. Soder*, 36 Tex. 629; *Gerhard v. Neese*, 36 Tex. 635.

An agent leaving the union lines and going into the confederate lines to purchase cotton, which he shipped to his principal on the other side, cannot recover commissions, as the contract was illegal. *Irwin v. Levy*, 24 La. Ann. 302. And a contract to transport cotton from the confederate into the federal lines is void. *Rhodes v. Summerhill*, 4 Heisk. (Tenn.) 204.

Bills and Notes.—All notes and bills made, drawn on, or indorsed by, an alien enemy are void. See *BILLS AND NOTES*, vol. 2, p. 344; *Britton v. Butler*, 9 Blatchf. (U. S.) 456; *Woods v. Wilder*, 43 N. Y. 164; 3 Am. Rep. 684. But see *U. S. v. Barker*, 1 Paine (U. S.) 156.

Contracts in Aid of the Civil War.—All contracts and transactions entered into, the effect of which was to aid the Confederate States in the late civil war, have been declared void, and a recovery upon them denied. *Patton v. Gilmer*, 42 Ala. 548; *Shepherd v. Reese*, 42 Ala. 329; *Haney v. Manning*, 21 La. Ann. 166; *West Tennessee Bank v. Citizens Bank*, 21 La. Ann. 18; *Williams v. Gay*, 21 La. Ann. 110; *Pratt v. Draughon*, 21 La. Ann. 194; *McWilliams v. Bryan*, 21 La. Ann. 211; *Juillard v. Rogay*, 21 La. Ann. 259; *Foster v. Bank of New Orleans*, 21 La. Ann. 338; *Overby v. Overby*, 21 La. Ann. 493; *Tanneret v. Marshall*, 21 La. Ann. 619; *Heidenreich v. Leonard*, 21 La. Ann. 628; *Eastin v. Ducrest*, 21 La. Ann. 656; *Fournet v. Beer*, 21 La. Ann. 658; *Cousin v. Abat*, 21 La. Ann. 705.

1. *Chappelle v. Oleny*, 1 Sawy. (U. S.) 401; *Mumford v. Mumford*, 1 Gall. (U. S.) 366; *The Emulons*, 1 Gall. (U. S.) 563; *Johnson v. Goods*, 2 Paine (U. S.) 639; *Crawford v. The William*

Penn. Pet. (C. C.) 106; *Wilcox v. Henry*, 1 Dall. (U. S.) 69; *Bell v. Chapman*, 10 Johns. (N. Y.) 183; *Jackson v. Decker*, 11 Johns. (N. Y.) 418; *Mayer v. Reed*, 37 Ga. 482; *Stephens v. Brown*, 24 W. Va. 234; *Haymond v. Camden*, 22 W. Va. 180; *Sturm v. Fleming*, 22 W. Va. 404; *Kuvefel v. Williams*, 30 Ind. 1; *Brooke v. Filer*, 35 Ind. 402; *INTERNATIONAL LAW*, vol. 11, p. 464; *PARTIES TO ACTIONS*, vol. 17, p. 484. And see *ALIEN*, vol. 1 p. 465.

A declaration of war puts an end to any action between citizens of the opposing country. *Jackson Ins. Co. v. Stewart*, 1 Hughes (U. S.) 310.

Courts have no jurisdiction over an alien enemy, *Livingston v. Jordan*, Chase's Dec. (U. S.) 454; and a personal judgment against one is void. *Selden v. Preston*, 11 Bush (Ky.) 191; *Rockhold v. Blevins*, 6 Baxt. (Tenn.) 115. A judgment on appeal taken while the parties are on opposite sides of the military lines is void. *Stephens v. Brown*, 24 W. Va. 234.

But where an alien obtains judgment, on which a writ of error is brought, and war occurs pending such writ, judgment will nevertheless be affirmed. *Owens v. Hanney*, 9 Cranch (U. S.) 180.

The existence of war does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property, in their own courts, against citizens of the other, whenever the latter can be reached by process, *Lee v. Rogers*, 2 Sawy. (U. S.) 549; *De Jarnette v. De Giverville*, 56 Mo. 440; which may be by order of publication, *Seymour v. Bailey*, 66 Ill. 288; although being within the hostile lines, he is unable to receive the notice of publication. *Dorsey v. Thompson*, 37 Md. 25. And see *Mixer v. Sibley*, 53 Ill. 61.

The defendant cannot set up in his own defense that he is an alien enemy to the government in whose courts he is sued. *Dorsey v. Kyle*, 30 Md. 512; 96 Am. Dec. 61.

The civil war did not have the effect of suspending, in favor of a non-resident enemy and to the prejudice of a resident and friendly creditor, the laws of *Maryland* passed for the purpose of enabling the courts of the state to sell, for payment of debts, the property of non-residents situated in the state, held

Commercial intercourse is usually suspended from the time war is declared or formally recognized as existing.¹

But war does not deprive an individual in an enemy's country of his right or demand entirely, but only suspends it during the continuance of hostilities, and until the courts of justice are open to him so that he may enforce it.²

under and subject to its laws and within the jurisdiction of its courts. *Dorsey v. Dorsey*, 30 Md. 522; 96 Am. Dec. 633.

The question whether a plaintiff shall be excluded from the courts as an alien enemy, depends not so much upon whether he has a legal citizenship in the enemy's country at the beginning of hostilities, which he may resume when they cease, but on the question, where is his actual residence during the war, and whether, if he be allowed to recover his dues, the probable effect will be to place the amount within reach of the enemy. *Zacharie v. Godfrey*, 50 Ill. 186; 99 Am. Dec. 506.

A citizen of *Tennessee* was entitled to sue in the courts of *Georgia*, notwithstanding *Georgia* claimed to withdraw from the Union and was engaged in hostilities with the national government, and *Tennessee* had not done so when the action was commenced. *Edmonson v. Union Bank*, 33 Ga. 91.

Enforcement of Mortgages, Liens, etc.—But though no personal judgment can be rendered against an alien enemy, his property may be proceeded against, and a judicial sale of property during the absence of the owner, who had left the state and was engaged in the service of its enemies, on the opposite side of the military lines, was held valid. *Jenkins v. Hannan*, 26 Fed. Rep. 657.

The sale of land for unpaid purchase-money has also been held valid. *Johns v. Slack*, 2 Hughes (U. S.) 467. And, likewise, a sale by trustees while the grantor in the deed was in the enemy's lines. *Mitchell v. Nodaway*, 80 Mo. 257; *Martin v. Paxson*, 66 Mo. 260; *Bush v. Sherman*, 80 Ill. 160. See also *Washington University v. Finch*, 18 Wall. (U. S.) 106.

The decisions on these points are not unanimous, however, and in *Grinnan v. Edwards*, 21 W. Va. 347, it was held that a decree enforcing a vendor's lien, where the parties were on opposite sides of the hostile lines, was void.

In *Walker v. Beauchler*, 27 Gratt. (Va.) 511, it was held that a sale by the trustee while the grantor in the

deed was in the enemy's lines, was void, since he could not legally pay, or the grantee in the deed receive, the debt. And see, to the same effect, *Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 Blatchf. (U. S.) 391.

The foreclosure of a mortgage while the mortgagee is within the enemy's lines is void. *Dean v. Nelson*, 10 Wall. (U. S.) 158; *Lasere v. Rochereau*, 17 Wall. (U. S.) 437.

1. As soon as war is commenced, business intercourse must cease between the citizens of the respective parties engaged in it. *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72. See also *Jackson Ins. Co. v. Stewart*, 1 Hughes (U. S.) 310; *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

2. *Wall v. Robson*, 2 Nott & M. (S. Car.) 498; 10 Am. Dec. 623; *Louisville, etc., R. Co. v. Buckner*, 8 Bush (Ky.) 277; 8 Am. Rep. 462; *Selden v. Preston*, 11 Bush (Ky.) 191; *Semmes v. City F. Ins. Co.*, 36 Conn. 543; *Spencer v. Brower*, 32 Tex. 663; 5 Am. Rep. 254; *Caldwell v. Harding*, 1 Low. (U. S.) 326. And see *INTERNATIONAL LAW*, vol. II, p. 462, n.

War *ipso facto* dissolves all contracts wholly executionary, requiring for their continued existence commercial intercourse or communication; and while it does not abrogate, yet it suspends all other existing contracts and obligations, and the remedies thereon. *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

A law of a state during war sequestering debts due the enemy, does not vest the same in the state. It only prevents the creditor recovering while the war continues, and the right revives on peace being made. *Georgia v. Brailsford*, 3 Dall. (U. S.) 1; 2 Dall. (U. S.) 402. And see *Ware v. Hylton*, 3 Dall. (U. S.) 199; *Dunlop v. Ball*, 2 Cranch (U. S.) 180; *Higginson v. Mein*, 4 Cranch (U. S.) 415; *Hopkirk v. Bell*, 3 Cranch (U. S.) 454; *Conn v. Penn. Pet. (C. C.)* 496; *Hoare v. Allen*, 2 Dall. (U. S.) 102; *Foxcraft v. Nagle*, 2 Dall. (U. S.) 132; 3 Wash. (U. S.) 403; *King v. Hanson*, 4 Call. (Va.) 259; *Brewer v. Hastie*, 3 Call.

b. NON-INTERCOURSE ACTS.—Upon the breaking out of hostilities, statutes are often passed forbidding all commercial intercourse with the enemy, and making all property used in such intercourse liable to forfeiture.¹

During the late civil war, all commercial intercourse was forbidden by act of Congress, with the states declared by the President to be in a state of insurrection,² except so far as licensed by the

(Va.) 22; *Beattie v. Tabb*, 2 Munf. (Va.) 254; *Com. v. Walker*, 1 Hen. & M. (Va.) 144.

1. During hostilities between the *United States* and *France*, an act for the suspension of all intercourse between the two nations was annually passed. Such acts were passed by Congress in 1798, 1799, and 1800. *Little v. Barreme*, 2 Cranch (U. S.) 170; *Murray v. Schooner Charming Betsey*, 2 Cranch (U. S.) 64; *Sands v. Knox*, 3 Cranch (U. S.) 499.

And in 1809, Congress passed an act prohibiting the importation into the *United States* of any goods, etc., from any place situated in *France* or *Great Britain*, or in any of the colonies or dependencies of either. *Clark v. U. S.*, 1 Wash. (U. S.) 101; *The New York*, 3 Wheat. (U. S.) 59; *The Ann Maria*, 1 Paine (U. S.) 256; *U. S. v. 1960 Bags of Coffee*, 8 Cranch (U. S.) 398; *U. S. v. The Mars*, 8 Cranch (U. S.) 417. And see 10 Hogsheads of Rum, 1 Gall. (U. S.) 187; *The Rose*, 1 Gall. (U. S.) 211.

But under this act a vessel from *Great Britain* had a right to lay off the coast of the *United States* to receive instructions from her owners in *New York*, and if necessary to drop anchor, and in case of a storm to make a harbor, and if prevented by a mutiny of her crew from putting to sea again, might wait in the waters of the *United States* for orders. *U. S. v. The Fanny*, 9 Cranch (U. S.) 181.

To constitute importation, within the inhibition of this act, there must have been a voluntary arrival within some port with intent to unload the cargo, but an arrival is *prima facie* evidence of importation. *The Mary*, 1 Gall. (U. S.) 206; *The Boston*, 1 Gall. (U. S.) 239. And see *U. S. v. The Nancy and Caroline*, 3 Wash. (U. S.) 281.

The Non-Intercourse Act of April 18, 1818, prohibited the coming of British vessels to ports of the *United States* from a British port closed against the commerce of the *United States*, either

directly or through an open British port, but did not prohibit the coming of such vessels through a foreign port (not British), where the continuity of the voyage was fairly broken. *The Pitt*, 8 Wheat. (U. S.) 371. And if a British ship coming from a foreign port (not British) touched at an intermediate closed British port through necessity, and in order to procure provisions without trading there, the continuity of the voyage was not broken, and she was not liable to forfeiture. *The Frances and Eliza v. Coates*, 8 Wheat. (U. S.) 398.

This act required vessels bound for permitted ports to give bond not to go to prohibited ports, *The Edward*, 1 Wheat. (U. S.) 261; which provision applied to vessels and ballast as well as a vessel with a cargo on board. *The Richmond v. U. S.*, 9 Cranch (U. S.) 102.

Again in 1820 and 1823, acts were passed prohibiting commercial intercourse with the British colonial possessions. *U. S. v. An Open Boat*, 5 Mason (U. S.) 120; *U. S. v. An Open Boat*, 5 Mason (U. S.) 232.

At the time of the revolution in *San Domingo*, *France* prohibited intercourse with the revolted blacks, but the prohibition was an exercise of a municipal, not of a belligerent right, and seizures under that prohibition were only authorized within two leagues of the coast of that island. *Rose v. Himely*, 4 Cranch (U. S.) 241.

See, as to the construction of such statutes, *Sawyer v. Steele*, 3 Wash. (U. S.) 464; *U. S. v. The Penelope*, 2 Pet. Adm. 438; *The Adventure*, 1 Brock. (U. S.) 235; *The Patriot*, 1 Brock. (U. S.) 407; *Graves v. Tilford*, 2 Duv. (Ky.) 108; 87 Am. Dec. 483.

2. U. S. Act, July 13, 1861. The proclamation of President Lincoln, declaring the blockade of the southern states and recognizing the existence of war, did not have the effect of suspending commercial intercourse, which was not prohibited until his proclamation of

August 16, 1861, declaring such intercourse unlawful. *Mathews v. McStea*, 91 U. S. 7; *Speed v. Smith*, 2 Am. L. T. 149.

From the date of that proclamation all commercial intercourse between the sections was unlawful. See *Hamilton v. Dillin*, 21 Wall. (U. S.) 73; *U. S. v. The William Arthur*, 3 Ware (U. S.) 276; *The Reform*, 3 Wall. (U. S.) 617; *Folsom v. U. S.*, 4 Ct. of Cl. 366; *U. S. v. 129 Packages*, 2 Am. L. Reg. N. S. 419; *The Ouachita Cotton*, 6 Wall. (U. S.) 521. But not transactions prior to that date. *McCormick v. Arnsperger*, 38 Tex. 569.

The U. S. Act of July 13, 1861, prohibiting such intercourse with districts proclaimed by the President to be in a state of insurrection, "so long as such condition of hostility shall continue," is not a temporary act which expired with the cessation of hostilities, but a general law without any limitation as to duration. *The Reform*, 3 Wall. (U. S.) 617. And forfeitures incurred thereunder during the continuance of hostilities, may be enforced afterward. *U. S. v. Stevenson*, 3 Ben. (U. S.) 119. It does not revoke or supersede any of the war powers possessed by the government under the law of nations. *The Sarah Starr*, Blatchf. P. C. (U. S.) 650. Nor does it have any bearing on the question of condemning, as a prize, any vessels captured at sea prior to its passage. *The Hiawatha*, Blatchf. P. C. (U. S.) 1.

Gold coin is included in the words "goods and chattels, wares and merchandise," as used in this act, and is forfeited by an attempt to carry it into an insurgent state. *U. S. v. A Canoe, etc.*, 5 Hughes (U. S.) 490; *U. S. v. Four Thousand American Gold Coin*, 1 Woolw. (U. S.) 217. And it is also within the act of 1862, prohibiting the transportation of "goods, wares, or merchandise" intended for any place in the possession, or under the control of the insurgents. *Gay's Gold*, 13 Wall. (U. S.) 358, affirming *U. S. v. Gay's Gold*, 1 Woods (U. S.) 55.

The share in a vessel owned by a citizen of one of the Confederate States, is forfeitable under the Act of July 13, 1861, § 6. *Schooner Ned*, Blatchf. P. C. (U. S.) 119. This act did not apply to intercourse between the states in the Confederacy; and commercial intercourse and contracts between citizens of the Confederate States were perfectly legal. *Bond v. Owen*, 7 Baxt. (Tenn.)

340. And see *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594; *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719; *Furman v. U. S.*, 5 Ct. of Cl. 579. And a citizen of a loyal state, involuntarily detained within the confederate lines, may, with his own earnings, buy and sell property so long as he gives neither aid nor comfort to the insurgents, and so long as he brings nothing within and carries nothing without the confederate lines. *Ealer v. U. S.*, 5 Ct. of Cl. 708; *Spain v. U. S.*, 5 Ct. of Cl. 598.

Nor does the act apply to non-resident aliens. Commercial intercourse between a neutral and a belligerent is not only lawful but is protected by the courts, so long as it is impartial and not intended to violate any blockade or siege, or to deal in goods contraband of war. *La Plante v. U. S.*, 6 Ct. of Cl. 311; *Hill v. U. S.*, 8 Ct. of Cl. 470. And a vessel purchased in good faith by an alien, while on a visit to her friends in the Confederate States, is not liable to confiscation under the act. *The D. F. Keeling*, Blatchf. P. C. (U. S.) 92. Neither does the proclamation of August 16, 1861, forbid a person, residing in a district or country alternately raided by both belligerents and occasionally occupied by one or the other, from acquiring a valid title to property within the confederate lines. *Cartwright v. U. S.*, 8 Ct. of Cl. 465.

The act only authorized the appropriation of goods by the general government, and the owner of live stock sent through the lines from *Missouri* into *Texas* may recover from a private citizen for its conversion. *Charles v. McCune*, 57 Mo. 166.

The act cannot be construed as allowing intercourse to be resumed by individuals at will, as fast and as far as the union armies succeeded in occupying insurrectionary territory. *Hamilton v. Dillon*, 21 Wall. (U. S.) 73. And see *Cutner v. U. S.*, 6 Ct. of Cl. 415.

But intercourse between southern territory occupied by the union armies, and other sections of the Confederacy, is illegal. *The Ouachita Cotton*, 6 Wall. (U. S.) 521; *U. S. v. Lapene*, 17 Wall. (U. S.) 601; *Ensley v. U. S.*, 6 Ct. of Cl. 282. And see *Craft v. U. S.*, 12 Ct. of Cl. 178.

No question of blockade or mutual rights can arise under this act. *U. S. v. The William Arthur*, 3 Ware (U. S.) 276. It is a revenue statute and should be liberally construed. *U. S. v. 129 Packages*, 2 Am. L. Reg. N. S. 419.

President,¹ and the Secretary of the Treasury was authorized to make rules and regulations for the enforcement of the act.² This authority conferred upon the President to declare certain states in a state of insurrection, impliedly authorized him to declare the insurrection at an end.³

The court will not take judicial notice of the fact that a portion of a state is within the exceptions of the President's proclamation of non-intercourse. *Chappelle v. Olney, i Sawy.* (U. S.) 401.

1. See INTERNATIONAL LAW, vol. 11, p. 463. Under the act of July 13, 1861, providing that such intercourse, so far as licensed by the President, should be "conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury," it was held that the President alone had power to license intercourse, and not the Secretary of the Treasury, whose only function was to establish the rules by which it should be regulated when thus permitted. *The Sea Lion*, 5 Wall. (U. S.) 630; *The Reform*, 3 Wall. (U. S.) 617.

The license must have been given by the President. Licenses given by the military authorities were nullities. *The Ouachita Cotton*, 6 Wall. (U. S.) 521; *Coppell v. Hall*, 7 Wall. (U. S.) 542; *McKee v. U. S.*, 8 Wall. (U. S.) 163.

The President, by the proclamation of March 31, 1863, sanctioned and licensed a partial restoration of intercourse, subject to restrictions and regulations prescribed by the Secretary of the Treasury. *U. S. v. Steamboat Homoyer*, 2 Bond (U. S.) 217. Treasury agents could license trading in districts occupied by the federal forces, and a license granted by a treasury agent to trade in a district previously occupied by the Confederacy, raises a presumption that it was occupied by the union forces at the time the permit was issued. It is to be presumed, until the contrary is established, that a treasury agent in granting a permit, acted rightly. *Butler v. Maples*, 9 Wall. (U. S.) 766; *U. S. v. Weed*, 5 Wall. (U. S.) 62.

Licenses under this act were controlled by the act of July 17, 1862, and were restricted to permission to trade with persons not within the prohibition of that act. *McKee v. U. S.*, 8 Wall. (U. S.) 163.

The power of the President to license intercourse was taken away by the act of July 2, 1864 (13 Stat. at L. 377, § 9), except in certain limited cases. *Walker v. U. S.*, 12 Ct. of Cl. 408.

Under that act, no officer of the *United States*, civil or military, had authority to grant permission to any person to take goods beyond the lines of the military occupation of the *United States*, for trade, or exchange for the products of the insurgent states. *Snell v. Dwight*, 120 Mass. 9.

That act empowered the Secretary of the Treasury, with the assent of the President, to authorize agents to purchase the products of the Confederate States for the *United States*, but did not confer power to license trading within the military lines of the enemy. *U. S. v. Lane*, 8 Wall. (U. S.) 185; *Maddox v. U. S.*, 15 Wall. (U. S.) 58.

2. He could enforce such regulations by penalties. *U. S. v. The Francis Hatch*, 4 Am. L. Reg. N. S. 289. And see *The Ouachita Cotton*, 6 Wall. (U. S.) 521; *Hughes v. Oaks*, 59 Pa. St. 32.

The contracts made in behalf of the *United States* for the purchase of the products of the southern states, had to conform to such regulations. *U. S. v. Lane*, 8 Wall. (U. S.) 185.

Acts authorizing the imposition of conditions upon such intercourse, such as the payment of fees, are not unconstitutional. *Hamilton v. Dillin*, 21 Wall. (U. S.) 73; *Folsom v. U. S.*, 4 Ct. of Cl. 366; *Schooner Ned, Blatchf. P. C.* (U. S.) 119.

And there can be no intercourse except upon the terms and conditions imposed by the statute. *Block v. U. S.*, 8 Ct. of Cl. 461.

Bond for Clearance.—By U. S. Act of May 20, 1862, the Secretary of the Treasury was authorized to require reasonable security that goods should not be transported in vessels to any place under insurrectionary control, nor in any way to be used in giving aid or comfort to the enemy, and to establish such general regulations as he deemed necessary and proper to carry into effect the purposes of the act. And under this act it was held that a bond taken in double the value of the goods shipped, was a reasonable security. *U. S. v. Mora*, 97 U. S. 413.

3. *Chappelle v. Olney, i Sawy.* (U. S.) 401; *Semms v. Hartford City F. Ins. Co.*, 6 Blatchf. (U. S.) 445.

2. Effect on Property—*a.* GENERALLY.—All the property within the enemy's territory is enemy's property and subject to capture and confiscation. A neutral owning property within the enemy's lines, holds it as enemy's property, subject to the laws of war; and if it is hostile property, subject to capture.¹ But a citizen residing temporarily in an enemy's country, at the breaking out of war, is entitled to a reasonable time within which to collect his effects, convert them into manageable funds, and withdraw with them from the country.²

The same rules, relative to the capture and confiscation of property, apply to civil wars as to wars between nations.³ During the late civil war in the *United States*, there may be said to have been four classes of property: *First*, that belonging to the hostile government or employed in actual hostilities; *second*, that which at sea became the lawful subject of capture; *third*, that which became the subject of confiscation; and, *fourth*, a peculiar description known only to the recent war, called captured and abandoned property.⁴

The proclamation of President Lincoln of June 13, 1865, annulling all restrictions previously imposed upon internal, domestic, and coastwise intercourse and trade, in the territory of the *United States* east of the Mississippi river, in the states theretofore declared in insurrection, took effect from the beginning of that day. *U. S. v. Norton*, 97 U. S. 164; *Lapeyre v. U. S.*, 17 Wall. (U. S.) 191.

The President's order of April 29, 1865, removed, from that date, all restrictions upon commercial intercourse between *Tennessee* and New Orleans. *Bond v. Moore*, 93 U. S. 593.

The war continued in *Texas* until declared at an end by the President's proclamation of August 20, 1866. *Philips v. Hatch*, 1 Dill. (U. S.) 571.

1. *Young v. U. S.*, 97 U. S. 39; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603.

But title by capture can be only set up by the organized and recognized parties to the war, or those claiming under them. *Huff v. Odom*, 49 Ga. 395.

Military forces in the occupation of friendly territory may, upon pressure of military necessity, take for public use, or destroy, private property without first making compensation. *Taylor v. Nashville, etc., R. Co.*, 6 Coldw. (Tenn.) 646; 98 Am. Dec. 474. And see *Wellman v. Wickerman*, 44 Mo. 484.

2. The *John Gilpin*, Blatchf. P. C. (U. S.) 661, *reversing* Blatchf. P. C. (U. S.) 291; The *Sarah Starr*, Blatchf. P. C. (U. S.) 650, *reversing* Blatchf. P. C. (U. S.) 69; *Fifty-Two Bales of*

Cotton, Blatchf. P. C. (U. S.) 644, *reversing* Blatchf. P. C. (U. S.) 309.

But the property must be withdrawn within a reasonable time, and eleven months after the declaration of war is too late. *The St. Lawrence*, 9 Cranch (U. S.) 120.

A home vessel, withdrawing herself from an enemy's country after the declaration of war, has no right to carry a cargo consisting of enemy property, for the benefit of enemy owners. *The Hannah M. Johnson*, Blatchf. P. C. (U. S.) 160.

3. See INTERNATIONAL LAW, vol. II, pp. 458, 460.

4. The first of these descriptions of property, as property of other like kind in ordinary international wars, became, wherever taken, *ipso facto*, the property of the *United States*. The second comprehended ships and vessels, with their cargoes, belonging to the insurgents or employed in aid of them; the property in these was not changed by capture alone, but by regular judicial proceedings and sentence. *U. S. v. Klein*, 13 Wall. (U. S.) 128.

The rightful capture of movable property on land, transfers the title to the government of a captor as soon as the capture is complete, which is as soon as the property is reduced to firm possession. There is no necessity for judicial condemnation, and in this respect captures on land differ from those at sea. *Young v. U. S.*, 97 U. S. 39; *Lamar v. Browne*, 92 U. S. 187.

Personal chattels of a non-combatant

While acts of the federal Congress, providing for the confiscation of property in belligerent states, were held constitutional and justifiable,¹ similar acts passed by the confederate Congress, providing for the confiscation of the property of union citizens within confederate territory, were held illegal and void, and the payment of a claim due a union citizen to an agent of the Confederacy, in accordance with a judgment of confiscation, was held no bar to a subsequent recovery of the claim.²

b. CONFISCATION OF PROPERTY.—There were two acts passed by Congress, during the late civil war, providing for the confiscation of the property of insurgents. The first, passed August 6, 1861, was directed against property actually used for insurrectionary purposes, with the knowledge and consent of the owner;³

citizen captured in battle by union soldiers during the civil war, and sold by the soldiers of the capturing party to a citizen, and demanded of him by the owner within twenty-four hours after capture, are subject to the *ius postlimini*. *Elrod v. Alexander*, 4 Heisk. (Tenn.) 342. And see *Chesney v. Rodgers*, 1 Heisk. (Tenn.) 239.

The confiscation acts, therefore, applied to private property alone, and proceedings had to confiscate property of the confederate government were superfluous, and the informer therein entitled to no share in the proceeds. *Titus v. U. S.*, 20 Wall. (U. S.) 475; *U. S. v. A Tract of Land*, 1 Woods (U. S.) 475. And see *U. S. v. Huckabee*, 16 Wall. (U. S.) 414.

Title by capture cannot be set up by unorganized marauding parties who follow an army for the purpose of plunder. *Worthy v. Kinamon*, 44 Ga. 297. And see, generally, as to the effect of war on property, *INTERNATIONAL LAW*, vol. II, p. 457; *MILITARY LAW*, vol. 15, p. 417.

1. These acts were held a legitimate exercise of the war power, and constitutional. *Miller v. U. S.*, 11 Wall. (U. S.) 294; *Schooner Ned, Blatchf. P. C.* (U. S.) 119; *Simple v. U. S.*, Chase's Dec. (U. S.) 259. And see *infra*, this title, *Confiscation of Property*.

2. It was held that the confederate government was nothing more than a military representative of an insurrection against the *United States*, and that legal rights could be neither created nor defeated by its action; that whatever efficacy the act possessed, arose from the efficacy given it by the individual states belonging to the Confederacy; that if enforced as a law, it would be

considered as a statute, not of the Confederacy, but of the state in which it was enforced; and that so considered, it was unconstitutional as not only impairing, but attempting to destroy, the obligations of contracts, and as discriminating against citizens of loyal states, and refusing them the privileges accorded its own citizens. *Williams v. Bruffy*, 96 U. S. 176; *Shortridge v. Macon*, Chase's Dec. (U. S.) 136; *Stevens v. Griffith*, 111 U. S. 48. Field, J., delivering the opinion of the court in this last case, said: "The belligerent rights conceded to it [the Confederacy] in the interests of humanity, to prevent the cruelties which would have followed mutual reprisals and retaliations, were, from their nature, such only as existed during the war. Their concession led to arrangements between the contending parties to mitigate the calamities of the contest. It placed those engaged in actual hostilities on the footing of persons in legitimate warfare, but it gave no sanction to hostile legislation, and in no respect impaired the rights of loyal citizens of a loyal state." And see, to the same effect, *McIntyre v. Thompson*, 4 Hughes (U. S.) 562; *Dewing v. Perdicaris*, 96 U. S. 193, *affirming* *Perdicaris v. Charleston Gaslight Co.*, Chase's Dec. (U. S.) 435; 1 Hughes (U. S.) 69; *Keppel v. Petersburg R. Co.*, Chase's Dec. (U. S.) 167; *McCormick v. Arnspiger*, 38 Tex. 569.

3. 12 U. S. Stat. at L. 319.

To justify a judicial sentence of condemnation under this act, the hostile use of the property must be proven. *Kirk v. Lynd*, 106 U. S. 315; *Chapman v. Phoenix Nat. Bank*, 85 N. Y. 448.

The act extends to all descriptions of property on land and water. Union

the second, passed July 17, 1862, was directed against the estates and property of those who did not cease to aid, countenance, and abet the Confederacy.¹ Tribunals and proceedings were provided in both instances by which alone the property could be condemned, and without which it remained unaffected in the possession of the owner.² The acts proceeded upon different

Ins. Co. v. U. S., 6 Wall. (U. S.) 759. And the employment of the phrase "prize and capture," in declaring the property to be a "lawful subject of prize and capture," does not limit its operation to property taken at sea. *U. S. v. Athens Armory*, 2 Abb. (U. S.) 129. It was directed to the confiscation of specific property used with the consent of the owner to aid the insurrection, and has no reference to the guilt of the owner and can apply only to visible tangible property which has been so used. *Phoenix Bank v. Risley*, 111 U. S. 125.

An owner of real property who leased it to a firm publicly engaged in the manufacture of arms for the Confederacy, the lease stating in terms that the lessees intended to establish "engines, machinery," etc., in the property leased, was presumed to have made the lease knowing the purpose for which it was to be used and consenting to it, and his interest in the property was held to be rightfully confiscated. But the presumption was otherwise in regard to a party taking a mortgage from the owner before the lessees took possession, where there was no proof of consent by the mortgagee to the use made of the premises, beyond the fact of his having taken the mortgage, and his interest was not confiscable. *Union Ins. Co. v. U. S.*, 6 Wall. (U. S.) 759.

Where a vessel and cargo sailed from a northern port in August, 1861, for Wilmington, N. C., an intent to aid the Confederacy would be implied, and the vessel and cargo might be decreed forfeited under this act. *U. S. v. The William Arthur*, 3 Ware (U. S.) 276.

1. 12 Stat. at L. 589. Under this act, after sixty days from the date of President Lincoln's proclamation of July 25, 1862, all the estates and property of those who did not cease to aid, countenance, and abet the Confederacy, became liable to seizure and confiscation. *Wallach v. Van Riswick*, 92 U. S. 207.

The purpose, as well as the justification, of this act was to strengthen the government, and to enfeeble the public

enemy by taking from its adherents the power to use their property in aid of the hostile cause, and it is therefore constitutional. *Miller v. U. S.*, 11 Wall. (U. S.) 268. But see the dissenting opinion of Justice Field, Clifford, J., concurring, in which he maintains that the act was not passed in the exercise of the war-making power, but of municipal legislation; that the joint resolution of Congress, passed contemporaneously with the act, construes it as penal, not as a war-making measure; that it is not directed against enemies but against persons who have committed treason, and that the property of persons charged with treason cannot be confiscated by a proceeding *in rem* before they are convicted.

The act applied only to the property of persons who thereafter might be guilty of acts of disloyalty. *Conrad v. Waples*, 96 U. S. 279.

Property of Corporations. — But neither act contemplated nor authorized the confiscation of the property of a corporation. *Risley v. Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421; *Ellis v. Phenix Nat. Bank*, 12 Daly (N. Y.) 177.

2. *U. S. v. Klein*, 13 Wall. (U. S.) 128; *Bigelow v. Forest*, 9 Wall. (U. S.) 339. And see *Clark v. Mitchell*, 64 Mo. 564.

Confiscation must be decreed by a *United States* court, and title through that source must be proved by the record. *Snow v. Grace*, 29 Ark. 131.

The statute required the proceedings to be conducted according to proceedings in admiralty as near as may be. *Phoenix Bank v. Risley*, 111 U. S. 131.

They were proceedings *in rem* and were not governed by the rules prevailing in respect to indictments or criminal informations. *U. S. v. Clarke* (The Confiscation Cases), 20 Wall. (U. S.) 92.

Confiscation proceedings under the act of August 6, 1861, and also under the Non-Intercourse Act of July 13, 1861, may be taken by prize courts as respects property captured at sea, *The Sarah Starr*, Blatchf. P. C. (U. S.) 69; and a vessel may be condemned both

principles. The object of the first was to authorize the capture of property used in aid of insurrection; the object of the second, to confiscate the property of traitors. Under the first act, the fee of property could be condemned and sold;¹ but the second was qualified by a joint resolution passed contemporaneously therewith, providing that no proceedings thereunder should work a forfeiture of the real estate of an offender beyond his natural life,² so that upon his death, the estate passed to his heirs as if there had been no forfeiture.³ But this provision did not leave the

as a prize and under these acts at the same time. The Schooner *Falcon*, Blatchf. P. C. (U. S.) 52. But the admiralty jurisdiction of the *United States* district courts does not extend to seizures made on land under these acts. *U. S. v. Winchester*, 99 U. S. 372.

The federal courts, in proceedings to condemn real estate or property on land, however, may shape the proceedings in general conformity to the practice in admiralty; but issues of fact must, on the demand of either party, be tried by a jury. Such cases differ from seizures made on navigable waters, where the course of admiralty must be strictly observed. *Union Ins. Co. v. U. S.*, 6 Wall. (U. S.) 759. See also *Pasteur v. Lewis*, 39 La. Ann. 5; *U. S. v. Athens Armory*, 2 Abb. (U. S.) 129.

Such proceedings are not proceedings in admiralty, though *in rem* and conforming to admiralty procedure, and hence a writ of prohibition to the district court will not lie in such cases. *Ex p. Graham*, 10 Wall. (U. S.) 541.

Proceedings under these acts must conform to the course of the common law in respect to the trial of issues of fact and exceptions to evidence, and can only be reviewed after final judgment or decree on writ of error, that writ being the process by which common-law proceedings are reviewed. *Simple v. U. S.*, Chase's Dec. (U. S.) 259; *Morris' Cotton*, 8 Wall. (U. S.) 507; *Armstrong's Foundry*, 6 Wall. (U. S.) 766; *Brown v. U. S.*, McCahon (Kan.) 229; 1 Woolw. (U. S.) 198.

U. S. Act March 3, 1863, giving the district court for the territory of *New Mexico* jurisdiction over all cases which should arise in the collection district of Paso del Norte, in the administration of revenue laws, does not warrant proceedings against lands in El Paso, *Texas*, under the act of July 17, 1862. *U. S. v. Hart*, 6 Wall. (U. S.) 770.

1. The condemnation was decreed in

this case, not because the owner had subjected himself to punishment, but because the property had been devoted to the insurrection and must suffer the consequences. The property was the offending thing. The condemnation was decreed because its owner had voluntarily allowed it to become involved in the offense. *Kirk v. Lynd*, 106 U. S. 316; *Kirk v. Lewis*, 4 Woods (U. S.) 100; 9 Fed. Rep. 645.

2. 12 U. S. Stat. at L. 627.

It was doubted whether, under *United States* Const., art. 3, § 3, providing that "no attainer of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," Congress had a right to enact that any forfeiture of land should extend beyond the life of the offender, and it was to meet this doubt that the resolution was adopted. *Wallach v. Van Riswick*, 92 U. S. 202.

All that could be sold by virtue of a decree of confiscation was a right to the property seized, terminating with the life of the person for whose act it had been seized. *Bigelow v. Forrest*, 9 Wall. (U. S.) 339; *Slidell v. Huppenbauer*, 27 La. Ann. 383; *Avegno v. Schmidt*, 35 La. Ann. 585. And a decree condemning the fee could have no greater effect than to subject the life estate to sale. *Day v. Micou*, 18 Wall. (U. S.) 156. And see *Burbank v. Conrad*, 96 U. S. 291; *Waples v. Hays*, 108 U. S. 6.

Where the marshal's deed assumed to convey the fee, it was held that the purchaser, evicted after the death of the offender whose estate had been confiscated, could not hold the government liable on the deed for the purchase-money. *Waples v. U. S.*, 16 Ct. of Cl. 126.

3. This provision was intended for the benefit of the heirs exclusively. *Wallach v. Van Riswick*, 92 U. S. 207; *Pike v. Wassell*, 94 U. S. 711.

The effect of a decree of condemna-

offender still seized of an estate expectant on the determination of a life estate which he could sell and convey; while the forfeiture lasted, it was complete.¹

tion under the statute is to take from the offender all estate, leaving him only the naked capacity to transmit to his heirs. *Szywanski v. Zunts*, 20 Fed. Rep. 361.

The heir of any person, whose lands have been condemned as forfeited under the act, can recover them after the person's death. *Bigelow v. Forrest*, 9 Wall. (U. S.) 339.

On the death of such grantor the lands go to his heirs at law, subject to his debts created previously to the act for which his estate was confiscated. *Wallach v. Van Riswick*, 3 McArthur (D. C.) 168.

The heirs apparent or presumptive of one whose lands are confiscated have, in regard to such lands, a right to protect their estate from forfeiture or incumbrance. And where the purchaser at a confiscation sale refused to pay taxes on the lands, in order that by buying them at a sale for delinquent taxes his title might be perfected, a proper case for equitable relief is presented. *Pike v. Wassell*, 94 U. S. 711, *reversing* 2 Dill. (U. S.) 555.

Proceedings being taken under the confiscation acts against mortgaged real estate, B, the mortgagee, intervened, and upon the condemnation and sale of the estate to C, the proceeds were paid to him under the decree of court. After the death of the original owner and mortgagor, suit was brought on behalf of his heirs to recover possession of the property, and it was held that C acquired only the life estate of the original owner whose heirs were entitled to recover, and that neither he nor the *United States* was subrogated to the rights of the mortgagee, B. *Waples v. Hays*, 108 U. S. 6. And see *Pendegast v. Schawtz*, 30 La. Ann. 590.

1. In *Wallach v. Van Riswick*, 92 U. S. 202, Strong, J., in delivering the opinion of the court, said: "It is argued, on behalf of the defendant, that because, under a confiscation sale of land, or of estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere; for it is said that a fee can never be in abeyance; and as the fee cannot be in the *United States*, they having sold all

that was seized, nor in the purchaser, whose interest ceases with the life, it must remain in the person whose estate has been seized. The argument is more plausible than sound. It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; and it is, therefore, of no weight in the inquiry what was intended by the Confiscation Act and concurrent resolution. Undoubtedly there are some anomalies growing out of the congressional legislation, . . . but it is the duty of the court to carry into effect what Congress intended, though it must be by denying the applicability of some common-law maxims, the reasons of which have long since disappeared. It has not been found necessary in *England* to hold that a reversion remained in a traitor after his attain, though the statutes declared that the forfeiture shall be during his natural life only. We are not, therefore, called upon to determine where the fee dwells, during the continuance of the interest of a purchaser at a confiscation sale, whether in the *United States* or in the purchaser, subject to be defeated by the death of the offender whose estate has been confiscated. That it cannot dwell in the offender, we have seen is evident; for, if it does, the plain purpose of the Confiscation Act is defeated, and the estate confiscated is subject alike in the hands of the *United States* and of the purchaser, to a paramount right remaining in the offender. If he is a tenant of the reversion or of a remainder, he may control the use of the estate, at least so far as to prevent waste. That Congress intended such a possibility, is incredible. If it be contended that the heirs of Wallach cannot take by descent, unless their father, at his death, was seized of an estate of inheritance, *e. g.*, reversion or a remainder—it may be answered that, even at common law, it was not always necessary that the ancestor should be seized to enable the heir to take by descent. *Shelley's Case* is, that, where the ancestor might have taken and

By the act of 1861, one half the proceeds of a forfeiture went to the informer, but under the act of 1862, the whole went to the government,¹ and by this last act all sales, transfers, and conveyances of any property liable to confiscation thereunder, made after the expiration of sixty days from the President's proclamation, were declared void.²

The President's proclamation of amnesty and pardon did not affect cases where the property had been already condemned and sold under the provisions of these acts,³ and the proceeds had

been seized, the heir shall inherit.

. . . If it were true that, at common law, the heirs could not take in any case where their ancestor was not seized at his death, the present case must be determined by the statute. Wallach was seized of the entire fee of the land before its confiscation, and the act of Congress interposed to take from him that seisin for a limited time. That it was competent to do, attaching the limitation for the benefit of the heirs. It wrought no corruption of blood." And see, to the same effect, *Shields v. Shiff*, 36 La. Ann. 644, in which case it was said that during the life estate the fee dwelt in the government, in trust for, and for the use of, the presumptive heirs of the offender. The property becomes the property of the *United States* from the date of the decree. *Semmes v. U. S.*, 91 U. S. 21.

Where the owner of lands sold under confiscation proceedings, purchased them under the decree, and on receiving the marshal's deed therefor sold them to a third party in fee, by an authentic act of sale, with all legal warranties, upon his death, his heirs at law may sue such third party for, and recover the possession of, the lands. *French v. Wade*, 102 U. S. 132. The only effect which could be invoked from the violation of the warranty, would be that, because other property of the ancestor warrantor had come into the possession of the plaintiffs as heirs, a right of action against them existed upon the ancestor's warranty. *Szywanski v. Zunts*, 20 Fed. Rep. 361.

A release without warranty, given the purchaser by the offending owner, does not complete and validate the title, which is ineffective beyond the life of such owner, and his release does not enlarge it. *Chaffraix v. Shiff*, 92 U. S. 214.

But where the proceedings of condemnation are void, and nothing passes to the purchaser, a quit-claim deed by

the original owner of the land, releasing to the purchaser all his interest of every kind therein, and covenanting against the claims of all persons claiming under him, is valid to convey the fee in the land, and his heirs after his death cannot recover it. *Mason v. Tuttle*, 75 Va. 105.

1. U. S. v. 1756 Shares of Capital Stock, 5 Blatchf. (U. S.) 231.

But that act gave the informer no such interest in the property seized as would prevent the attorney general from dismissing the suit. He is neither a party to the suit, nor entitled to be heard as such at any stage of the proceedings. *Confiscation Cases*, 7 Wall. (U. S.) 454.

The informer must be a party to the original proceeding in order to share in its benefits, and is then liable for costs, and he cannot assert himself as an informer after the attorney general has instituted proceedings for the sole use of the government. *Francis v. U. S.*, 5 Wall. (U. S.) 338.

2. 12 U. S. Stat. at L. 627. This provision only invalidated such transactions as were against any proceedings taken by the *United States* for the condemnation of the property. They are not void as between the parties, or against any other party than the *United States*. *Conrad v. Waples*, 96 U. S. 279; *Bates v. U. S.*, 4 Ct. of Cl. 569; *Galbraith v. McFarland*, 3 Coldw. (Tenn.) 267; 91 Am. Dec. 281.

Sales of property prior to the proclamation are not affected, although the deed is not recorded. *Burbank v. Conrad*, 96 U. S. 291.

3. It did not give back property which had been sold, or any interest in it, either in possession or expectancy. *Wallach v. Van Riswick*, 92 U. S. 202; *Semmes v. U. S.*, 91 U. S. 21; *U. S. v. Clarke* (*Confiscation Cases*), 20 Wall. (U. S.) 92; *Chaffraix v. Shiff*, 92 U. S. 214; *Bragg v. Lorio*, 1 Woods (U. S.) 209. And see, generally, as to the effect

been paid into the treasury, although these facts could be pleaded as a defense to condemnation proceedings.¹

The proceedings under these acts were not merely *in rem* against offending property, but the right to condemn depended upon the *delictum* of the owner, who had to be made a party and duly served

of amnesty and pardon, PARDON, vol. 17, p. 317.

While a full pardon releases the offender from all disabilities imposed by the offense pardoned, and restores to him all his civil rights, it does not affect any rights which have vested in others directly by the execution of the judgment for the offense, or which had been acquired by others while that judgment was in force; and if the proceeds of the property of the offender sold under judgment, have been paid into the treasury, the right to them has so far become vested in the *United States* that they can be recovered only through an act of Congress. Moneys once in the treasury can be withdrawn only by an appropriation by law. *Knote v. U. S.*, 95 U. S. 149.

But though property has been sold, until an order of distribution of the proceeds is made, or until the proceeds are actually paid into the hands of the party entitled, as informer, to receive them, or into the treasury of the *United States*, they are within the control of the court, and no vested right to them accrues so as to prevent the pardon from restoring them to the claimant. *Brown v. U. S.*, 1 Woolw. (U. S.) 198, *affirmed sub nom.* *Osborn v. U. S.*, 91 U. S. 474; *Knote v. U. S.*, 95 U. S. 149.

It would seem that merely depositing the proceeds of the forfeiture in one of the public depositories, to the credit of the *United States*, does not amount to paying it into the treasury so as to prevent its being refunded. 8 Op. Atty. Gen'l 281. And see *Knote v. U. S.*, 95 U. S. 155.

Field, J., delivering the opinion of the court in *Osborn v. U. S.*, 91 U. S. 474, said: "But it is contended that, as the bonds were forfeited to the government by the decree of the district court, there can be no restitution except by grant or conveyance of some kind from the government, and that the proprietary interest of the government can only be disposed of by an act of Congress. The answer is that the forfeiture results, not from the decree of the court, but from the offense which the decree establishes and declares.

The pardon in releasing the offense, obliterating it in legal contemplation, removes the ground of the forfeiture upon which the decree rests, and the source of title is then gone."

1. *Armstrong's Foundry*, 6 Wall. (U. S.) 766; *Kirk v. Lynd*, 106 U. S. 315; *U. S. v. Athens Armory*, 2 Abb. (U. S.) 129.

The claimant is entitled to the benefit of amnesty to the same extent as he would be entitled to the benefit of pardon, but in pleading an amnesty proclamation, it must be averred that the pleader is not within any of the exceptions in the proclamation. *St. Louis Street Foundry*, 6 Wall. (U. S.) 770, note. See also *Knote v. U. S.*, 95 U. S. 149.

But a pardon may be partial or subject to conditions, provided the conditions are lawful. *U. S. v. Six Lots of Ground*, 1 Woods (U. S.) 237. And one accepting and pleading a pardon becomes bound by the conditions. *Brown v. U. S.*, 1 Woolw. (U. S.) 198.

Hence, where the pardon contained a condition that the one to whom it was granted should not claim any of his property, or the proceeds thereof, that had been sold by the order, judgment, or decree of a court, under the confiscation laws of the *United States*, it was a bar to a claim for the proceeds. *U. S. v. Six Lots of Ground*, 1 Woods (U. S.) 234.

But a condition annexed to a pardon that the recipient shall not, by virtue of it, claim any property, or the proceeds of any property, sold by the order, judgment, or decree of a court, under the confiscation laws of the *United States*, does not preclude him from applying to the court for the proceeds of a confiscated money bond secured by mortgage, which were collected by the officers of the court, in part by a voluntary payment by the obligors, and in part by a sale of the lands mortgaged. The condition is only intended to protect purchasers at judicial sales decreed under the confiscation laws, from any claim of the original owner for the property sold or the purchase-money. *Osborn v. U. S.*, 91 U. S. 474.

by order of publication or otherwise;¹ and in order that such proceedings might be upheld, it had to be shown that the laws had been strictly complied with.² A seizure of the property was necessary,³ and neither the act of 1861, nor that of 1862, contemplated

1. *Chapman v. Phoenix Nat. Bank*, 85 N. Y. 437. In this case the question was as to the validity of the confiscation of certain shares of bank stock owned by one Verina S. Moore, whose name by marriage became Verina S. Chapman, she having been married before the institution of the confiscation proceedings. At the time of their institution she was within the Confederate lines, and the proceedings were had in the federal court of *New York*. She was named in the proceedings as Ver. S. Moore, and had only twenty days within which to appear. The court said, in denying validity to the confiscation, that "the fatal defect to the proceedings now under consideration is, that the owner of the property was in no way brought into court." The court cited *Windsor v. McVeigh*, 93 U. S. 274; *Day v. Micou*, 18 Wall. (U. S.) 156; *Conrad v. Waples*, 96 U. S. 279; *Risley v. Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421.

In *Day v. Micou*, 18 Wall. (U. S.) 156, it was held that in condemnation proceedings under the act of 1862, the property and estate of persons not made parties to the proceedings, remained unaffected by the decree of condemnation and the sale thereunder.

One whose property is sought to be condemned may appear and defend, and have a writ of error to review the proceedings, and this though he is an alien enemy. *McVeigh v. U. S.*, 11 Wall. (U. S.) 259; *Buford v. Speed*, 11 Bush (Ky.) 338; *U. S. v. 1756 Shares of Stock*, 5 Blatchf. (U. S.) 232.

By the decree of condemnation, the *United States* acquires only the estate which, at the time of the seizure, the alleged offender actually possesses, not what he may have appeared from the public records to have possessed, by reason of the omission of his vendees to record an act of sale to them; and only that estate, whatever it may be, passes by the marshal's sale and deed. *Burbank v. Conrad*, 96 U. S. 291, affirming 27 La. Ann. 152. See also *Conrad v. Waples*, 96 U. S. 279. The purchaser under the decree is presumed to know that if the offender had no estate in the premises at the time of the

seizure, nothing passed to the *United States* by the decree, or to him by purchase. The general language of description in his deed will not operate as a warranty to affect this presumption. *Waples v. U. S.*, 110 U. S. 630.

Proceedings under these acts, although in the nature of proceedings *in rem*, operate only to divest the title of the party alleged to be the owner of the property seized, and judgment of confiscation and forfeiture does not divest or affect the title of third persons originating prior to the seizure, or of the real owner not proceeded against. *Risley v. Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421; affirmed in *Phoenix Bank v. Risley*, 111 U. S. 125.

2. *Chapman v. Phoenix Nat. Bank*, 85 N. Y. 437.

A marshal's deed, including a parcel of land not mentioned either in the information, the monition, or the decree of condemnation, under which the sale was made, conveys no title to such parcel. *Burbank v. Semmes*, 99 U. S. 138.

Where lands are seized and proceeded against, and after the libel is filed it is amended so as to include other lands not seized, an intervening attachment levied by the owner's creditors upon the latter lands will secure a priority to one claiming thereunder over a purchaser under the confiscation proceedings. *Pike v. Wassell*, 94 U. S. 711.

3. *Seizure Necessary*.—A seizure of the property is necessary to give the court jurisdiction for its condemnation. *Miller v. U. S.*, 11 Wall. (U. S.) 294; *Pelham v. Way*, 15 Wall. (U. S.) 201; *Brown v. Kennedy*, 15 Wall. (U. S.) 597; *U. S. v. Clarke* (The Confiscation Cases), 20 Wall. (U. S.) 108; *Pike v. Wassell*, 94 U. S. 711; *U. S. v. Stevenson*, 3 Ben. (U. S.) 119; *Duncan v. U. S.*, 18 Ct. of Cl. 230. For the bar of the confiscation acts applies only to property seized thereunder. *Elgee v. Lovell*, 1 Woolw. (U. S.) 102.

In *U. S. v. Winchester*, 99 U. S. 372, the decree of confiscation was held illegal and void for want of an executive seizure.

As to what is sufficient seizure of land, see *Tyler v. Defrees*, 11 Wall. (U. S.) 331; *Bragg v. Lorio*, 1 Woods

any proceedings, as in admiralty, where there existed no specific property or proceeds capable of seizure and capture.¹

The rights of mortgagees, and others having liens upon the property, are not affected by its confiscation and sale.²

(U. S.) 209; *U. S. v. Clarke* (The Confiscation Cases), 20 Wall. (U. S.) 92.

The district court of the *United States* being a court of limited jurisdiction, the record should show that it had jurisdiction; and where it does not appear that there has been an order of seizure of property, or a return of seizure by the officer, the decree of the court is a nullity. *Mason v. Tuttle*, 75 Va. 105. The facts upon which the jurisdiction of the *United States* courts rests, must appear in some form upon the record, and when such facts do not thus appear, the proceedings are void, and may be so treated by other courts. *Duncan v. U. S.*, 18 Ct. of Cl. 230.

A return by a marshal that he has "arrested the property within mentioned," signifies that he has actually taken it into his custody and under his control. *Pelham v. Rose*, 9 Wall. (U. S.) 103. And see *Brown v. Kennedy*, 15 Wall. (U. S.) 591.

Choses in Action.—By seizure of a thing is meant the physical taking into custody, as applied to subjects capable of manual delivery, and in order to effect the seizure of a promissory note, it is necessary for the marshal to take it into his actual custody and control. *Pelham v. Rose*, 9 Wall. (U. S.) 103.

Where a debt is sought to be condemned, the admiralty proceedings in cases of foreign attachment should be followed, and the debtor be required to answer under oath as to the debts, credits, or effects of the defendant in his hands. Something more is necessary than the mere statement of the marshal that he has attached or seized a certain sum of money. *Phoenix Bank v. Risley*, 111 U. S. 125. See also *Alexandria v. Fairfax*, 95 U. S. 774.

But where the marshal returned that he had attached the bond, mortgage, and credit, and the decree expressly condemned the bond, mortgage, and credit, the debt was held to be effectively confiscated. And a seizure of stock "by serving a notice of said seizure personally upon the vice-president or president of the company" was adjudged a sufficient seizure. *Miller v. U. S.*, 11 Wall. (U. S.) 268.

But in the absence of the owner, shares of stock in a corporation can be proceeded against only in the district where the corporation is located. *U. S. v. 1756 Shares of Capital Stock*, 5 Blatchf. (U. S.) 232.

1. In *Morris v. U. S.*, 7 Wall. (U. S.) 578, an information was exhibited alleging in substance that certain bales of cotton had become the property of the *United States* through the surrender of the Confederate General, Taylor, or otherwise had become liable to seizure and condemnation under the acts of 1861 and 1862; that this cotton was stored, until some day in April not specified, in the warehouse of the defendant, and on some day, not specified, in the year 1865, was removed by him and sold, and that the defendant had appropriated the proceeds to his own use. The information did not allege that the cotton was at the time, or had ever been, in any place where it could be seized, or that any proceeds of the sale existed in any such form as to be capable of seizure. It was held that the information, at most, presented only a case of the unlawful conversion of property, and that for the redress of such injury, a proceeding by information could not be sustained.

2. *Day v. Micou*, 18 Wall. (U. S.) 156; *Union Ins. Co. v. U. S.*, 6 Wall. (U. S.) 759. And see *Waples v. Hays*, 108 U. S. 6; *Pike v. Wassell*, 94 U. S. 711.

Such proceedings and sale do not affect the rights of a mortgage in favor of third persons on the property, which goes to the government or to the purchaser *cum onere*. *Avegno v. Schmidt*, 35 La. Ann. 585.

Mortgagees are not bound to come in and assert their claims. Their interests do not pass to the purchaser at the sale, and they remain unaffected by the decree of condemnation and the sale thereunder. *Day v. Micou*, 18 Wall. (U. S.) 156.

Lienors have no right to intervene, as their liens are not disturbed by the proceedings. *U. S. v. Clarke* (The Confiscation Cases), 20 Wall. (U. S.) 114. See also *Ludlow v. Ramsey*, 11 Wall. (U. S.) 581.

c. CAPTURED OR ABANDONED PROPERTY.—All persons in the military or naval service of the *United States* were prohibited from buying or selling, trading, or in any way dealing in, captured or abandoned property, and were required to turn over any such property coming into their possession or control to the proper agent of the *United States* without delay.¹

By act of Congress, passed in 1863, provision was made for the collection of all captured or abandoned property, which was required to be turned over to agents of the treasury department. The act had reference only to the late civil war, and was in force for a limited period only, the last case arising under the act being decided by the court of claims in 1883.² By the provisions of that act the treasury agent was directed to sell such property at public outcry, and pay the proceeds into the national treasury,³ the government constituting itself trustee of the fund for the original owner,⁴ who was allowed to prefer his claim in the court of claims,⁵ and, upon proof of his ownership and right to the

The heirs of one whose property has been confiscated are not third parties *quoad* such property during the existence of the life estate. Hence, they are affected and bound by the foreclosure of a pre-existing mortgage on such property, and by the divesture of the title to the fee operated by such proceedings. *Shields v. Shift*, 36 La. Ann. 644.

1. *United States* Rev. Stat., § 5313; 12 U. S. Stat. at L. 821.

2. 12 U. S. Stat. at L. 820; *Hodges v. U. S.*, 18 Ct. of Cl. 700. But see reporter's note to this case, where it is said that since that decision a claim had been filed under a special act of Congress of March 3, 1883.

The captured or abandoned property cases are without precedent, the time within which they might have been brought is brief, the statute upon which they rest is remedial, and the court will not allow a just claim to be defeated if, upon any legal theory, it can be sustained. *Kohns v. U. S.*, 5 Ct. of Cl. 603.

3. *U. S. v. Klein*, 13 Wall. (U. S.) 128.

Where the general commanding the military department orders the proceeds of captured property to be expended for military purposes, and the accounting officers of the treasury audit and allow the accounts of the quartermaster making the disbursements, the proceeds become as effectually in the treasury as if the identical money had been placed in its vaults. It is immaterial that they were applied to the relief of

freedmen and the support of their schools. *Fluker v. U. S.*, 14 Ct. of Cl. 252.

In making the sale of the property, neither the treasury agent, nor the auctioneer employed by him, has authority to bind the government by a warranty, express or implied. *Bennett v. U. S.*, 6 Ct. of Cl. 103.

It was the purpose of the act, in addition to the Abandoned or Captured Property Act, July 2, 1864 (12 U. S. Stat. at L. 375), to dispose of all funds derived from captured property by bringing them within the operation of the Abandoned or Captured Property Act, and thereby obviate the necessity of judicial proceedings under the confiscation or the non-intercourse act. *Goodman v. U. S.*, 14 Ct. of Cl. 547.

No agent of the treasury department under the Abandoned or Captured Property Act, was justified in receiving any captured or abandoned property after June 30, 1865, unless theretofore surrendered by confederate agents or officers, much less making any seizure of unsurrendered property. *McLeod v. Callicott*, Chase's Dec. (U. S.) 443.

4. *U. S. v. Villalonga*, 23 Wall. (U. S.) 35; *U. S. v. Klein*, 13 Wall. (U. S.) 128.

5. The court of claims has jurisdiction of all claims to the proceeds of abandoned or captured property, as provided by Act of March 12, 1863, provided that the jurisdiction shall not extend to any claim against the *United States*, growing out of the destruction, or ap-

property,¹ and that he had never afforded aid or comfort to the

propriation of, or damage to property by the army and navy in the prosecution of the war. *United States Rev. Stat.*, § 1059. This remedy is exclusive in the court of claims. *Elgee v. Lovell*, 1 *Woolw.* (U. S.) 102.

This court is not limited to determining whether the claimant is entitled to receive the proceeds of the property, leaving it for an officer of the treasury to fix the amount. It may render judgment for a specific sum. *U. S. v. Anderson*, 9 *Wall.* (U. S.) 56.

1. No one can sue in the court of claims for the proceeds of captured or abandoned property, unless he can prove his ownership of the property seized, and his right to the proceeds thereof. *U. S. v. Woodruff*, 22 *Wall.* (U. S.) 180; *Hodges v. U. S.*, 18 *Ct. of Cl.* 700.

The ownership required to be proved is that which existed at the time of capture or abandonment, and the right to the proceeds is that which existed at the time of the petition filed in the court of claims. *Carroll v. U. S.*, 13 *Wall.* (U. S.) 151.

A suit cannot be maintained by the vendor of goods for the benefit of the vendee, nor for the vendor's own benefit, as he had no interest remaining. *Cutner v. U. S.*, 17 *Wall.* (U. S.) 517.

The ownership must be a *bona fide* one, not collusive or colorable, and the evidence thereof must be at least equal to that necessary to sustain an action of trespass or trover. *Bond v. U. S.*, 2 *Ct. of Cl.* 529; *Bramhall v. U. S.*, 4 *Ct. of Cl.* 51.

The declarations of a claimant are not evidence of ownership. *Crussell v. U. S.*, 4 *Ct. of Cl.* 533. Nor are the reports and accounts of the treasury agents, receiving or transmitting captured property, conclusive as to the title or the sources from whence it was derived. *Sharp v. U. S.*, 12 *Ct. of Cl.* 638. But evidence that the property was produced by the claimants at another time, or of one whose loyalty has since been judicially established, is satisfactory proof of ownership. *Brown v. U. S.*, 3 *Ct. of Cl.* 119.

It was the purpose of the act to bring before the court the one entitled to the fund, and anyone entitled to the fund, or a portion thereof, is a proper claimant under the statute, whether his title be legal or equitable. *Meriwether v. U. S.*, 13 *Ct. of Cl.* 259.

A factor in possession of the property with a lien thereon for his advances, can, at most, recover only to the extent of his lien. *U. S. v. Villalonga*, 23 *Wall.* (U. S.) 35.

One who appears on the record as equitably entitled to an interest in a fund derived from the captured property, may be substituted as a claimant, though the jurisdictional period for bringing such suits has expired. *Hall v. U. S.*, 11 *Ct. of Cl.* 704.

An insurance company, created by the legislature of one of the Confederate States, is a valid corporation, and has a legal capacity to sue under the Abandoned and Captured Property Act. *U. S. v. Home Ins. Co.*, 22 *Wall.* (U. S.) 99.

Where one sold cotton to the Confederate States and accepted their bonds in payment therefor, but remained in possession until its seizure by the agents of the *United States*, he cannot recover the proceeds under the provisions of this act. *Whitfield v. U. S.*, 92 *U. S.* 165. A bill of sale given by the owner to the purchasing agent of the Confederate States, passes title and prevents recovery. *Gilmer v. U. S.*, 14 *Ct. of Cl.* 184.

But the overseer of a plantation having, before the war, a general power from the owner, a loyal citizen in Washington, to sell all products save cotton, has no implied authority during the war to sell cotton to the Confederate Government, and the owner, at the close of hostilities, may repudiate the sale and recover the proceeds. *Taylor v. U. S.*, 5 *Ct. of Cl.* 701. And the seizure, by the confederate authorities, of cotton belonging to a loyal owner, does not divest him of his title, and when captured by the *United States*, he may sue for the proceeds. *Wilson v. U. S.*, 4 *Ct. of Cl.* 559.

Where the agreement to sell passes no title, the vendee cannot, but the vendor and his representatives can, sue for the proceeds. *U. S. v. Woodruff*, 22 *Wall.* (U. S.) 180.

Where one living in a loyal state goes, during the war, into a disloyal one, and there purchases cotton, his purchase is void and gives him no title to sue for the proceeds. It will not be presumed that he went into such disloyal state with the intention of taking up his abode. *Mitchell v. U. S.*, 21 *Wall.* (U. S.)

Confederacy, but had been loyal to the United States government,¹

S.) 350; *Desmare v. U. S.*, 93 U. S. 605. Where the purchase is in violation of the non-intercourse acts, no title passes, and the purchaser cannot sue under the act. *Walker v. U. S.*, 106 U. S. 413; *Dillon v. U. S.*, 5 Ct. of Cl. 586; *Desmare v. U. S.*, 10 Ct. of Cl. 385.

A purchase from an agent of the Confederate Government for cash is giving aid and comfort to the enemy, and such purchase vests no title in the purchaser. *Sprott v. U. S.*, 20 Wall. (U. S.) 459.

But the prohibition against selling contained in the Confiscation Act of July 17, 1862, is not to be imported into this act. *U. S. v. Anderson*, 9 Wall. (U. S.) 56; *Wayne v. U. S.*, 4 Ct. of Cl. 426.

Where the purpose of a contract during the war was to place at the disposal of one resident in hostile territory, funds within *United States* fixed lines of military occupation, no effect can be given to the contract, and a title to personal property thus acquired cannot be upheld in a suit for the proceeds under this act. *Craft v. U. S.*, 12 Ct. of Cl. 178.

But where one residing in *Georgia*, left there at the commencement of hostilities, and remained in loyal territory until the close of the war, and during his absence his agent, whom he left in charge of his business, purchased cotton with money collected on his account, which cotton was subsequently captured and sold, he is entitled to sue for the proceeds in the court of claims. *U. S. v. Quigley*, 103 U. S. 595. And see *supra*, this title, *Suspension of Intercourse*.

The purchase of cotton made at an unusual hour for the transaction of business, and from one not shown to have been loyal, and but a short time before the capture of the place where the purchase was made, both parties being informed of the approach of the capturing forces, is in fraud of the act and no recovery can be had. *Gerstmann v. U. S.*, 3 Ct. of Cl. 233; *Bulwinkle v. U. S.*, 4 Ct. of Cl. 395.

But a purchase of cotton by an unquestionably loyal citizen, but a short time before the capture of the place of purchase, is not void, where there is evidence of the good faith of the transaction. *McMahon v. U. S.*, 3 Ct. of Cl. 120; *Fernandez v. U. S.*, 7 Ct. of Cl. 541;

Howe v. U. S., 3 Ct. of Cl. 231; *Reynolds v. U. S.*, 3 Ct. of Cl. 232; *Watts v. U. S.*, 3 Ct. of Cl. 269; *Pollard v. U. S.*, 4 Ct. of Cl. 328; *Aiken v. U. S.*, 3 Ct. of Cl. 307; *Quinby v. U. S.*, 4 Ct. of Cl. 417; *Foley v. U. S.*, 3 Ct. of Cl. 53. And see *Dereef v. U. S.*, 3 Ct. of Cl. 163; *Bates v. U. S.*, 4 Ct. of Cl. 569; *Oliver v. U. S.*, 3 Ct. of Cl. 62; *Armstrong v. U. S.*, 3 Ct. of Cl. 243.

Where cotton is purchased and stored before capture, by, and in the name of one residing within an insurrectionary district, and after capture, is reported and registered as his, he is the proper claimant in an action for the proceeds, and, although he bought it with the intention of holding and transferring it to his brother, a loyal citizen residing within a loyal state, and with funds belonging to his brother, the latter will not be deemed to be the owner. *Kohns v. U. S.*, 5 Ct. of Cl. 603.

Where both the assignor and assignee of a claim joined as co-claimants, the assignor verifying the petition, and the petition alleging that the suit was brought for the use of the assignee, it was not necessary that the assignment be proved. *Tebbetts v. U. S.*, 5 Ct. of Cl. 607.

1. The claimant must show that he never gave aid and comfort to the Confederacy. *U. S. v. Woodruff*, 22 Wall. (U. S.) 180. And the restoration of the proceeds becomes the absolute right of the persons pardoned, provided application is made within the proper time. *U. S. v. Klein*, 13 Wall. (U. S.) 128.

Acts not committed with the intention of giving aid and comfort to the enemy, but under the apprehension and fear of danger to the person and property of a claimant, do not bar his right of recovery. *Ayers v. U. S.*, 4 Ct. of Cl. 422. Aid and comfort involuntarily given to the Confederacy does not deprive one of the benefits of the act. *U. S. v. Padelford*, 9 Wall. (U. S.) 531.

Under this act, a claimant must show that he complied with the rigid requirements of the law in relation to allegiance and conduct during the war. The law was not made for that large class which endeavored to be safe whichever side might succeed. There was no middle ground. Neutrality was opposition. But offices and acts of affection and humanity rendered to

individuals engaged in the Confederacy, taxes paid where the confederate authority held sway, contributions levied and payments extorted by the presence of a power and force that could compel submission, are not willful breaches of allegiance and duty, and therefore do not come within the letter, the reason, the spirit or purpose of the act. The law is penal, and not intended to punish other than willful transgressions. *Grossmeyer v. U. S.*, 4 Ct. of Cl. 1. But direct and positive proof of loyalty is required to justify recovery. *Dothage v. U. S.*, 4 Ct. of Cl. 208.

Where the property is taken from an administrator after the death of his intestate, he should prove his own loyalty, and not that of his intestate. *Caroll v. U. S.*, 13 Wall. (U. S.) 151. But where the owner dies subsequently to the capture, then the loyalty of the owner should be proved, and the loyalty of the distributees, executor, or administrator cannot be put in issue. *Aubert v. U. S.*, 3 Ct. of Cl. 84; *Mims v. U. S.*, 4 Ct. of Cl. 521; *Deeson v. U. S.*, 5 Ct. of Cl. 626; *Taylor v. U. S.*, 5 Ct. of Cl. 701.

When property belonging to a trust estate is captured, the trustees who bring suit for the proceeds need not prove their own loyalty, but must prove the loyalty of the beneficiaries entitled thereto. *Stoddart v. U. S.*, 6 Ct. of Cl. 340.

Evidence of Loyalty.—Expressed sentiments of loyalty, avoidance to take the confederate oath of allegiance, freeing slaves so that they should not work on confederate fortifications, and contributions for, and kindness shown to union prisoners, are satisfactory evidences of loyalty, *Foley v. U. S.*, 3 Ct. of Cl. 53; as is also the fact that a man escapes from the confederate lines and gives useful information to federal officers, and comes within the federal lines and remains there until his death, *Igoe v. U. S.*, 3 Ct. of Cl. 226; and that a widow residing in Charleston contributed from scanty means to aid suffering union prisoners, and that she harbored and sheltered some who escaped, *Hilborn v. U. S.*, 3 Ct. of Cl. 270; also that one living in *Texas* abandoned his business at the beginning of the war and went beyond the confederate lines, to avoid taking an oath of allegiance to the confederate government, *Hudnal v. U. S.*, 3 Ct. of Cl. 291; see also *Hancock v. U. S.*,

3 Ct. of Cl. 177; and that the claimants devoted themselves and their means to the care of union prisoners, suffering obloquy and even affliction by the cruelties practiced on their families because of their fidelity to the Union. *Potter v. U. S.*, 3 Ct. of Cl. 390.

Valuable services rendered to the federal military officers are deemed satisfactory evidences of loyalty, *Fennerty v. U. S.*, 3 Ct. of Cl. 437; so, also, removing one's family from an insurrectionary to a loyal state at the beginning of hostilities and subsequently escaping from the confederate to the union lines. *Ealer v. U. S.*, 4 Ct. of Cl. 372.

But a loyal person surrounded by contending armies is not bound to abandon his family, and may remove it to a retired place, though within the confederate lines. *Hayden v. U. S.*, 4 Ct. of Cl. 475.

The presumption of loyalty is in favor of a claimant residing before and during the war in a loyal state, though he continues to own and work a plantation in *Louisiana*, and is against one residing in a disloyal state. *Turner v. U. S.*, 3 Ct. of Cl. 400. The presumption in the last case must be overcome by testimony. *Wayne v. U. S.*, 4 Ct. of Cl. 426.

By the Act of June 25, 1868, all claimants against the *United States* who voluntarily resided in the southern states during the war, were required to prove their loyalty affirmatively. *Zellner v. U. S.*, 4 Ct. of Cl. 480. But the presumption of disloyalty does not attach to one who is temporarily in the south at the outbreak of the war, and, being aged and infirm and poor, is unable to escape, *Spain v. U. S.*, 5 Ct. of Cl. 598; or is prevented from returning North by the confederate authorities. *Foster v. U. S.*, 5 Ct. of Cl. 412.

The hearsay of others and the opinion of the witnesses are not admissible on the question of the loyalty of the claimants. *Crussell v. U. S.*, 4 Ct. of Cl. 533. It is insufficient for one to call witnesses merely to show that they know nothing against one's loyalty or neutrality. *McKay v. U. S.*, 3 Ct. of Cl. 181. Such fact should be established by the evidence of intimate associates, or at least by witnesses of whom some knowledge exists that they were themselves loyal; not by one's employees or those interested in the property, the proceeds of which are

claimed. *Claussen v. U. S.*, 3 Ct. of Cl. 253.

Where one's neighbors speak in doubtful terms of his loyalty, and whose household servants, when produced as witnesses, are silent in regard thereto, he is but a neutral at best, and does not establish his loyalty by such evidence. *Zellner v. U. S.*, 4 Ct. of Cl. 480.

The testimony of a single witness, negative in its character, is not satisfactory proof of loyalty where the claimant resided voluntarily within the confederate districts, and had friends and neighbors who could understandingly testify as to his conduct during the war. *Patterson v. U. S.*, 6 Ct. of Cl. 40. See also *Witkowski v. U. S.*, 6 Ct. of Cl. 406.

A certificate of a major general commanding a department, stating that he had the means of ascertaining the feeling and conduct of the claimant toward the Union, and that he remained truly loyal during the war, will well sustain the oath of one who swears for himself that he was faithful to his allegiance and gave useful information to federal officers. *Clark v. U. S.*, 3 Ct. of Cl. 228. And a contemporary certificate signed by five union prisoners, whom the claimant harbored and aided to escape, attested by a rear admiral of the *United States* navy, is most satisfactory evidence of loyalty. *Armstrong v. U. S.*, 3 Ct. of Cl. 243.

The concurrent testimony of a large number of acquaintances and associates, with whom a party is in daily intercourse, is satisfactory evidence of loyalty. *Mott v. U. S.*, 3 Ct. of Cl. 363. But the testimony of two partners, each to his own and the other's loyalty, is insufficient and unsatisfactory, especially where it appears that they lived in different places during a portion of the war. *Donnelly v. U. S.*, 3 Ct. of Cl. 276.

Giving Aid and Comfort.—Going on the bond of a confederate official, is giving aid and comfort to the enemy. *U. S. v. Padelford*, 9 Wall. (U. S.) 531. So is serving in a company enrolled for the local defense of a city, and standing guard over union prisoners, in obedience to a general order that all persons not enrolled as part of the reserved force, shall be arrested, *Kuper v. U. S.*, 3 Ct. of Cl. 74; though joining, but not serving in, a home guard with intent to escape conscription, is not, *Lynch v. U. S.*, 3 Ct. of Cl. 392; nor is involuntary parol duty in the home

guards, the service being in the nature of police duty and not military, and the party being otherwise shown to be loyal. *Miller v. U. S.*, 4 Ct. of Cl. 288. See also *Quinby v. U. S.*, 4 Ct. of Cl. 417.

Selling saltpetre to the Confederacy, knowing it is to be used in the manufacture of gunpowder for the prosecution of the war, is giving aid and comfort. *Carlisle v. U. S.*, 16 Wall. (U. S.) 147.

A citizen of *Pennsylvania* carrying on commercial transactions within the confederate lines, contrary to the act prohibiting commercial intercourse, gives aid and comfort to the Confederacy. *Gearing v. U. S.*, 3 Ct. of Cl. 165. And the willingness of a claimant to connect himself with an enterprise, the probable purpose of which is to violate the blockade, shows an absence of neutrality, and the desire to give aid and comfort to the Confederacy. *Claussen v. U. S.*, 3 Ct. of Cl. 253. See also *Gearing v. U. S.*, 3 Ct. of Cl. 165; *Stark v. U. S.*, 4 Ct. of Cl. 280.

But to enter into a partnership for the purpose of running a blockade, shipping cotton, and bringing into the Confederate States articles suited to the wants of the people, the sanction of the government to be first given, and nothing in fact being done by the co-partnership, does not constitute aid or comfort to the Confederacy. *Ans-tell v. U. S.*, 7 Ct. of Cl. 599.

For one residing in the south to go farther south on the approach of the union forces, carrying her slaves with her to prevent their emancipation, is to render aid or comfort to the enemy. *Armstrong v. U. S.*, 5 Ct. of Cl. 623. But it will be regarded as involuntary aid, where one residing in the south enters a confederate arsenal as a workman, his business being that of a shopkeeper, solely to avoid conscription, and while there evades serving so far as possible, receiving no pay, and in fact paying for the appointment, if his loyalty otherwise be fully established. *Koester v. U. S.*, 5 Ct. of Cl. 642.

It is not aid or comfort for a non-resident alien to purchase products of the insurrectionary districts, for ordinary business purposes, through a commercial house within the confederate lines, and to accept and pay drafts abroad, drawn for the purchase price of the products. *Harrison v. U. S.*, 6 Ct. of Cl. 323. And the mere writing of a letter during the war, by a British sub-

to recover the proceeds,¹ after the deduction of all lawful

ject resident in the south, addressed to the head of the Confederate Government, unaccompanied by the sending, uttering, or publishing thereof, is not an act of aid or comfort, though it contain proffer of services; but the writing and sending of such a letter is aid and comfort in violation of the alien's proper neutrality. *Medway v. U. S.*, 6 Ct. of Cl. 421.

1. Abandoned and Captured Property Act, March 13, 1863 (12 U. S. Stat. at L. 820).

But no suit can be maintained under the provisions of this act, if the property in question was neither captured, seized, nor sold pursuant to its provisions, and the proceeds were not paid into the treasury. *Spencer v. U. S.*, 91 U. S. 577.

Property seized during the military occupancy of territory from which the enemy has retreated, is taken from "hostile possession" within the meaning of the act. *Lamar v. Browne*, 92 U. S. 187.

Rents and income of abandoned real estate may be recovered under this act and the act in addition thereto. *Moore v. U. S.*, 10 Ct. of Cl. 375.

A suit under this act is a suit in equity against a specific fund partaking largely of the nature of a proceeding *in rem*. Whenever the fund vanishes, the liability of the defendants under the statute ceases and the jurisdiction of the court ends. *Thomas v. U. S.*, 12 Ct. of Cl. 273. And see *Cones v. U. S.*, 8 Ct. of Cl. 329. The recovery must be restricted to the fund actually remaining in the treasury at the time of judgment. *Sharp v. U. S.*, 12 Ct. of Cl. 638.

But the proceeds of such property may be recovered by the owner, even though the money has been paid out, if such payment was made without proper authority. *Duncan v. U. S.*, 18 Ct. of Cl. 230. But see *Spencer v. U. S.*, 8 Ct. of Cl. 288; *Dent v. U. S.*, 8 Ct. of Cl. 474.

If the proceeds of abandoned or captured property actually reached the treasury, it constitutes no defense for the government to show that a moiety of the proceeds was deposited under an order of a court of admiralty, and subsequently paid out and distributed as prize money under a decree of the same court. The government is liable for the proceeds so paid out, as well as

for the proceeds remaining in the treasury. *Winchester v. U. S.*, 14 Ct. of Cl. 13.

Congress has inserted in the revised statutes, a permanent annual appropriation "for the return of proceeds from the sale of captured and abandoned property, in insurrectionary districts, to the owners thereof, who may, to the satisfaction of the court of claims, prove their right to, and ownership of, said property." *United States Rev. Stats.*, § 3689.

The claimant must establish, by sufficient proof, that the property captured or abandoned came into the possession of the treasury agent; that it was sold; that the proceeds of the sale were paid into the treasury, and that he was the owner of the property and entitled to the proceeds. Because his property was captured and sent forward by a military officer, and there is an unclaimed fund in the treasury derived from sales of property of the same kind, a court is not authorized to conclude, as a matter of law, that the property was delivered by the officer to the treasury; that it was sold by the latter, and that the proceeds were paid into the treasury. *U. S. v. Ross*, 92 U. S. 281. And see *Sharp v. U. S.*, 12 Ct. of Cl. 638.

But where it is shown that the claimant's property was in possession of the officers of the government, and that property marked with his mark was sold, the officers will be presumed to have done their duty, and a conclusion in the court of claims that the proceeds of the property belonging to the claimant were paid into the treasury, will be upheld. *U. S. v. Crusell*, 14 Wall. (U. S.) 1. And see *U. S. v. Pugh*, 99 U. S. 265; *Henry v. U. S.*, 6 Ct. of Cl. 389; *Cones v. U. S.*, 8 Ct. of Cl. 329.

But this presumption does not extend to a mere contractor or employee of an officer. *Johnson v. U. S.*, 8 Ct. of Cl. 454.

Where a claimant traced his cotton into the possession of a quartermaster, who sold some captured property and turned over other to the treasury agents, it was held that there was a presumption that the claimant's cotton remained with the quartermaster; that the burden was not on the defendants to show that the quartermaster did not turn it over, and that the claimant

expenses.¹ But the general amnesty proclamation of the President practically relieved most claimants from making proof of

was not entitled to a general average of that turned over with that sold. *Ealer v. U. S.*, 4 Ct. of Cl. 372.

Where three bales of cotton are captured but only two are traced to the possession of the treasury agents, the claimant is limited in his recovery to the proceeds of the latter. *West v. U. S.*, 3 Ct. of Cl. 341. And see *Rudolph v. U. S.*, 3 Ct. of Cl. 356; *Mintz v. U. S.*, 4 Ct. of Cl. 471.

But where the cotton is traced into the possession of the proper agents of the treasury, and appears to have been there mingled with other cotton so that the net proceeds cannot be precisely ascertained, he can recover the average of the net proceeds of all the cotton so intermingled. *Mott v. U. S.*, 3 Ct. of Cl. 363. And see *Intermingled Cotton Cases v. Raymond*, 92 U. S. 651; *Lynch v. U. S.*, 3 Ct. of Cl. 392; *Geilfuss v. U. S.*, 5 Ct. of Cl. 697; *Minor v. U. S.*, 6 Ct. of Cl. 393; *Martin v. U. S.*, 7 Ct. of Cl. 450; *Price v. U. S.*, 7 Ct. of Cl. 567; *Boyd v. U. S.*, 9 Ct. of Cl. 419; *Carroll v. U. S.*, 7 Ct. of Cl. 589.

The proceeds may be constructively in the treasury, though not appearing in that fund, as where a quartermaster has expended them in the military service, and his accounts are under examination in the treasury department, the quartermaster's department not having been yet charged with the moneys expended, nor the abandoned property fund credited with the amount received. *Hudnal v. U. S.*, 3 Ct. of Cl. 291. Only the net proceeds actually in the treasury can be recovered. *Byrnes v. U. S.*, 3 Ct. of Cl. 195; *Crussell v. U. S.*, 4 Ct. of Cl. 533. And see *Douglass v. U. S.*, 7 Ct. of Cl. 604; *Hunt v. U. S.*, 4 Ct. of Cl. 438.

The government is not liable for the proceeds of captured property, or its value, where it has neglected to prosecute shippers and forwarders who have had such property in their possession as its agents, and have failed to account for it; but in such a case, a judgment of the court will be rendered without prejudice to the equitable interests of the claimants in the lost property. *Terry v. U. S.*, 8 Ct. of Cl. 277.

As to what is sufficient proof of capture to sustain a recovery, see *Lowry v. U. S.*, 4 Ct. of Cl. 377; *Habersham v.*

U. S., 4 Ct. of Cl. 433; *Cattel v. U. S.*, 6 Ct. of Cl. 278; *Furman v. U. S.*, 5 Ct. of Cl. 579; *Anstell v. U. S.*, 7 Ct. of Cl. 599.

The burden is upon the government to explain and justify erasures and alterations in its original shipping books of captured property, if it would avail itself of the altered entries. *Daniels v. U. S.*, 7 Ct. of Cl. 447.

New Trial.—Where the claimant's evidence, uncontradicted at the trial, establishes the capture and seizure of a large quantity of cotton by federal troops not, however, identified, and the Attorney General subsequently discovers what troops made the capture, and produces their affidavits to show that no cotton was seized and brought out, so that the court is satisfied *prima facie* that gross wrong and injustice, if not fraud, had been done to the defendants, a new trial will be granted under the statute. (*United States Rev. Stat.*, § 1088.) *Douglas v. U. S.*, 11 Ct. of Cl. 655.

Abandonment of Property.—Property cannot be said to be "abandoned" in the sense in which the word is used in this act, unless the owner is voluntarily absent, and engaged either in arms or otherwise in aiding or encouraging the Confederacy; and property in New Orleans, belonging to an owner who was expelled from the city by the *United States* military authorities, and sent within the confederate lines, was in no sense "abandoned property." *Kimball v. Taylor*, 2 Woods (U. S.) 37.

It is not an "abandonment," within the meaning of the act, where a woman leaves her house and furniture, first making a pretended sale thereof to another, and goes to reside in an adjoining county. *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208.

1. And even where illegal expenses have been improperly allowed in the collection of captured or abandoned property, so that the proceeds to that amount have never reached the treasury, the owner is without redress, and can recover only the net proceeds; but where the proceeds have reached the treasury, and a portion is withheld to meet an illegal charge, the owner has redress, and the amount withheld will be included in the judgment. *Bynum v. U. S.*, 8 Ct. of Cl. 440; *Houston v.*

loyalty.¹ The suit must have been begun within two years from the close of hostilities,² and all property which had been used

U. S., 8 Ct. of Cl. 446. And see *Gaither v. U. S.*, 3 Ct. of Cl. 191.

But where cotton, which was not in fact captured or abandoned property, was seized by a treasury agent and taken to New Orleans, the claimant cannot be required to pay freight charges thereon for the transportation to New Orleans. *Steamer Saratoga v. 438 Bales of Cotton*, 1 Woods (U. S.) 75.

Deduction of Cotton Tax.—Where a claimant recovered a verdict in the court of claims for the proceeds of cotton sold under this act, and no appeal was taken by the *United States*, but the judgment was acquiesced in, the Secretary of the Treasury, in paying such judgment, cannot deduct from it the amount due the government for an internal revenue tax on the cotton. In order to avail itself of a counterclaim for the cotton tax, the government should plead it. *U. S. v. O'Grady*, 22 Wall. (U. S.) 641. And see *Quinby v. U. S.*, 4 Ct. of Cl. 417.

1. *Meriwether v. U. S.*, 13 Ct. of Cl. 266; *U. S. v. Padelford*, 9 Wall. (U. S.) 531; *Armstrong v. U. S.*, 13 Wall. (U. S.) 154; *Pargoud v. U. S.*, 13 (U. S.) 156; *Witkowski v. U. S.*, 7 Ct. of Cl. 393. And see *Carroll v. U. S.*, 7 Ct. of Cl. 589.

But where one guilty of giving aid and comfort to the Confederacy, died before the General Amnesty Proclamation of December 25, 1868, the proclamation did not obliterate the offense, and his administrator could not sue for the proceeds of his captured property. *Meldrim v. U. S.*, 7 Ct. of Cl. 595.

2. *Haycraft v. U. S.*, 22 Wall. (U. S.) 81. And see *Chamberlain v. Stanton*, 2 Woods (U. S.) 164.

The purpose of this provision was not that of a Statute of Limitations to prevent the mischief of unreasonable delay, but arose from the absolute necessity of having all claimants upon the fund before the court at one time, so far as to enable adverse parties seeking the proceeds of the same property to interplead and contest their conflicting rights. *Thomas v. U. S.*, 12 Ct. of Cl. 273; *Green v. U. S.*, 7 Ct. of Cl. 496.

The provision is not one of limitation, but of jurisdiction. *Kidd v. U. S.*, 8 Ct. of Cl. 259.

For the purposes of this act, the war is to be considered as ended August 20, 1866, the date of the President's proclamation, and a claim presented in two years from that date is in time. *U. S. v. Anderson*, 9 Wall. (U. S.) 56.

Amendment.—As the object of the limitation is to bring all claims before the court within a fixed and definite period, it does not conflict with the true intent of the statute, where a suit has been improperly brought in the name of one, as where it is brought by the wife, the property being at the time of the capture in the husband, or where it is brought by an assignee, to allow the husband, or assignor, to be substituted as claimant after the expiration of the two years prescribed by the statute. *Green v. U. S.*, 7 Ct. of Cl. 496; *Payan v. U. S.*, 7 Ct. of Cl. 400; *Hall v. U. S.*, 11 Ct. of Cl. 704. It is of little consequence whether the suit is commenced by the right or the wrong representative, so long as it brought for the party really entitled to receive the net proceeds, and so long as the interest represented remains unchanged. *Mount v. U. S.*, 11 Ct. of Cl. 509. And so where the petition sufficiently defines the property and intelligibly sets forth the title by which it was acquired, so as to constitute a notice of *lis pendens* against the proceeds, a change of parties can be allowed, though the jurisdictional period for bringing a new suit has passed; but where a petition merely alleges possession and ownership in the claimant at the time of capture, when they in fact were in her husband, the court is without power to substitute his executor as claimant. *Thomas v. U. S.*, 12 Ct. of Cl. 273.

One claiming to be the owner of captured property, who neglects to sue within the prescribed time, cannot come in afterward and file what he terms an intervening petition against one who properly brought his suit for the same proceeds within the prescribed time. It is only where a party has a standing in court, by having brought his suit within the jurisdictional period, that he can attack the title of another who is prosecuting a claim for the same proceeds. *Hill v. U. S.*, 8 Ct. of Cl. 361. Nor can such a one be substituted by consent as claimant for one who,

for the purpose of carrying on war against the *United States* was expressly excluded from the operation of the act.¹

There was no such repugnancy between this act and the confiscation act as to warrant the implication that the one repealed the other.²

The provisions of the act were enlarged and extended by the act of July 2, 1864, so as to enable the claimant to sue for the proceeds of property, although captured and sold prior to its passage, the proceeds being in the treasury, and credited to the "Abandoned Property Fund."³

Non-residents in southern territory were entitled to the benefits of this act,⁴ as were also aliens, provided they had never given aid

without title, has brought suit for the proceeds of the same property. *Mount v. U. S.*, 11 Ct. of Cl. 509.

A new cause of action cannot be introduced into the petition by amendment when a new suit would be barred. *Lamar v. U. S.*, 7 Ct. of Cl. 603. And where admitting new parties to set up a different title and prosecute an existing suit, after the statutory period has expired, would in effect be allowing them to bring a new suit as to which the court is excluded from jurisdiction, such amendments have never been allowed. *Hamner v. U. S.*, 13 Ct. of Cl. 7. Nor will any amendment be allowed after the period for bringing suit has expired, which will enable the claimant to sue for a larger quantity of captured property than that for which he at first preferred his claim. *Kidd v. U. S.*, 8 Ct. of Cl. 259.

1. *Slawson v. U. S.*, 16 Wall. (U. S.) 310.

And the court of claims has no jurisdiction of the proceeds of a steamer used by the Confederate Government as a military transport and headquarters boat, notwithstanding the owner did not consent to such use and the proceeds have come into the captured or abandoned property fund. *Gearing v. U. S.*, 3 Ct. of Cl. 165.

But property of a loyal owner seized by the military authorities of the Confederacy, and actually used for waging war against the *United States*, does not come within this exception. *Wilson v. U. S.*, 4 Ct. of Cl. 559.

2. The Confiscation Acts authorized the seizure of the enemy's property wherever found; the Captured and Abandoned Property Act, only of certain kinds of property in the enemy's country. The former contemplated the condemnation and sale only of the

offender's interest in the property; the latter proceeded against the property itself and put the absolute title to it in the state. The former, at least the act of 1861, was a permanent measure; the latter was a temporary act and expired with the war. The former were repealed, if at all, on the passage of the new statute. The effective force of the latter was not suspended until the Secretary of the Treasury should appoint agents to execute its provisions. Thus it appears, not only that the subject-matter and the duration of the earlier and of the later statutes were dissimilar, but also that the supposed date of the extinction of the former, and the actual time when the latter became operative, were not identical. *U. S. v. Winchester*, 99 U. S. 372, *affirming Winchester v. U. S.*, 14 Ct. of Cl. 13.

3. The Abandoned and Captured Property Act was enlarged and extended by the act of July 2, 1864 (13 U. S. Stat. at L. 375), taken in connection with the acts of July 13, 1861 (12 U. S. Stat. at L. 255), and July 17, 1862 (12 U. S. Stat. at L. 589). *Barringer v. U. S.*, 3 Ct. of Cl. 358; *Minor v. U. S.*, 6 Ct. of Cl. 393; *Terry v. U. S.*, 8 Ct. of Cl. 277; *Jenkins v. U. S.*, 8 Ct. of Cl. 464.

But the amendatory act of 1864 only carries the right to the proceeds back to the time of the passage of the act of July 17, 1862, and no further. *Moore v. U. S.*, 10 Ct. of Cl. 375; *U. S. v. Pugh*, 99 U. S. 265.

4. The act allows residents within southern territory to recover the net proceeds of captured and abandoned property upon certain conditions; therefore, persons not resident in such territory should also recover upon like conditions. The intent of the act was to prevent injury to those who were

and comfort to the Confederacy,¹ and their governments accorded similar privileges to citizens of the *United States*.²

guiltless of aiding the Confederacy. *Mayer v. U. S.*, 3 Ct. of Cl. 249.

1. *Waltjen v. U. S.*, 3 Ct. of Cl. 238; *Bruning v. U. S.*, 3 Ct. of Cl. 242.

The act does not require a resident alien to establish positive sympathy or loyalty, but simply to prove that he has never given aid and comfort to the Confederacy. *Byrnes v. U. S.*, 3 Ct. of Cl. 195.

The fact that an alien was engaged in blockade running, does not prevent him from maintaining an action for the proceeds of captured and abandoned property. *Collie v. U. S.*, 9 Ct. of Cl. 431.

Where an alien is required to aver that he has not voluntarily aided, abetted, or encouraged the Confederacy, and the government does not traverse the averment, it is presumptively true. *Hill v. U. S.*, 8 Ct. of Cl. 470.

Proclamation of Amnesty and Pardon.

—The President's "Amnesty Proclamation" did not restore the right to sue to a non-resident alien. By giving aid and comfort to the Confederacy he committed, in a criminal sense, no offense against the *United States*, and was not, therefore, included in the proclamation. *Young v. U. S.*, 97 U. S. 39; *Collie v. U. S.*, 12 Ct. of Cl. 648.

But aliens domiciled in this country who gave aid and comfort to the Confederacy, were included in the proclamation, and were by it relieved from the necessity of establishing their loyalty in order to prosecute their claims. All aliens are under the protection of the sovereign while within his territories, and owe a temporary allegiance in return for that protection. *Carlisle v. U. S.*, 16 Wall. (U. S.) 147. See also *Green v. U. S.*, 8 Ct. of Cl. 412.

2. Act of July 27, 1868 (15 U. S. Stat. at L. 243); *Byrnes v. U. S.*, 3 Ct. of Cl. 195; *Waltjen v. U. S.*, 3 Ct. of Cl. 238; *Bruning v. U. S.*, 3 Ct. of Cl. 242; *McElhose v. U. S.*, 3 Ct. of Cl. 240.

British citizens may prosecute claims against the *United States* for the proceeds of captured and abandoned property, as the British government allows citizens of the *United States* to prosecute claims against it by a proceeding known as petition of right. *U. S. v. O'Keefe*, 11 Wall. (U. S.) 178, *affirming O'Keefe v. U. S.*, 5 Ct. of Cl. 674.

The disability imposed on aliens by the act of July 27th, 1868, providing that only citizens of such countries as allowed similar privileges to citizens of the *United States*, could sue in the court of claims, does not apply to one who declared his intentions before bringing suit, and was naturalized before the plea of alienage was filed, *Scharfer v. U. S.*, 4 Ct. of Cl. 529; *Wagner v. U. S.*, 5 Ct. of Cl. 637; and a claimant naturalized after bringing his action and before the passage of the act of 1868, is not affected by its provisions. *Mintz v. U. S.*, 4 Ct. of Cl. 471; *Bulwinkle v. U. S.*, 4 Ct. of Cl. 395.

Although in *Prussia*, foreigners bringing suit against the state are required to give security for costs, yet if a citizen of the *United States* may bring such a suit in the courts of that country at any time, and have execution against the property of the government, it is a sufficient compliance with the condition imposed by the act of July 27, 1868. *Brown v. U. S.*, 5 Ct. of Cl. 571.

When, by the laws of *Switzerland*, a private citizen may maintain an action against the Confederation in its federal tribunal, if the object of the litigation is of the value of at least 3,000 francs, and when, by a treaty with the *United States*, citizens of the *United States* are "at liberty to prosecute and defend their rights before the courts of justice in the same manner as native citizens," the government of *Switzerland* will be deemed to accord to citizens of the *United States* the right to prosecute claims against such government in its courts, within the meaning of the act of July 27, 1868, and hence a citizen of *Switzerland* may maintain an action for the proceeds of captured property. *Lobsiger v. U. S.*, 5 Ct. of Cl. 687.

By the written laws and precedents of *France*, a French subject has the right to sue the French government for real and personal property, and the right of an American citizen to sue the French government is exactly the same as that enjoyed by French citizens, subject only to giving *judicatum solvi*. *Rothschild v. U. S.*, 6 Ct. of Cl. 204; *Dauphin v. U. S.*, 6 Ct. of Cl. 221.

Claims under this act cannot be assigned, so as to enable the assignee to bring suit in his own name in the court of claims.¹

Under this act suits may be brought by partners and joint owners;² and also by married women, when they are allowed by the laws of the state to hold and sue for property.³

3. Effect on Courts of Justice.—Where a country is overrun by the enemy, war often results in suspending the operation of the courts of justice or in closing them entirely.⁴

1. An assignment or transfer of the claim, executed before a judgment is recorded, is void. *Cote v. U. S.*, 3 Ct. of Cl. 64.

The ownership claimed and required to be proved, is that which existed at the time when the property in question was captured; and an assignee of a claim for the proceeds of such property is not entitled to sue for the same in the court of claims. *U. S. v. Gillis*, 95 U. S. 407.

But this rule applies only to cases of voluntary assignments. The claim against the government constitutes property and passes to an assignee in bankruptcy. *Erwin v. U. S.*, 97 U. S. 392.

2. Joint owners may maintain separate actions for their separate shares in the proceeds of property; but a joint owner can recover only his proportionate share, and gains nothing by the fact that the other owners do not claim the balance. *Fain v. U. S.*, 4 Ct. of Cl. 237. And where property belonging to two owners is partially burned, one cannot disclaim in favor of the other, and the claimant can only recover his proportion of the part saved. *O'Keefe v. U. S.*, 5 Ct. of Cl. 674.

A joint owner cannot maintain a separate action without proof of the extent of his interest. *Headman v. U. S.*, 5 Ct. of Cl. 640.

Where a joint action is brought by two, and one fails to establish his loyalty, judgment will be rendered in favor of the other to the extent of his interest. *Meldrim v. U. S.*, 7 Ct. of Cl. 595.

If an action is brought in the names of two, setting up a joint title, and the evidence indicates that only one of the parties is entitled to the proceeds, yet if he verifies the petition presenting the joint title, judgment will be rendered accordingly, and not for him individually. *Richmond v. U. S.*, 7 Ct. of Cl. 533.

Partners before the war, the one re-

siding in New York and the other in Mobile, are joint owners and entitled to the proceeds of cotton bought by the Mobile partner, with partnership funds, during the war. *Miller v. U. S.*, 4 Ct. of Cl. 288. And see *Douglas v. U. S.*, 14 Ct. of Cl. 1.

Property bought by the managing partner with his own funds, in the name of a firm, after the dissolution of the firm and while its affairs are in process of liquidation, belongs to such partner, who may sue for the proceeds in his individual name. *Lowe v. U. S.*, 7 Ct. of Cl. 515.

3. Husband and Wife.—The right of the wife to sue for the proceeds of captured or abandoned property, will depend upon the laws of the different states governing the wife's property rights. See *Benton v. U. S.*, 5 Ct. of Cl. 692; *Foley v. U. S.*, 7 Ct. of Cl. 449; *Roddin v. U. S.*, 6 Ct. of Cl. 308; *Green v. U. S.*, 7 Ct. of Cl. 496; *Mount v. U. S.*, 11 Ct. of Cl. 509; *Meriwether v. U. S.*, 13 Ct. of Cl. 259; *Reilly v. U. S.*, 7 Ct. of Cl. 504; *Sykes v. U. S.*, 8 Ct. of Cl. 330; *Thomas v. U. S.*, 11 Ct. of Cl. 722; *Stanton v. U. S.*, 4 Ct. of Cl. 456.

4. As we have seen, one of the definitions of war is a time "when the peaceable course of justice is disturbed and stopped, so that the courts of justice be, as it were, shut up." *Mayfield v. Richards*, 115 U. S. 137. See *supra*, this title, *Definition*.

An administrator, who had qualified in a county, was not held liable for failing to sue in such county during the late civil war, in cases in which he knew there would be defenses, there having been but one court held in the county during the war, the enemy either encamping or passing through it constantly. *Lacy v. Stampfer*, 27 Gratt. (Va.) 42.

During the civil war, when a portion of the Confederate States was in the occupation of the forces of the *United States*, the municipal laws, if not sus-

V. CONQUEST AND BELLIGERENT OCCUPATION.—The laws of war authorize the conquering power to organize and establish government over the people of the country conquered and occupied by it.¹

pendent or superseded, were generally administered there by the ordinary tribunals, for the protection and benefit of persons not in the military service. *Dow v. Johnson*, 100 U. S. 158.

But the probate of wills, and the grant of letters of administration, by the probate courts of a state, during the late civil war between the states, is perfectly legal and valid. *Allen v. Kellam*, 69 Ala. 442; *Nelson v. Boynton*, 54 Ala. 368.

Where, during the late civil war, upon the abandonment by the Confederates of a certain county, the clerk of the county court went with them, taking with him all or the greater part of the records of his office, and immediately thereafter the county passed into the actual possession and under the control of the *United States* troops, and so continued until they were driven out some four months thereafter, the clerk all that time remaining within the confederate lines, it was held that no one residing in the county within the federal lines could, as deputy of such clerk, conduct the business of the clerk's office, for, or in the name of such clerk, while he remained within the confederate lines, and the acts of any one making such attempt were void. *Herring v. Lee*, 22 W. Va. 661.

1. *Isbell v. Farris*, 5 Coldw. (Tenn.) 426; *Hefferman v. Porter*, 9 Am. L. Reg. N. S. 41; *Cross v. Harrison*, 16 How. (U. S.) 164; *U. S. v. Reiter*, 4 Am. L. Reg. N. S. 534.

The belligerent occupation imports an established possession of the country, so that the occupying power can execute its will either by force or by the acquiescence of the people for an indefinite period, subject only to the fluctuations and chances of war; it also implies that while war continues, the occupying power is not the permanent civil action. *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719.

The occupying sovereign may establish such laws of its own, and recognize only such laws of the subdued country as it sees fit. The private relations of the people, however, the ordinary laws of contract, and the rights of property, remain unchanged,

except so far as they may conflict with any regulations which the occupying authority may ordain. Duties and tonnage for the support of the temporary government are usually levied. If the conquest and occupation be temporary, the government so established ends with the restoration of peace. By the modern usage of nations, it is unusual for the conqueror to do more than to displace the sovereign and to assume dominion over the country. *U. S. v. Rice*, 4 Wheat. (U. S.) 246; *U. S. v. Percheman*, 7 Pet. (U. S.) 51; *Leitensdorfer v. Webb*, 20 How. (U. S.) 176; *Coleman v. Tennessee*, 97 U. S. 509; *Cross v. Harrison*, 16 How. (U. S.) 164. See also *Wheaton on Int. L.* (8th ed.), p. 432, n.

The laws and government in force at the time of the conquest remain in force until altered by the conqueror. *Hawkins v. Filkins*, 24 Ark. 286. And during the civil war, when any portion of the southern states was in the occupation of the forces of the *United States*, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service. *Dow v. Johnson*, 100 U. S. 158.

In times of civil war, the conquering power has the right, under the laws of war, to dispossess the legally constituted officers in the conquered territory, and appoint others in their stead, whose acts within the sphere of their authority, are valid and binding. *State v. Hall*, 6 Baxt. (Tenn.) 3. And so long as the late civil war lasted, the President of the *United States* could institute temporary governments within hostile territory occupied by federal troops. *Texas v. White*, 7 Wall. (U. S.) 700.

It was within the President's constitutional authority, as commander in chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the state and of the *United States*. *The Grapeshot v. Wallerstein*, 9 Wall. (U. S.) 129.

But where President Lincoln, at the close of the war, appointed a military

VI. MARTIAL LAW—1. Definition.—Martial law is the law of military necessity, administered by the general of the army during the actual presence of war; it is, in fact, his will.¹

governor for one of the former Confederate States, it was held that such appointment did not change the general laws of the state then in force for the settlement of the estates of deceased persons, nor remove from office those who were at the time charged with public duties in that behalf. *Ketcham v. Buckley*, 99 U. S. 188. And a special order, issued by an officer in command of the federal forces in *South Carolina*, wholly annulling a decree rendered by a court of chancery in that state in a case within its jurisdiction, was held void. *Raymond v. Thomas*, 91 U. S. 712.

A commander of a military district has no authority, as such, to issue an order to the sheriff of a county requiring him to place a person in possession of a plantation and personal property, which were at the time in possession of another person. *Whalen v. Sheridan*, 17 Blatchf. (U. S.) 9.

The orders of such commanders, relating to the administration of civil affairs, have no further efficacy than such as they draw from the superior force which upholds them. *Varner v. Arnold*, 83 N. Car. 206.

But while the belligerent's territory is occupied by an invading force, the military commander may establish such regulations as serve his ends. He may forbid the inhabitants from passing beyond his lines, and enforce his orders by military penalties. *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594.

Pending the existence of a civil war, any government that may arise, capable of enforcing obedience, is entitled to exact it, and no person, under the sway of such government, can be prejudiced in any manner for yielding it obedience. *Lay v. O'Neil*, 29 La. Ann. 722.

When a state is not able to protect its citizens, its claim to their allegiance is suspended, and their fealty becomes due to the occupying power, and they cannot afterward be punished for acquiescing in its authority. *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719.

An island in the temporary occupation of an enemy is to be deemed an enemy's colony. Thirty Hogsheads of Sugar *v. Boyle*, 9 Cranch (U. S.) 191.

During the military occupation of Castine by the British, it was deemed a foreign country so far as the execution of the revenue laws was concerned, and it was held that goods imported from *England* during such occupancy could not, after its evacuation by the enemy and the resumption of authority by the *United States*, be compelled to pay duty. *U. S. v. Rice*, 4 Wheat. (U. S.) 246.

But *Tampico, Mexico*, did not become a part of the *United States* by its conquest and occupancy by her troops during the Mexican war, and goods imported into the *United States* during such occupancy had to pay duty. *Fleming v. Page*, 9 How. (U. S.) 603.

1. Waite, C. J., in *U. S. v. Diekelman*, 92 U. S. 520; *Anderson's L. Dict.*

Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observed, in truth and reality no law, but something indulged rather than allowed as law. The necessity of order and discipline in an army is the only thing which can give it countenance, and, therefore, it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the law of the land. 1 Bl. Com. 413.

Strictly, there is no such thing as martial law, it is martial rule, that is to say, the will of the commanding officer, and nothing more, nothing less, exercised by him only on his responsibility to his government, or superior officer. *Johnson v. Jones*, 44 Ill. 142; 92 Am. Dec. 159. See also *Ex p. Milligan*, 4 Wall. (U. S.) 35. It is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or superior executive ruler. *Hansard's Parl. Debate* (3d Series), vol. 95, p. 86; 8 Op. of Atty. Gen.'s 367.

In *Re Egan*, 5 Blatchf. (U. S.) 319, it is said that "All respectable writers and publicists agree in the definition of martial law, that it is neither more nor less than the will of the general who commands the army. It overrides and

2. Declaration of.—The right to declare, apply, and enforce martial law is, like the power to declare war, a sovereign power,¹ properly residing in the legislature,² but which, it has been said, may be exercised by the executive when and where the civil power is suspended by force, though in such cases only. In all other times and places the civil power is supreme and excludes martial law—excludes government by the war power.³

suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power; and every citizen or subject, in other words, the entire population of the country within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty, and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is a legislator, judge, and executioner. His order to the provost marshal is the beginning and the end of the trial and the condemnation of the accused. There may be a hearing or not, at his will. If permitted, it may be before a drumhead court-martial, or the more formal board of a military commission, or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious."

Distinct From Military Law.—Martial law exists during the time, and upon the scene, of active military operations; it is the law governing all persons within the territory covered, and supersedes all civil law conflicting with it. Military law is the general law of the land applicable to persons and affairs connected with the military service, in time of peace as well as war. Black's L. Dict.

Military law, as distinguished from martial law, consists of the rules prescribed for the government and discipline of troops, which apply only to persons in the military or naval service of the government, whereas martial law, when once established, applies alike to citizen and soldier. *Johnson v. Jones*, 44 Ill. 142; 92 Am. Dec. 159.

1. Halleck's International Law and Laws of War, p. 373.

2. *Johnson v. Duncan*, 3 Martin (La.) 530; 6 Am. Dec. 675.

And in 1842, the legislature of *Rhode Island* declared the state under martial law. In *Luther v. Borden*, 7 How. (U. S.) 1, Taney, C. J., in delivering the

opinion of the court, said: "In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a state. Unquestionably, a military government established as a permanent government of the state would not be a republican government, and it would be the duty of Congress to overthrow it, but the law of *Rhode Island* evidently contemplated no such government. It was intended merely for the crisis, to meet the peril under which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities, and unquestionably a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authorities. The power is essential to the existence of every government; essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands, and if the government of *Rhode Island* deemed the armed opposition so formidable, so ramified throughout the state, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and to overcome the opposition."

In *Griffin v. Wilcox*, 21 Ind. 370, it is said that one cannot, without act of congress, be subjected to martial law, except upon necessity occasioned by force actually existing, or immediately threatened at the time and place where martial law is exercised.

3. The right temporarily and locally to exercise martial law, in case of necessity, is the war power of the governor of a state and of the President of the

WAREHOUSE AND WAREHOUSEMAN.—See ACCESSION, vol. 1, p. 54; CARRIERS OF GOODS, vol. 2, pp. 784, 878; DEBTOR AND CREDITOR, vol. 5, p. 194; DOCK WARRANTS, vol. 5, p. 852; EXPRESS COMPANIES, vol. 7, p. 562; FORWARDING MERCHANTS, vol. 8, p. 573; MARITIME LIENS, vol. 14, p. 434.

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I. DEFINITION.—A warehouse is a building or place provided for the receipt and storage of property.¹ A warehouseman is a

United States, and it is all the war power that either possesses, by virtue of which he can assume to govern independently of civil law; and this war power each executive usually exerts through his subordinate military officers. *Griffin v. Wilcox*, 21 Ind. 370.

In *Re Kemp*, 16 Wis. 382, Cole, J., said: "Undoubtedly the President or any general under him may, when it is deemed necessary for the successful prosecution of military operation, declare martial law over the rebellious states, or other districts in a state of war, and within those limits subject all persons and things to its operation. In places where hostilities exist, the military authority often declares the martial law, which, during its continuance, supersedes and puts in abeyance all civil authority. This is of frequent occurrence and is a legitimate exercise of the war power."

In *Johnson v. Jones*, 44 Ill. 142; 92 Am. Dec. 159, the court said that in this case it was unnecessary to decide whether the right to declare martial law belonged to the President as commander in chief of the army, or whether he must receive authority from Con-

gress. But it was also said that "The power to thus arrest being once conceded, every man in the state, from the governor down to the humblest citizen, would hold his liberty at the mercy of the military officer in command. For it is to be borne in mind that this power is not one to be exercised only by the highest officers of the government, in whose hands it might be exercised with moderation. It is claimed for the President as commander in chief, and as incident to a state of war. But if it exists at all, it exists as a law of war, or martial law, and may be exercised by the military officer in command of any district, without reference to his rank, as rightfully as by the President himself. He might be afraid to exercise it without orders from his superior, but if it exists at all, it belongs to him as well as to the President."

1. *Titsworth v. Winnegar*, 51 Barb. (N. Y.) 153; *Watson v. Cotton*, 5 C. B. 51; 57 E. C. L. 50; *Ray v. Edmundson*, 2 El. & El. 77.

In *Owen v. Boyle*, 22 Me. 47, the court said: "The building or apartment, where the salt was stored, was used and appropriated by the occu-

person who receives goods and merchandise, to be stored in his warehouse for hire.¹

1. Public Warehouse.—In some states, although a warehouse or elevator is considered private property, yet, as it is a connecting link between great water and land carriers, it is regarded as for public use, and as having a public trust attached to it;² hence, such a warehouseman cannot discriminate between customers,³ and the lease of a public wharf to him is not void as a

pant, not for the deposit and safekeeping or selling of his own goods, but for the purpose of storing the goods of others, placed there in the regular course of commercial dealing and trade, to be again removed or re-shipped, and the building or apartment had acquired the character of a warehouse."

In *Reg. v. Hill*, 2 M. & R. 458, "the prisoners were indicted under the statute (7 & 8 Geo. IV., ch. 29, § 15), for breaking and entering a 'warehouse.'" It appeared that the prosecutor occupied a shop. In a cellar, under the shop, he kept such goods as he had not at the time occasion to expose for sale in his shop, and the goods stolen were in that cellar. There was no inner communication between the house and the cellar, but the cellar was entered by a stairway from the street. It was objected for the prisoners that such cellar was not a warehouse under the statute. Rolfe, B., said: "A warehouse, in common parlance, certainly meant a place where a man stowed, or kept, his goods, which were not immediately wanted for sale, and there was no reason to suppose that the legislature used the term in this statute in a sense repugnant to its ordinary meaning." But see *Rex v. Godfrey*, 1 Leach 287.

The terms "warehouse" and "storehouse," as used in the *Kentucky* Gen. Stat., ch. 29, art. 6, § 4, mean any house, not an office or a shop, or a room in a steamboat, or other boat, in which goods, wares, and merchandise are usually deposited for safe-keeping or for sale." *Ray v. Com.*, 12 Bush (Ky.) 397. A granary was here held to be a warehouse. And see also *Rex v. Godfrey*, 1 Leach 287; *Rex v. Amos*, F. & M. 425.

Stock-Yards.—The business of a stock-yard corporation, except in the character of the property which is the subject of bailment, corresponds with the business of warehousemen, who cannot have the possession of another's

property forced on them against their will. *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 46 N. J. Eq. 280.

1. Bouviers's Law Dict. One doing business in an elevator and its appurtenances, as storing grain therein for compensation, is a warehouseman under the laws of *Illinois*. *National Bank v. Langan*, 28 Ill. App. 401.

2. Under a *Virginia* statute providing that if any warehouse established by law should not, for three successive years, receive income enough to pay expenses it should be discontinued, it was held that such a warehouse was not discontinued *ipso facto*, if in fact kept up, and if inspectors continued to be appointed; so that in case of the burning of such warehouse the commonwealth was liable under the statute to the owners of goods stored therein. *Auditor v. Dugger*, 3 Leigh (Va.) 241.

In *Lane v. Kasey*, 1 Metc. (Ky.) 410, it was held that a warehouseman in Louisville, who closed his warehouse without giving sixty days' written notice to the city council, was liable on a bond given under the *Kentucky* act of 1852, for any injury resulting from the act of closing.

3. In *Nash v. Page*, 80 Ky. 539; 44 Am. Rep. 490, the court said: "When he undertakes to sell at public auction, and to conduct the business as a public warehouseman, he assumes an obligation to serve the entire public, and has no right to select his own bidders, or to refuse to receive the tobacco of the producer when shipped to him. This obligation exists not only by reason of the statute, but under the rule of the common law. We perceive no difference between this character of warehouse and that of wine warehouses, or grain warehouses; and the rule applied to the latter required them to discharge the duty of receiving the wine and grain shipped to them by the owner. This is the first time in the

use of public property for private purposes,¹ and the legislature has a right to regulate his charges for storage;² but the business is not so far public that a combination of warehousemen to raise the price of storage is, in itself, contrary to public policy and void.³

In some states, statutes declare that a public warehouse is one where grain is stored in bulk or mixed,⁴ and a private warehouse is one where each person's grain is kept apart, stored in a separate bin.⁵

2. Bonded Warehouses.—Bonded warehouses are such warehouses as are designated by the Secretary of the Treasury of the *United States* for the storage of merchandise imported into the *United States* until such time as the customs duties thereon shall be paid. Any merchandise so deposited may be withdrawn at any time within one year from the time of importation, on payment of duties and charges, and after one year and until the expiration of three years on such payment and ten per centum additional. After three years the merchandise is regarded as abandoned to the government and may be sold. Such warehouses are generally private warehouses; a customs officer is delegated, who, with the owner of the warehouse, has joint custody of all merchandise stored therein.⁶ The government, however, assumes no responsibility

history of the state that warehousemen, controlled and regulated in their business by legislation, have asserted their right to select their customers, including both the producer and the buyer." See *Allnutt v. Inglis*, 12 East 527.

Duty to Receive Goods.—Public warehousemen must receive all grain offered for storage without discrimination. *Indiana Rev. Stat.*, § 6527. So, also, by statute in *Illinois*, *Kentucky* and *Minnesota*.

"There can be no doubt, I think, that a warehouseman is not required, by any general rule of law, to receive goods on storage against his will. . . . This must be so from the very nature of such transactions, for all bailments, not made by force of statutory regulation, rest in contract, and no contract can exist without consent, express or implied." *Van Fleet, V. C.*, in *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 45 N. J. Eq. 50.

Public Millers.—See *Wallace v. Canaday*, 4 Sneed (Tenn.) 364; 70 Am. Dec. 250.

A public warehouseman, for the public sale and purchase of tobacco, cannot refuse to receive the tobacco of the producer when shipped to him, nor refuse to sell it at auction, nor deny the right of any one to bid. He cannot

escape his liability by advertising that he has withdrawn from business as a warehouseman, and is conducting the same business as a commission merchant. *Nash v. Page*, 80 Ky. 539; 44 Am. Rep. 490.

1. *Belcher's Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192.

2. *Munn v. Illinois*, 94 U. S. 113.

3. *Ladd v. Southern Cotton Press Mfg. Co.*, 53 Tex. 172; *Seeligson v. Taylor Compress Co.*, 56 Tex. 219.

4. *Indiana Rev. Stat.*, § 6526. See also the statutes of *Illinois*, *Minnesota*, *Kansas*, *Kentucky*, *Maine*, *Connecticut*, *Tennessee*, and *Dakota*.

"Article XIII, title 'Warehouses,' of the *Illinois* Constitution of 1871, declares that, 'All elevators or storehouses where grain or other property is stored for compensation, whether the property stored be kept separate or not, are declared to be public warehouses.'" *National Bank v. Langan*, 28 Ill. App. 401.

5. **Private Warehouse.**—*Kansas Comp. Laws*, ch. 23, § 151. Termed class B in *Indiana* and class C in *Illinois*.

In *Minnesota*, *Kentucky*, and *Oregon* no warehouseman can mix different qualities or grades of produce together.

6. *United States Rev. Stat.*, § 2954-3008.

for the safe-keeping of the merchandise,¹ although the goods are deemed to be in its possession,² but the owner of the warehouse is held to the same degree of diligence as though the government exercised no control,³ and in case of danger of the destruction of the goods in the warehouse, he is justified in removing them, although removal without payment of duty is forbidden by the statute of the *United States*.⁴

II. DUTY OF WAREHOUSEMAN—1. As to the Warehouse—*a*. CARE OF THE PREMISES.—It is the duty of the warehouseman to keep his premises and the approaches thereto, and appliances thereof,

Under the act of Congress, no person can keep a storehouse for dutiable goods, except by appointment of the Secretary of the Treasury, and such appointment is revocable. And the government may require a person, who is allowed to use his private warehouse for such storage of dutiable goods, to pay the salary of an inspector there. *Corkle v. Maxwell*, 3 Blatchf. (U. S.) 413.

1. The establishment of such warehouses was an experiment, on the part of the government, for the benefit of those whose convenience or interest might be promoted by permitting their goods to remain in bond after the duties due the government were paid; beyond the duties due to the government, it had no interest in the preservation of the property; all else belonged to the importer or owner, and the warehousemen who had a lien upon them for storage. *Schwerin v. McKie*, 51 N. Y. 180; 10 Am. Rep. 581.

The custody which the officers of customs have of goods in a bonded warehouse is not a possession, but rather a restraint upon removal, vested in the government to secure payment of duties, while the possession is in the person who placed them there, or in the owner of the warehouse as his agent. *Cartwright v. Wilmerding*, 24 N. Y. 521.

If, however, goods are lost through the personal negligence of the collector, he is responsible. *Brissac v. Lawrence*, 2 Blatchf. (U. S.) 121. And see *Minturn v. U. S.*, 106 U. S. 437; *Robertson v. Sichel*, 127 U. S. 507.

2. Goods in a bonded warehouse on which the duties have not been paid, are in the possession of the *United States*, and an order by their owner for their delivery by the warehouseman, even though accepted by the warehouseman, will not be good as a constructive delivery, nor constitute a

receipt or acceptance of the goods sufficient to satisfy the Statute of Frauds. *In re Clifford*, 2 Sawy. (U. S.) 428.

3. *Clafin v. Meyer*, 43 N. Y. Super. Ct. 1; 75 N. Y. 260; 31 Am. Rep. 467; *Fairfax v. New York Cent. R. Co.*, 43 N. Y. Super. Ct. 18.

"Without referring in detail to the laws of Congress regulating the rights, duties, and powers of keepers of bonded warehouses, we hold that the appointment by the Internal Revenue Department of storekeepers who are invested with the joint custody with the warehousemen, of the warehouses and the goods stored therein, does not lessen in any degree the diligence which the latter, as bailees for hire, are by the general laws required to exercise to prevent fire from being communicated to their houses or to the goods in their custody. The right of the storekeeper to ingress into the warehouse, for the discharge of certain duties imposed upon him by law, does not exonerate the warehouseman from the use of at least ordinary diligence in preventing the goods stored therein from being damaged or destroyed by the recklessness or carelessness of that officer." *Macklin v. Frazier*, 9 Bush (Ky.) 3.

4. "That appellant might have disregarded this provision of the law, and that it was his duty to do so when its observance would inevitably result in the destruction of the property intrusted to his care, we do not doubt; but it must be borne in mind that the necessity which will excuse or warrant the violation of the law, must be of that character which ordinary energy and intrepidity cannot resist and overcome; and so long as appellant had reason to believe that the fire could and would be extinguished by the means at hand, which were being used for that purpose without damage to the whisky, he would not have been excusable for

reasonably safe for the use of all persons visiting them on business or on an invitation, express or implied, and he is liable for any injury occurring from any defect in the premises or appliances, to any person not guilty of contributory negligence.¹

b. PLACE OF STORAGE.—It is the duty of the warehouseman to furnish a building which shall be reasonably fit and safe for storage, and if the building proves unsafe and property stored therein is damaged, the warehouseman will be held liable for the loss, unless the defect was one of which he did not know, and could not have discovered by the use of ordinary care.² If the warehouseman agrees to store property received by him, in a fire-proof building, he will be liable for any loss by reason of its not

the violation of the statute in question by the removal of the whisky." *Macklin v. Frazier*, 9 Bush (Ky.) 3.

1. *Buckingham v. Fisher*, 70 Ill. 121; *Parker v. Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262; *Pittsburgh v. Grier*, 22 Pa. St. 54; 60 Am. Dec. 65; *Nave v. Flack*, 90 Ind. 205; 46 Am. Rep. 205; *Donaldson v. Wilson*, 60 Mich. 86; 1 Am. St. Rep. 487 and note; *Welch v. McAllister*, 15 Mo. App. 492; *Hotel Assoc. v. Walter*, 23 Neb. 280; *Ackert v. Lansing*, 59 N. Y. 646; *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175; *Dobiecki v. Sharp*, 88 N. Y. 203; *Freer v. Cameron*, 4 Rich. (S. Car.) 228; 55 Am. Dec. 663; *Atlanta, etc., Oil Mills v. Coffey*, 80 Ga. 145; 12 Am. St. Rep. 244; *Lyme Regis v. Henley*, 3 B. & Ad. 92; 23 E. C. L. 32.

One erecting a building expecting to rent it as a warehouse, and knowing that in such case a strong building would be needed, suitable for heavy storage, and knowing after its completion that there were defects in it which unfitted it for the designated purpose, who leases it for warehouse purposes, yet does not stipulate in his lease against its being used for heavy storage, is liable in damages to an employee of the lessee, who, while attending to his proper business therein, is injured by the fall of the building. *Godley v. Hagerty*, 20 Pa. St. 387; 59 Am. Dec. 731.

In *Wendell v. Baxter*, 12 Gray (Mass.) 494, the court said: "They were legally bound to exercise at least ordinary diligence to keep their wharf safe for those who had a right to pass over it. . . . It has been argued for the defendants, that if they were legally bound to keep their wharf in repair, they were so bound only in favor of those with whom they, as

owners, contracted or dealt, and that they had no contract with the plaintiff. But the plaintiff's right of action arises from the duty which the law imposed on the defendants to keep their wharf safe, so long as they should permit it to be open and used, and not from any contract between them and him."

"The plaintiff was a wharfinger and warehouseman, and by holding himself out to the public as such, extended a license to enter upon his premises, to all persons having occasion to do so in connection with that business. His employment, however, was a merely private one; he was under no legal obligation to allow the use of his wharf or warehouse to every person applying, even if he had suitable accommodations, and a reasonable reward was offered him; but he might limit the general license, or terminate it, in the case of any particular persons, by giving them notice not to come on the premises." *Bogert v. Haight*, 20 Barb. (N. Y.) 251.

A private warehouseman and wharfinger is not under any specific legal duty to place guards on the wharf to prevent teams from falling into the water, or to provide places for hitching horses at his warehouse, and is not liable for an injury growing out of the want of such provision being made. *Buckingham v. Fisher*, 70 Ill. 121.

2. *Moulton v. Phillips*, 10 R. I. 218; 14 Am. Rep. 663; *Walden v. Finch*, 70 Pa. St. 460.

In *Hickey v. Morrell*, 102 N. Y. 454; 55 Am. Rep. 824, reversing the decision below in 12 Daly (N. Y.) 482, it was held that a statement by the owner of a storage warehouse that the building was fireproof, was not an expression of opinion, but a statement of a fact, which might render him liable for

being so deposited;¹ but the bailor by acts, as well as by words, may assent to the storing of his goods in a house of material and structure different from what the contract contemplated.² The warehouseman may be liable for any loss to the goods if he removes them to another place of storage without the consent of the owner or bailor,³ and it is his duty to deposit

the loss of goods stored in reliance on such representation.

In *Hallock v. Mallett*, 55 N. Y. Super. Ct. 265, in an action for damages for breach of an alleged warranty that a certain warehouse was "frost proof," it was held that proof of statements by the owner that the warehouse was free and safe from frost, and that there was no danger of the freezing of bulbs that were to be stored there, was not sufficient to show such a warranty, and that it was error to charge that, if the warehouseman stated that his warehouse was as frost proof as brick, iron, and mortar could reasonably be expected to make it, the warehouse not being in fact frost proof to this extent, the plaintiff was entitled to recover, because such a statement was plainly an opinion and not a warranty. The court in this case referred to *Hickey v. Morrell*, 102 N. Y. 463, cited above, and distinguished the cases.

In *Newby v. Sharpe*, 38 L. T. N. S. 583; 18 Alb. J. L. 23, the defendant leased the basement of a warehouse, the rest of which was leased to others, for the storage of gunpowder, with liberty to store cartridges, and covenanted to keep the premises in condition for the storage of cartridges; he also covenanted for quiet enjoyment. Soon after a statute was passed forbidding the storage of cartridges in the same building with gunpowder. The defendant at once removed the cartridges, against the will of the lessee. It was held that the defendant was under no liability, under his covenants, to make the storing of cartridges legal. The case is an illustration of the principle that there is no implied warranty that the leased premises shall be fitted for the purposes for which they were leased, or that they will continue so. See *Sutton v. Temple*, 12 M. & W. 52; *Ersine v. Adeane*, 29 L. T. N. S. 234.

1. Fireproof Warehouses.—*Vincent v. Rather*, 31 Tex. 77; 98 Am. Dec. 516; *Hamilton v. Elstner*, 24 La. Ann. 455.

An agreement to store cotton in a fireproof warehouse does not devolve on the warehouseman the necessity of pro-

viding water and buckets for the extinguishment of fire, there being no such terms in the contract, or custom among warehousemen. *Jones v. Hatchett*, 14 Ala. 743.

In support of a claim against a warehouseman, for the loss of cotton destroyed by fire in his warehouse, it may be shown by his advertisements, receipts, and declarations, that the house was to be fireproof. *Hatchett v. Gibson*, 13 Ala. 587.

The law does not require a warehouseman to construct his buildings secure from all possible contingencies. If they are reasonably and ordinarily safe against ordinary and common occurrences, it is sufficient. *Cowles v. Pointer*, 26 Miss. 253.

2. Hatchett v. Gibson, 13 Ala. 587; *Conway Bank v. American Express Co.*, 8 Allen (Mass.) 512; *Whitney v. Lee*, 8 Met. (Mass.) 91; *Mitchell v. Lancashire, etc., R. Co.*, L. R., 10 Q. B. 256; *Searle v. Laverick, L. R.*, 9 Q. B. 122; *Harper v. Jones*, 4 Vict. L. R. L. (Australia) 536; *Brandon v. Gulf City, etc., Mfg. Co.*, 51 Tex. 121.

"When the bailor or depositor not only knows the general character and habits of the bailee or depositary, but the place where and the manner in which the goods deposited are to be kept by him, he must be presumed to assent, in advance, that his goods shall be thus treated; and if under such circumstances they are damaged or lost, it is by reason of his own fault or folly. He should not have intrusted them with such a depositary to be kept in such a manner and place." *Knowles v. Atlantic, etc., R. Co.*, 38 Me. 55; 41 Am. Dec. 234.

Under a contract of bailment for mutual benefit, the bailee may show that the bailor approved of the place of storage, and that the goods were damp when delivered, and liable to mildew; and the bailor, that the goods were in the ordinary trade condition, and that the bailee knew they should have been aired and dried. *Brown v. Hitchcock*, 28 Vt. 452.

3. St. Losky v. Davidson, 6 Cal. 643;

them in his warehouse as soon after the receipt thereof as is possible.¹

2. Reasonable Care—*a*. GENERAL RULE.—A warehouseman is responsible for the loss or destruction of, or for injury to, property intrusted to his care, only when he has failed to exercise due and ordinary care in the custody of the property.² What constitutes such care is a question of fact for the jury, to be judged

Lilley v. Doubleday, 7 Q. B. Div. 10; 51 L. J. Q. B. Div. 310; 44 L. T. N. S. 814.

Warehousemen received from the plaintiff, for storage, certain goods, she to bear the risk from fire; and she had the goods insured in the warehouse where they were. They agreed with her to give her notice when the goods were removed, so that she might have the insurance continued. They removed the goods, and failed to give her notice. By the removal the insurance became void. The goods were destroyed by fire. The defendants testified, but it was denied by the agent for the insurance company, that they informed such agent of the removal, and he promised to make the necessary change in the policy. It was held that, conceding the plaintiff might, when informed of this, after the fire, have adopted or ratified what the defendants so testified to, as an agreement by the insurer to continue the policy, she was not bound to do so, and that it was no defense to an action for neglecting to give notice of the removal. *Conover v. Wood*, 48 Minn. 438.

1. *Vincent v. Rather*, 31 Tex. 77; 98 Am. Dec. 516.

In *Burr v. Daugherty*, 21 Ark. 559, the defendant, a warehouseman, received salt on the sand bar of a river by agreement. It was held that he was bound to extraordinary diligence to remove it to a place of safety and preserve it from waste, and was liable for loss from a sudden rise in the river.

2. Story on Bailments (9th ed.), § 444; Edwards on the Law of Bailments 284; Angell on Carriers (5th ed.), § 45; Califf v. Danvers, 1 Peake N. P. 114; Finucane v. Small, 1 Esp. 315; Lamare v. London, etc., Docks Co., 39 L. T. 330; Batut v. Hartley, L. R., 7 Q. B. 594; Backus v. Start, 13 Fed. Rep. 69. *Alabama*.—Hatchett v. Gibson, 13 Ala. 587; Jones v. Hatchett, 14 Ala. 743; Moore v. Mobile, 1 Stew. (Ala.) 284.

New York.—Platt v. Hibbard, 7 Cow. 701.

(N. Y.) 497; Schmidt v. Blood, 9 Wend. (N. Y.) 268; 24 Am. Dec. 143; Knapp v. Curtis, 9 Wend. (N. Y.) 60; Foote v. Storrs, 2 Barb. (N. Y.) 326; Tittsworth v. Winnegar, 51 Barb. (N. Y.) 148; Bogert v. Haight, 20 Barb. (N. Y.) 251; Arent v. Squire, 1 Daly (N. Y.) 350; Claffin v. Meyer, 75 N. Y. 260; 31 Am. Rep. 467; Smith v. Simms, 51 How. Pr. (N. Y. C. Pl.) 305; Golden v. Romer, 20 Hun (N. Y.) 438.

Massachusetts.—Cass v. Boston, etc., R. Co., 14 Allen (Mass.) 448; Norway Plains Co. v. Boston, etc., R. Co., 1 Gray (Mass.) 263; 61 Am. Dec. 423; Nichols v. Smith, 115 Mass. 332; Lamb v. Western R. Co., 7 Allen (Mass.) 98.

Vermont.—Farmers', etc., Bank v. Champlain Trans. Co., 23 Vt. 211; 56 Am. Dec. 68; Brown v. Hitchcock, 28 Vt. 452; Blin v. Mayo, 10 Vt. 56; 33 Am. Dec. 175.

New Hampshire.—Brown v. Grand Trunk R. Co., 54 N. H. 535.

Rhode Island.—Moulton v. Phillips, 10 R. I. 218; 14 Am. Rep. 663.

Illinois.—Spangler v. Eicholtz, 25 Ill. 297; Myers v. Walker, 31 Ill. 353; Buckingham v. Fisher, 70 Ill. 121.

Louisiana.—McCullom v. Porter, 17 La. Ann. 89.

Missouri.—Ducker v. Barnett, 5 Mo. 97; Holtzclaw v. Duff, 27 Mo. 392.

Kentucky.—Macklin v. Frazier, 9 Bush (Ky.) 3.

North Carolina.—Neal v. Wilmington, etc., R. Co., 8 Jones (N. Car.) 482; McCombs v. North Carolina R. Co., 67 N. Car. 192.

Virginia.—Southern Express Co. v. McVeigh, 20 Gratt. (Va.) 264.

Tennessee.—Kremer v. Southern Express Co., 6 Coldw. (Tenn.) 356.

Mississippi.—Cowles v. Pointer, 26 Miss. 253.

Texas.—Vincent v. Rather, 31 Tex. 77; 98 Am. Dec. 516.

Wisconsin.—Dimmick v. Milwaukee, etc., R. Co., 18 Wis. 471; Pike v. Chicago, etc., R. Co., 40 Wis. 583.

Iowa.—State v. Stevenson, 52 Iowa

of by them with reference to all the circumstances,¹ and especially with reference to the degree of care which other persons engaged in similar business in the vicinity are in the habit of bestowing on property similarly situated.² The standard of ordinary

Indiana.—*Cincinnati, etc., R. Co. v. McCool*, 26 Ind. 140; *Reamer v. Davis*, 85 Ind. 201.

Ohio.—*Chase v. Washburn*, 1 Ohio St. 244; 55 Am. Dec. 623; *Taylor v. Secrist*, 2 Disney (Ohio) 299.

Pennsylvania.—*Eagle v. White*, 6 Whart. (Pa.) 505; 37 Am. Dec. 434; *Hemphill v. Chenie*, 6 W. & S. (Pa.) 62; *McCarthy v. New York, etc., R. Co.*, 30 Pa. St. 247; *Rodgers v. Stophel*, 32 Pa. St. 111; 72 Am. Dec. 775.

California.—*Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268. This is also the rule by statute in *California, Dakota, and Georgia*. See *Georgia Code*, § 2112.

1. In *Schwerin v. McKie*, 51 N. Y. 180; 10 Am. Rep. 581, the court said of the province of the jury: "In determining the means used in protecting goods stored against loss, they (the warehousemen) were not to occupy their time in endeavoring to find out in what form the highest exertion of the most acute intellect and experience would enable a man to devise means to protect goods in a warehouse against danger, but to determine what a man would do in the exercise of ordinary prudence to protect his property. They must be careful not to say at once, 'such and such things ought to have been done,' because they were suggested or then suggested themselves to them, but reflect what a merely ordinary prudent man would do in taking charge of property of this kind, and therefore to determine 'whether this warehouse was put in proper condition, such as a prudent man taking care of his own goods in his own warehouse would have put it, who guarded and cared for his own property.' 'If there is extra precaution that a prudent man would use as to fastenings, or as to the use of fence, watch dogs, or private watchmen outside, it was for them to say whether these were such things as a prudent man would use in ordinary cases, and whether the want of such safeguards, was the cause of the abstraction of the goods.'"

In an action against a warehouseman for the loss of goods by fire, evidence that the warehouse was filled with wool

in sacks, and paper stock in a ragged condition scattered loosely upon the floor; that some kind of oil was stored there, a portion of which had leaked out upon the floor; that much of the glass was broken out of the windows at one end of the building; that the most inflammable materials were stored in that end; that a locomotive engine passed over the track, twenty-five or thirty feet from said windows, about fifteen minutes before the fire was discovered, and that the fire caught at that end of the building, is evidence to be submitted to a jury of want of ordinary care on the part of the warehouseman. *Nichols v. Smith*, 115 Mass. 332.

Where a bailee, to store cotton for hire, permitted it to be with the roping off, the bagging torn, the cotton loose, and the under bales in the mud, whereby it was much injured, it was held that it was a want of ordinary care. *Morehead v. Brown*, 6 Jones (N. Car.) 367.

The keeping of a floating warehouse is an employment requiring skill, and the owner is liable for a less degree of negligence than the keeper of an ordinary warehouse; *e. g.*, if he receive on board goods on storage, and they are subsequently damaged by leakage which might have been prevented. *Hamilton v. Elstner*, 24 La. Ann. 455.

2. "The diligence required of a warehouseman is that which good and capable warehousemen are accustomed to show under similar circumstances. The utmost kind of diligence which the law requires or ought to require, aside from cases of special contract or confidence, in cases of bailment of the class immediately before us, is that which good business men, experienced and faithful in the particular department, are accustomed to exercise when in discharge of their duties. Applying this test to warehousemen, his duty is plain. He must erect a building, strong, fireproof, and watched, in proportion to the risks he is subject to, and the value of the goods with which he is likely to be intrusted, having, of course, in view the position in which his building is to stand, and his capacity of thus burdening himself without

care necessarily varies in different localities. One degree of diligence would be required for the city, and a less or greater for the country, depending on a great variety of circumstances;¹ so, one degree of diligence would be required for articles of value, or such as may be stolen easily or destroyed, and quite another for articles of bulk or of unimportant value.² A warehouseman is liable

incurring unjustifiable expense. To require more of him than this, would be to oppose an unnecessary obstacle to the easy transport of goods. For him to apply a less degree of diligence will render him liable for any losses which his laches in this respect may produce." Wharton on Negligence (2d ed.), § 573.

"The obligation of warehousemen to exercise ordinary care for the protection and safety of goods committed to their custody, depends upon and is co-extensive with actual and continued possession. If they lose that possession through any omission of the duty thus attaching to them in that relation, they are liable for all the consequences that ensue from it. On the other hand, if, without fault on their part, the property is taken from their possession, or lost by means for which they are not responsible, they are not required to go in pursuit of it, or to incur any expense of time, labor or money, in endeavoring to discover or regain it." Sessions v. Western R. Co., 16 Gray (Mass.) 132.

1. "The defendants offered to prove that there was exercised by them, in relation to this property, that care which other railroad corporations in Boston usually exercised in relation to such property. The court excluded this evidence, and on this ground the exceptions are well taken." Cass v. Boston, etc., R. Co., 14 Allen (Mass.) 448.

"For, as a matter of law, we do not think the failure to provide a night watch, or to have some person sleep in a depot situated as that of Boscobel was, in which the daily average value of property stored did not exceed \$500, as shown by the evidence, was ordinary negligence." Pike v. Chicago, etc., R. Co., 40 Wis. 583.

"The house is of the kind used by prudent men to store things of value. It is secured by fastenings appropriate to such buildings, is kept by an agent, who resides a short distance from it, and who closed it, by its fastenings, at all times, both night and day, when he

was absent from it. This satisfies the definition of ordinary care. There may be conditions of a city or other community, making a night watch a proper safeguard, but there is nothing in the previous general history of our country places, or in the proofs respecting this particular locality, which induces us to think that it was demanded there by the requirements of ordinary care." Neal v. Wilmington, etc., R. Co., 8 Jones (N. Car.) 482.

2. "It was the duty of the defendants to exercise ordinary care, skill, and diligence in preserving the hemp after it was taken from the cars; and in determining what is reasonable care, the nature of the commodity, its liability to injury from exposure to rain, the kind of weather at the time it arrived, the usual mode of storing or piling on the levee, and the ordinary manner of protecting such property out of doors, are circumstances to be considered by the jury; for what would be deemed ordinary care in reference to lead, pig iron or other articles of commerce not easily injured by exposure, would be gross negligence in reference to flour, grain, hemp, or other produce affected by dampness and requiring greater attention. When the plaintiffs delivered the hemp to the defendants, they had a right to expect that they would deal with it in good faith and take reasonable care of it, and they must answer for any loss the plaintiffs have sustained for the want of ordinary care on their part." Holtzclaw v. Duff, 27 Mo. 392.

In Platt v. Hibbard, 7 Cow. (N. Y.) 497, the judge charged the jury that liability "did not depend on the question, whether a prudent owner of the silks and other dry goods, would have left them in the storehouse exposed to thieves and without a guard. If there had been negligence in regard to these, the defendants might be answerable to the owner, unless he had agreed to leave them there at his own risk. On this branch of the case the question was, whether the potash and

for the negligence of his servants,¹ but only when they are acting in the regular course of their employment,² and he is also liable for the negligence of persons to whom he intrusts property.³

b. THEFT.—The warehouseman is not responsible for goods stolen from him, unless it appears that the theft was due to some lack of ordinary care on his part.⁴

corn were in probable danger from being left with the silks."

"There is not the slightest doubt that it was their duty, when the cotton bales, owing to the wet season, sank into the mud and water, to have them taken up and put in a drier place. For the neglect to do this, they were responsible as bailees independent of any contract to have the cotton covered over." *Morehead v. Brown, 6 Jones (N. Car.) 367.*

"It may be admitted that the degree of care required of a bailee is proportioned to the nature, intrinsic value, etc., of the article intrusted to his keeping. A man will not be expected to take the same care of a bag of oats, as of a bag of dollars; of a bail of cotton, as of a box of diamonds, or other jewelry; of a load of wood, as of a box of rare paintings; of a rude block of marble, as of an exquisite sculptured statue. The bailee, therefore, ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part, and to the watchfulness necessary to the preservation of the article. Hence, as dollars, jewelry, and fine paintings, present a greater temptation to the thief, and are more easily secreted, than oats, cotton, or wood; or a finished statue is more liable to injury than rough marble, a bailee should bestow more diligence in their safe-keeping. But the dictates of common sense would seem to require that the warehouseman, who receives cotton on deposit for a certain compensation, should be equally careful in preserving the crop of one who makes but a single bale, as that of him who makes a hundred. In respect to each of such bailors, he is bound to use ordinary diligence." *Hatchett v. Gibson, 13 Ala. 587.*

1. *Brind v. Dale, 8 C. & P. 207; 34 E. C. L. 355.*

2. "As the defendants furnished a suitable warehouse, properly secured, in which the goods were deposited, they had done their whole duty, until the time came when, upon reasonable notice of danger, an obligation should

arise to remove them. They were not chargeable with the negligence of any of their servants, unless it was negligence within the scope of the servant's employment. And a true test of this liability may be found in the question, Whether any one of the defendants' servants, who were present at the fire, would be answerable to his employers for a neglect of his duty? The answer to this question upon the evidence reported is perfectly plain. It was no part of the service for which either of them was engaged, to attend to the removal of goods from the freight house in case of a fire in the night. Neither of them was under any obligation, by reason of his employment, to rise in the night and be present at the fire. Neither of them had any custody, or responsibility, for the safety of the goods at that time. If they were under no obligation to be present, their voluntary attendance imposed upon them no legal liability for mere omission to do anything when on the spot." *Aldrich v. Boston, etc., R. Co., 100 Mass. 31; 1 Am. Rep. 76; 97 Am. Dec. 74.*

3. *Dufour v. Mephram, 31 Mo. 577.* As, for example, where he deposits property in the warehouse of another. *Alabama, etc., R. Co. v. Kidd, 35 Ala. 209.*

4. *Moore v. Mobile, 1 Stew. (Ala.) 284; Coggs v. Bernard, 2 Ld. Raym. 909; Vere v. Smith, 1 Vent. 121; Coke's Inst. 89a; 4 Rep. 83b; Lamb v. Western R. Co., 7 Allen (Mass.) 98; Cass v. Boston, etc., R. Co., 14 Allen (Mass.) 448; Clafin v. Meyer, 75 N. Y. 260; 31 Am. Rep. 467; Platt v. Hibbard, 7 Cow. (N. Y.) 497; Schmidt v. Blood, 9 Wend. (N. Y.) 268; 24 Am. Dec. 143; Williamson v. New York, etc., R. Co., 56 N. Y. Super. Ct. 508; Williams v. Holland, 22 How. Pr. (N. Y. C. Pl.) 137; Berry v. Marix, 16 La. Ann. 248.*

Where a railroad warehouse was locked, and a burglar entered through a grain-shoot and bored a hole in a barrel of whiskey and abstracted the contents. *Cincinnati, etc., R. Co. v. McCool, 26 Ind. 140.*

An express company is liable where

c. FIRE.—So the warehouseman is not liable for the destruction by fire of property stored with him, if he has been in the exercise of ordinary care.¹

its agent left money intrusted to it locked in a safe, but left the safe key where a burglar got it. It was held that the liability of the railroad company as a common carrier was terminated when the goods were discharged from the cars and stored in the warehouse, and, also, that as ordinary care was exercised in the keeping of the goods, the company was not liable for the loss. *American Express Co. v. Baldwin*, 26 Ill. 504; 79 Am. Dec. 389.

Where the thief entered by day and concealed himself, and stole during the night, this was considered evidence of want of care, although the warehouse was securely locked at night. *Madan v. Covert*, 42 N. Y. Super. Ct. 135; *affirmed* in 81 N. Y. 629.

Where the average value of goods stored does not exceed \$500, it is no evidence of negligence that no night watchman was hired. *Pike v. Chicago, etc., R. Co.*, 40 Wis. 583.

Where goods were deposited in a locked warehouse, the keeper of which lived two hundred yards away, it was held that the warehouseman was not responsible for goods stolen from the warehouse. *Neal v. Wilmington, etc., R. Co.*, 8 Jones (N. Car.) 482.

"Whether the storehouse in question was, in all respects, secured and watched as well as stores of the same description usually were, or whether they were as strongly secured, in the respects mentioned, as similar warehouses in Brooklyn, Jersey City, and Hoboken, did not establish the fact that goods in them were housed and protected as a man of ordinary prudence would, under the circumstances, have protected his own property. If the warehouse was as perfect and as well guarded as the dictates of common prudence would, under the circumstances, have suggested, and the defendant's goods were, notwithstanding, abstracted therefrom by burglars, it was entirely proper that the judge should, as he in substance did, instruct the jury that the evidence must be such that from it they could fairly assume that the goods were lost by that means." *Schwerin v. McKie*, 51 N. Y. 180; 10 Am. Rep. 581.

Presumption.—The law raises no presumption from the fact of theft. It

hears all the facts and then decides whether due care has been exercised. *Finucane v. Small*, 1 Esp. 315; *Butt v. Great Western R. Co.*, 11 C. B. 151; 73 E. C. L. 150.

But to exempt him from liability for loss of the goods, the warehouseman must do more than show that they might have been stolen by soldiers in the vicinity who were commonly believed to be thieving. *Thomas v. Darden*, 22 La. Ann. 413.

In an action to recover the value of goods held by the defendant as warehouseman, it was held that the failure of the defendant to deliver the goods threw upon the defendant the burden of accounting for them; and the goods having disappeared and the defendant failing to show how or when, or that they were lost without negligence on its part, it must answer to the plaintiff for their value. *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508. See, *contra*, that theft is presumptive evidence of want of care, *Jones on Bailments* 38-40, 43, 44, 66, 76-78, 109, 110, and note q, 119.

Where goods deposited with a warehouseman were stolen, and the depositor demanded payment for them from him, and he finally agreed to pay a less sum than that claimed, in settlement, but paid only a part of it, and suit was brought for the balance, it was immaterial to the issue that he was not originally liable as warehouseman, the suit being brought upon the compromise agreement. *Swem v. Green*, 9 Colo. 358.

1. *Gibson v. Hatchett*, 24 Ala. 201; *McCullom v. Porter*, 17 La. Ann. 89; *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263; 61 Am. Dec. 423; *Francis v. Dubuque, etc., R. Co.*, 25 Iowa 60; 95 Am. Dec. 769; *Russell v. Koehler*, 66 Ill. 459; *Francis v. Castleman*, 4 Bibb (Ky.) 282; *Irons v. Kentner*, 51 Iowa 88; 33 Am. Rep. 119.

A's goods were burned in a warehouse belonging to a railroad company. The fire broke out, not in the warehouse, but near by. Before the warehouse caught fire, A sought permission to remove his goods. Permission was refused on the ground that if the warehouse was opened other goods there might be stolen, and also because the

d. OTHER CASUALTIES.—The warehouseman is not liable for destruction of goods by rats, if he uses due care;¹ so there is no

company did not then think the warehouse in danger. The company had goods stored there of great value, and every effort was made to save the building, and finally to remove the goods. It was held that A had no right of action against the company. *Turrentine v. Wilmington, etc., R. Co.*, 100 N. Car. 375; 6 Am. St. Rep. 602.

"If the danger of fire from the oil mill was such that a reasonably prudent man would have considered it as affording a reason for not keeping his own property in a yard located as was that of the defendant, or if it was one of a number, and the surroundings, taken as a whole, made up a danger from fire, originating in and proceeding from the mill, too great to make the keeping of the cotton the act of a prudent man, then, though there were other circumstances more calculated to awaken alarm from which the fire did not arise, the cause is not too remote to be considered. But if the mill was not a cause of reasonable apprehension of a fire so originating or proceeding, either of and by itself, or taken in connection with other surroundings, the defendant would not be responsible for the result of an unexpected fire originating therein, merely because other and distinct circumstances from which no harm actually came admonished it of the danger of a fire." *Merchants' Wharf-boat Assoc. v. Wood*, 64 Miss. 661; 60 Am. Rep. 76. And see *Merchants' Wharf-boat Assoc. v. Smith* (Miss. 1887), 3 So. Rep. 249; *Merchants' Wharf-boat Assoc. v. Livingston* (Miss. 1887), 3 So. Rep. 251.

A railroad company, liable as a warehouseman, stored the plaintiff's goods in a wooden building, in which was also stored a lot of gunpowder. The building caught fire, the firemen were afraid to go near it, and the plaintiff's goods were burned. It was held that the company was liable for their value. *White v. Colorado Cent. R. Co.*, 3 McCrary (U. S.) 559.

In an action against a railroad, as warehousemen, for loss of grain and flour by fire, there was evidence that the flour was stored in sheds and the grain in an elevator. The sheds were of wood and not slated, and the shed where the fire started was only a few feet distant from a track where a wood-burning engine had passed shortly be-

fore the fire was discovered. The elevator was on a wharf more than two hundred feet from the sheds, the intervening space being covered with water. The fire took place in July in very dry weather. It was held that there was evidence for the jury that the flour in the sheds was burned through the defendants' negligence, but no evidence that the grain in the elevator was burned by such negligence. *Barron v. Eldredge*, 100 Mass. 455; 1 Am. Rep. 126.

In case of peril from fire at night, of such a character as ordinary energy and intrepidity cannot resist and overcome, it is the duty of a bonded warehouseman to violate the U. S. Act 1867, § 19, forbidding the removal of spirits after sunset and before sunrise, and use every effort to save the property in bond. *Macklin v. Frazier*, 9 Bush (Ky.) 3.

A warehouseman is not responsible for the neglect of his servants to remove goods from a warehouse on fire, when the fire occurs at night, and the servants are present merely as spectators and are not on duty. *Aldrich v. Boston, etc., R. Co.*, 100 Mass. 31; 1 Am. Rep. 76; 97 Am. Dec. 74.

If goods are injured by the negligence of the warehouseman, he is responsible, notwithstanding the fact that the goods are later wholly destroyed without his fault. *Powers v. Mitchell*, 3 Hill (N. Y.) 545. So, also, if the goods are not delivered when called for by the consignee, the warehouseman is responsible, if they are later destroyed by an accidental fire. *Stevens v. Boston, etc., R. Co.*, 1 Gray (Mass.) 277.

Where wheat was deposited for storage on an agreement to redeliver on demand, and the warehouseman sold and shipped it, it is no defense, when the warehouse was afterward burned, that there was wheat enough then on hand to satisfy the plaintiff's demand. *McGinn v. Butler*, 31 Iowa 160.

"No presumption of negligence arises from the destruction by fire of goods in the hands of a bailee for hire." *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586. See, for proximate cause of loss, *Deming v. Merchants' Cotton Press, etc., Co.*, 90 Tenn. 306.

1. *Edwards on Bailments* 295; *Story on Bailments* (9th ed.), § 444.

liability on his part if the goods are taken by superior force,¹ or are destroyed by inevitable casualty.²

III. BURDEN OF PROOF IN CASE OF LOSS.—The implied contract of the warehouseman, on receiving goods for storage, is not that he will, at all events, keep the goods safely, but that he will use ordinary diligence and care in keeping them. Unless, therefore, he fails to use such care, he has not broken his contract, and, therefore, the existence of negligence on the part of the defendant is an essential part of the plaintiff's case. He cannot ask the judgment of the court unless such negligence exists, and consequently the burden of proof is on him to establish such negligence.³ But while

The evidence on the trial was clear that every precaution was used to prevent the injury, even the constant presence of a "terrier dog." *Taylor v. Secrist*, 2 Disney (Ohio) 299. So keeping a cat. *Califf v. Danvers*, 1 Peake N. P. 155; *Garrigues v. Cox*, 1 Binn. (Pa.) 592; 2 Am. Dec. 493; *Aymar v. Astor*, 6 Cow. (N. Y.) 267; *Plaisted v. Boston*, etc., *Steam Nav. Co.*, 27 Me. 135; 46 Am. Dec. 587. *Contra*, *Laveroni v. Drury*, 16 Jur. 1024; 22 L. J. Exch. 2.

1. **Public Enemy.**—*Abraham v. Nunn*, 42 Ala. 51; *Yale v. Oliver*, 21 La. Ann. 454; *Babcock v. Murphy*, 20 La. Ann. 399; *McCranie v. Wood*, 24 La. Ann. 406; *Smith v. Frost*, 51 Ga. 336; *Waller v. Parker*, 5 Coldw. (Tenn.) 476. Thieves and tramps are not public enemies. *State v. Moore*, 74 Mo. 413; 41 Am. Rep. 322.

2. *Jones v. Gilmore*, 91 Pa. St. 310; *Knapp v. Curtis*, 9 Wend. (N. Y.) 60.

3. *Draper v. Delaware*, etc., *Canal Co.*, 118 N. Y. 118; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497, 500n; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; 24 Am. Dec. 143; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268; *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275; *Beckman v. Shouse*, 5 Rawle (Pa.) 179; *Clark v. Spence*, 10 Watts (Pa.) 335; *Smith v. First Nat. Bank*, 99 Mass. 605; 47 Am. Dec. 59; *Gay v. Bates*, 99 Mass. 263; *Lamb v. Western R. Co.*, 7 Allen (Mass.) 98; *Willett v. Rich*, 142 Mass. 336; 56 Am. Rep. 684; *Runyan v. Caldwell*, 7 Humph. (Tenn.) 134; *Browne v. Johnson*, 29 Tex. 40; *Cross v. Brown*, 41 N. H. 283; *Denton v. Chicago*, etc., *R. Co.*, 52 Iowa 161; 35 Am. Rep. 263; *Finucane v. Small*, 1 Esp. 315; *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 B. & C. 322; 11 E. C. L. 243; *Clay v. Willan*, 1 H.

Bl. 298; *Gilbart v. Dale*, 5 Al. & El. 543; 31 E. C. L. 393; *Midland R. Co. v. Bromley*, 17 C. B. 372; 84 E. C. L. 370.

"It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not, of course, intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner, by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is, in these cases, any real 'shifting' of the burden of proof. The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must, in all cases suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman." *Claflin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467.

"The complainant must show negligence. He proved a delay of the train, caused by breaking of machinery. It then devolved upon the carrier to show that this resulted from a latent defect or other cause sufficient to excuse it. Failing to do this, the carrier was liable." *Deming v. Merchants' Cotton Press*, etc., *Co.*, 90 Tenn. 306.

the burden of proof remains on him to the end, the burden of evidence may shift. If the plaintiff proves delivery of the goods to the warehouseman, and a failure to deliver on demand, these facts will be treated as *prima facie* evidence of negligence on the part of the defendant,¹ unless he shows on his part that the goods were lost and the manner in which they were lost, and these facts must be proved with reasonable certainty;² but when once these

1. *Clafin v. Meyer*, 75 N. Y. 260, *reversing* 43 N. Y. Super. Ct. 1; 31 Am. Rep. 467; *Coleman v. Livingston*, 36 N. Y. Super. Ct. 32; 45 How. Pr. (N. Y.) 483; *Golden v. Romer*, 20 Hun (N. Y.) 438; *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574.

"A *prima facie* case of negligence is made out against a warehouseman, who refuses to deliver property stored with him, upon proof of demand and refusal. Upon such proof alone, the burden is on him to account for the property; otherwise, he shall be deemed to have converted it to his own use. But if it appears that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman." *Wilson v. Southern Pacific R. Co.*, 62 Cal. 164.

"The doctrine deducible from these authorities seems to be this: A bailor seeking to recover from a warehouseman for the non-delivery of goods or an injury thereto, must prove negligence. When he shows that the goods were not delivered on demand, or were delivered in a damaged condition, he has made a *prima facie* case. If the defendant accounts for the non-delivery or injury by showing that the goods were stolen, or were lost or damaged by fire, or in any other manner consistent with the exercise of ordinary care on his part, the plaintiff's *prima facie* case is overcome, and he must prove positive negligence occasioning the loss." Editor's note to the case of *Schmidt v. Blood*, 24 Am. Dec. 153.

Where a trunk containing clothing is left for storage, if, when returned, the clothing is water-soaked and mildewed, there is a presumption against the warehouseman of a want of ordinary care, which justifies a recovery against him, in the absence of explanation. *Reed v. Crowe*, 13 Daly (N. Y.) 164.

The defendant being a storage and forwarding merchant, a roll of carpeting

was delivered to him, at his store on the Erie canal, to be forwarded, as directed, in the usual course of business; the charges to be paid at the end of the route. The defendant omitted to take a receipt, or make a memorandum of the transaction, and failed, when requested, to give any account of the property, which was never received by the owner. It was held that the neglect to take a receipt, or make and keep a memorandum of the transaction, rendered him liable, in his character of warehouseman and forwarder, for the value, without further proof of negligence. *Bush v. Miller*, 13 Barb. (N. Y.) 481.

2. In *Boise v. Hartford, etc., R. Co.*, 37 Conn. 272; 9 Am. Rep. 347, it appeared by the record that the plaintiff proved, to the satisfaction of the court, that the defendants received at their warehouse eighteen bales of cotton belonging to the plaintiff, and failed to deliver to him subsequently more than sixteen of the eighteen bales. The defendants did not show that the missing goods had been lost, neither did they give any explanation of what had become of them; nor that they exercised reasonable care. The court said: "If the defendants exercised reasonable care over the property to prevent its loss, they could easily show the fact, and having failed to prove it, the court regarded the circumstance as an implied admission that they did not exercise such care; which, considered in connection with the other facts of the case, satisfied the court that such care was not exercised. We think the defendants were bound to account for the missing bales, or show themselves not chargeable with negligence under the circumstances proved by the plaintiff."

"Were it shown, then, by the evidence, that the box of goods in question, which is traced to the possession of the defendants as wharfingers, had actually passed out of their possession—been lost, in fact, from them—we should be called upon to determine whether it

facts are made out, the plaintiff cannot recover without proof that the loss occurred by the negligence of the warehouseman.¹ There are some American cases that hold that in an action for the loss of goods due care on the part of the warehouseman is a matter in confession and avoidance, and must be alleged and proved by them;² but this view can hardly be supported, and cases holding this view have been overruled.³

had been so lost for the want of reasonable care on their part or not. . . . The naked facts simply appear, that the box is at one hour in the possession of the defendants, at another it is called for and not found, and from that time to the present remains unaccounted for. The rule that the party must prove the property to have been lost, may sometimes operate hardly on the bailee, but not so often as would the contrary work injustice to the owner." *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633.

"The rule is, that when a loss has been proved, or when goods are injured, the law will not intend negligence. The bailee is presumed to have acted according to his trust, until the contrary is shown. But to throw the proofs of negligence on the bailors, it is necessary to show, by clear and satisfactory proof, that the goods were lost, and the manner they were lost. All the bailor has to do, in the first instance, is to prove the contract and the delivery of the goods, and this throws the burden of proof that they were lost, and the manner they were lost, on the bailee, of which we have the right to require very plain proofs. . . . It is alleged by the bailee that the box was stolen; but of this, which is so material to the defense, we have slight and unsatisfactory proof. If such was the fact, it should be shown by evidence which would leave little room for doubt." *Clark v. Spence*, 10 Watts (Pa.) 335.

In an action to charge a warehouseman for the value of certain property, which it has failed to deliver on demand, the existence of some, but not conclusive, evidence that the property was stolen, is not sufficient to cast the burden of proof on the plaintiff to show such negligence. *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508; *Arent v. Squire*, 1 Daly (N. Y.) 347.

In an action to recover the value of property stored with the defendant, evidence was offered by him tending to show that the property might have

been lost or stolen, when transferred with other property from one to another of his warehouses; but it did not positively appear that the property was so lost or stolen. It was held that such evidence was insufficient to require proof, on the part of the plaintiff, that the supposed loss or theft could have been prevented by the defendant by the exercise of due care. *Leoncini v. Post* (C. Pl.), 13 N. Y. Supp. 825.

1. *Babcock v. Murphy*, 20 La. Ann. 399; *McCullom v. Porter*, 17 La. Ann. 89.

"The rule, as we understand it, is that the burden of proof is on the bailor to prove the contract and the delivery of the goods; then upon the bailee to show the loss and the manner of the loss. The burden then shifts to the bailor to establish that the loss was due to negligence." *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586. See also *Runyan v. Caldwell*, 7 Humph. (Tenn.) 134.

Where an action is brought against a warehouseman, to recover for the loss of property left with him, on the ground of negligence on the part of the defendant, the burden rests upon the defendant to explain and account for the loss. But where the testimony given on the part of the defense fully and satisfactorily explains the manner of the loss, and indicates that the defendant did not in any way contribute by any neglect or want of precaution on his part to such loss, and there is no proof on the plaintiff's side from which negligence could be inferred, the defendant is entitled to a nonsuit. *Coleman v. Livingston*, 45 How. Pr. (N. Y. Super. Ct.) 483.

2. *Funkhouser v. Wagner*, 62 Ill. 59; *Goodfellow v. Meegan*, 32 Mo. 280; *Wiser v. Chesley*, 53 Mo. 547; *Schwerin v. McKie*, 5 Robt. (N. Y.) 404; *MacKenzie v. Cox*, 9 C. & P. 632; 38 E. C. L. 263; *Wardlaw v. South Carolina R. Co.*, 11 Rich. (S. Car.) 337; *Brown v. Waterman*, 10 Cush. (Mass.) 117.

3. The case of *Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.) 448, was an

IV. FORWARDING MERCHANTS—(See FORWARDING MERCHANTS, vol. 8, p. 573; CARRIERS OF GOODS, vol. 2, p. 784).—Forwarding merchants act in most instances as warehousemen after goods are received and before they are shipped, and the liability during the time of storage is the same as that of warehousemen.¹

V. LIABILITY OF WAREHOUSEMAN—1. **Liability Begins**—*a. ON RECEIPT OF GOODS*.—The liability of the warehouseman begins when the goods are delivered at, or rather on, his premises, and he has, either expressly or by implication, received them.²

action of contract against a warehouseman for failure to re-deliver property intrusted to him. The answer of the defendants set up that the goods were stolen, without their fault, from their warehouse. The court, in a majority opinion, held that "This form of declaring imposed the duty and burden upon the defendants to put in evidence special matter in avoidance of the action. They must show an excuse for the non-performance of their promise; and the burden of proof was on them to establish their excuse." Bigelow, C. J., dissented in this case, and his views were adopted by the court in *Willett v. Rich*, 142 Mass. 356; 56 Am. Rep. 684, where the court, in *overruling* this case, said: "As the only contract of the warehouseman is that he will use due care in keeping the property, and deliver it on demand, if, after using due care, he shall have it in his possession, a plaintiff must show a breach of this contract to entitle him to recover, either in contract or tort. We do not see how, by changing the form of his declaration, he can change the liability or rights of the warehouseman. Whatever the form of declaration is, he is required to prove a breach of the contract. It may be that, where there is a refusal to deliver, the plaintiff may make out a *prima facie* case upon proving this fact, because such refusal, if unexplained, is some evidence of the breach of the contract. But this does not shift the burden originally on the plaintiff to prove a breach of contract. The majority of the court say, in their opinion (*Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.) 448): 'If the defendants indeed prove that the goods are stolen or lost, without direct fault on their part, so that performance is impossible, then, if the plaintiff charges that the loss occurred through negligence, he must prove it, and the burden of proof shifts upon him to do so.' We understand the

doctrine to be well settled in this commonwealth, that the burden of proof never shifts; and we think that in the case we are discussing, and in the case at bar, the burden to show negligence was upon the plaintiffs from the beginning, and remained upon them throughout the trial."

1. "It is conceded that the liability during this temporary detention is that of warehousemen. It is not necessary that there should be a separate charge for storage. The freight to be ultimately paid as compensation for the whole service, or the delivery for future transportation, furnishes a sufficient consideration for the promise to keep safely, and the defendants became bailees for hire. They cannot be charged for the loss, if, in the custody of the property, they exercised ordinary care." *Barron v. Eldredge*, 100 Mass. 455; 1 Am. Rep. 126. See also *Holtzclaw v. Duff*, 27 Mo. 392; *Streeter v. Horlock*, 1 Bing. 34; 8 E. C. L. 389; *Hyde v. Trent, etc., Nav. Co.*, 5 T. R. 389; *Forsythe v. Walker*, 9 Pa. St. 148; *Stannard v. Prince*, 64 N. Y. 300; *Roberts v. Turner*, 12 Johns. (N. Y.) 232; 7 Am. Dec. 311; *Brown v. Denison*, 2 Wend. (N. Y.) 593. See *Laden v. Griffith*, 25 N. Y. 364; 82 Am. Dec. 360.

2. *Rodgers v. Stophel*, 32 Pa. St. 111; 72 Am. Dec. 775; *Farrell v. Richmond, etc., R. Co.*, 102 N. Car. 390; 11 Am. St. Rep. 760; *DeMott v. Laraway*, 14 Wend. (N. Y.) 225; 28 Am. Dec. 523; *Titsworth v. Winnegar*, 51 Barb. (N. Y.) 148; *Thomas v. Day*, 4 Esp. 262; *Randleson v. Murray*, 8 Ad. & El. 109; 35 E. C. L. 342; *Story on Bailments* (9th ed.), § 445. Compare *Merritt v. Old Colony, etc., R. Co.*, 11 Allen (Mass.) 80.

So where the warehouseman consents to take charge of goods before they reach the warehouse, he is liable from that moment. *Ducker v. Barnett*, 5 Mo. 97.

A custom may be proved to show an implied receipt of the goods.¹

b. ON TERMINATION OF CARRIAGE—(See CARRIERS OF GOODS, vol. 2, p. 878 *et seq.*).—When goods transported by a common carrier arrive at their destination, they may be stored by the carrier in his warehouse, but the exact time at which the liability of the carrier ends, and that of the warehouseman begins, is a question on which the authorities are not agreed. By the *Massachusetts* rule, the liability of the warehouseman begins when the goods are delivered on the platform; this rule is definite and easy of application;² but under this rule the carrier, by his

1. In *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175, the plaintiff was allowed to show a usage that when the goods were delivered on the wharf, they were considered to be in the custody of the wharfinger.

In *Turner v. Huff*, 46 Ark. 222; 55 Am. Rep. 580, the court allowed proof of a usage that the liability of the warehouseman began on delivery of the goods on a wharf where there was no warehouse, and without notice to the warehouseman, and it made no difference that the usage was not known to either party.

2. *Thomas v. Boston*, etc., R. Co., 10 Met. (Mass.) 472; 43 Am. Dec. 444; *Rice v. Boston*, etc., R. Co., 98 Mass. 212; *Stowe v. New York*, etc., R. Co., 113 Mass. 521; *Hall v. Boston*, etc., R. Co., 14 Allen (Mass.) 439; 92 Am. Dec. 783; *Bansemmer v. Toledo*, etc., R. Co., 25 Ind. 434; 87 Am. Dec. 367; *New Albany*, etc., R. Co. v. *McCool*, 26 Ind. 140; *New Albany*, etc., R. Co., v. *Campbell*, 12 Ind. 55; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268; *Richards v. Michigan Southern*, etc., R. Co., 20 Ill. 404; *Porter v. Chicago*, etc., R. Co., 20 Ill. 407; 71 Am. Dec. 286; *Chicago*, etc., R. Co. v. *Scott*, 42 Ill. 133; *Cahn v. Michigan Cent. R. Co.*, 71 Ill. 96; *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284; *Merchants' Dispatch, etc., Co. v. Moore*, 88 Ill. 136; 30 Am. Rep. 541; *Mohr v. Chicago*, etc., R. Co., 40 Iowa 579; *Holtzclaw v. Duff*, 27 Mo. 392; *Hilliard v. Wilmington*, etc., R. Co., 6 Jones (N. Car.) 343; *Culbreth v. Philadelphia*, etc., R. Co., 3 Houst. (Del.) 392; *Western*, etc., R. Co. v. *Camp*, 53 Ga. 596; *McCarty v. New York*, etc., R. Co., 30 Pa. St. 247; *Hand v. Baynes*, 4 Whart. (Pa.) 204; 33 Am. Dec. 54. And see *Morris*, etc., R. Co. v. *Ayres*, 29 N. J. L. 394; *Shepherd v. Bristol*, etc., R.

Co., L. R., 3 Exch. 189. (Martin, B., *dissenting*.) So where the passenger's baggage is deposited in the baggage room until called for. *Thompson on Carriers of Passengers* 519; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61; *Fairfax v. New York Cent. R. Co.*, 67 N. Y. 11; *Pike v. Chicago*, etc., R. Co., 40 Wis. 583; *Van Toll v. South Eastern R. Co.*, 12 C. B. N. S. 75; 104 E. C. L. 75.

"We may then say, in the case of goods transported by railroad, either that it is not the duty of the company, as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; or, in analogy to the old rule that delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence. . . . This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot then be delivered; or if, for any reason, the consignee is not there ready to receive them, it is the duty of the

company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties after the goods are delivered from the cars, the company are liable, as warehousemen, or keepers of goods for hire. It was argued in the present case that the railroad company is responsible as common carriers of goods, until they have given notice to consignees of the arrival of goods. The court is strongly inclined to the opinion that, in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties." *Shaw, C. J., in Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263; 61 Am. Dec. 423; 2 Redf. Am. Ry. Cas. 152.

"Where freight is carried on a railroad from station to station, if the consignee or agent be not ready to receive it at its destination, the duty of the carrier is discharged by placing it in the warehouse of the company; for there is no usage or rule of law which requires the company's servants to deliver elsewhere than at the station, and from the nature of this mode of transportation, it is impracticable to give notice prior to the necessary discharge of the freight." *Neal v. Wilmington, etc., R. Co.*, 8 Jones (N. Car.) 482.

Where it was the custom for the railroad to deliver grain for the consignee to one of the public elevators, immediately on inspection of it by the public inspector, and the amount of freight charges determined by the public weigher who weighed the grain and reported to the elevator company, which notified both the railroad company and the consignee, and the railroad then made out a freight bill, upon the payment of which the elevator issued a warehouse receipt, in a case where the grain was placed in the elevator and was destroyed by fire after it was weighed and notice of the weight communicated to the parties, it was held that the railroad was no longer liable, although no demand for freight was made by it until after the fire.

Arthur v. St. Paul, etc., R. Co., 38 Minn. 95.

The goods arrived on Saturday at 3:30 p. m. The plaintiff's teamster called at 4:15 p. m. and waited until 5 p. m., when he was told that he could not get the goods until Monday. The property was destroyed on Sunday. It was held that the carrier was responsible only as warehouseman. *Rice v. Hart*, 118 Mass. 201; 19 Am. Rep. 433.

In *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79; 93 Am. Dec. 208, the supreme court of *Michigan* was equally divided, *Martin, C. J.*, and *Campbell, J.*, agreeing with the *Massachusetts* doctrine, and *Cooley* and *Christiancy, JJ.*, holding the opposite view. Able opinions were rendered by *Cooley* and *Campbell, JJ.* *Cooley, J.*, said: "On this point three distinct views have been taken by different jurists, neither of which can be said to have been so far generally accepted as to have become the prevailing rule of the courts. *First*: That when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only. This is the rule of the *Massachusetts* cases. *Thomas v. Boston, etc., R. Co.*, 10 Met. (Mass.) 472; 43 Am. Dec. 444, and *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263; 61 Am. Dec. 423, and those which follow them. *Second*: That merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away, in the common course of business. *Morris, etc., R. Co. v. Ayers*, 29 N. J. L. 393; *Blumenthal v. Brainerd*, 38 Vt. 413; 91 Am. Dec. 350; *Moses v. Boston, etc., R. Co.*, 32 N. H. 523; 64 Am. Dec. 381; *Wood v. Crocker*, 18 Wis. 345; 86 Am. Dec. 773; *Redfield on Railways* (6th ed.), p. 80. *Third*: That the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time, in the common course of business, to take them away, after such notification. *McDonald v. Western R. Co.*, 34 N. Y. 497, and cases cited; 2 *Parsons on Contracts* (7th ed.) 141; *Angell on Carriers* (5th ed.), § 304; *Chitty on Carriers* 90."

"In short, the railroad corporation ceases to be a common carrier and becomes a warehouseman, as matter of

own misconduct in misleading the consignee, may be subjected to liability for loss of the goods.¹

The rule in some other states is that the liability of the warehouseman begins only after the consignee has had a reasonable time to call for the goods after they are unloaded and ready for delivery;² under this rule it is a question of some nicety what

law, when it has completed the duty of transportation and assumed the duty of warehouseman, as matter of fact and according to the usages and necessities of the business in which it is engaged." *Hart v. Rice*, 118 Mass. 201.

1. *The Peytona*, 2 Curt. (U. S.) 21; *Stevens v. Boston*, etc., R. Co., 1 Gray (Mass.) 277.

"Should a case arise where the goods arrived out of time, and especially where the consignee had been active in endeavoring to find them or to ascertain the probable time of their arrival—and where the company failed to give notice—we should hesitate before holding that a deposit in the warehouse was an end of the carrier's liability." *Francis v. Dubuque*, etc., R. Co., 25 Iowa 60; 95 Am. Dec. 769.

Statute.—In some states, by statute, if a carrier uses due diligence and stores the property in his warehouse, he is liable as warehouseman only. Such is the law in *Texas, Nevada, California, and Colorado*. See also *Missouri Rev. Stat.*, § 6280.

2. **Reasonable Time.**—*Moses v. Boston*, etc., R. Co., 32 N. H. 523; 64 Am. Dec. 381; 2 Redf. Am. Ry. Cas. 65; *Price v. Powell*, 3 N. Y. 322; *Fenner v. Buffalo*, etc., R. Co., 44 N. Y. 505; 4 Am. Rep. 709; *Zinn v. New York Steamboat Co.*, 49 N. Y. 442; 10 Am. Rep. 402; *McAndrew v. Whitlock*, 52 N. Y. 40; 11 Am. Rep. 657; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Tarbell v. Royal Exch. Shipping Co.*, 110 N. Y. 170; 6 Am. Rep. 350; *Michigan Cent. R. Co. v. Ward*, 2 Mich. 538; *McMillan v. Michigan*, etc., R. Co., 16 Mich. 79; 93 Am. Dec. 208 (divided court); *Buckley v. Great Western R. Co.*, 18 Mich. 121; *Western R. Co. v. Little*, 86 Ala. 159; *Alabama*, etc., R. Co. *v. Kidd*, 35 Ala. 209; *Mobile*, etc., R. Co. *v. Prewitt*, 46 Ala. 63; 7 Am. Rep. 586; *Kennedy v. Mobile*, etc., R. Co., 74 Ala. 430; *Smith v. Nashua*, etc., R. Co., 27 N. H. 86; 59 Am. Dec. 364; *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Ouimit v. Henshaw*, 35 Vt. 605; *Blumenthal v. Brain-*

erd, 38 Vt. 402; 91 Am. Dec. 350; 2 Redf. Am. Ry. Cas. 175; *Winslow v. Vermont*, etc., R. Co., 42 Vt. 700; *Derosia v. Winona*, etc., R. Co., 18 Minn. 133; *Pinney v. First Div. St. Paul*, etc., R. Co., 19 Minn. 253; *Leavenworth*, etc., R. Co. *v. Maris*, 16 Kan. 333; *Jeffersonville R. Co. v. Cleveland*, 2 Bush (Ky.) 468; *Rome R. Co. v. Sullivan*, 14 Ga. 277; *Maignan v. New Orleans*, etc., R. Co., 24 La. Ann. 333; *Steamboat Sultana v. Chapman*, 5 Wis. 454; *Parker v. Milwaukee*, etc., R. Co., 30 Wis. 689; *Wood v. Milwaukee*, etc., R. Co., 27 Wis. 541; 9 Am. Rep. 465; *Conkey v. Milwaukee*, etc., R. Co., 31 Wis. 619; 11 Am. Rep. 630; *Mordecai v. Lindsay*, 5 Wall. (U. S.) 481; *Richardson v. Goddard*, 23 How. (U. S.) 28; *Michigan*, etc., R. Co. *v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *National Line Steamship Co. v. Smart*, 107 Pa. St. 492; *Dear v. Vaccaro*, 2 Head (Tenn.) 488; 75 Am. Dec. 744; *Mackenzie v. Cox*, 9 C. & P. 632; 38 E. C. L. 263.

"The rule adopted in *Massachusetts* has the merit of being definite and of easy application, and may, in many cases, avoid a painful controversy as to what, under the circumstances, is a reasonable time, within which the consignee must appear and claim his goods. But on the other hand, that rule puts an end to the carrier's responsibility, as such, just where that responsibility is of the highest value to the shipper. Between the deposit of the goods on the platform, and their delivery to the consignee, they are exposed to theft, depredation, and injury by strangers, and by the carrier's employees. In making the delivery, care is needed to avoid mistakes, and attention required to see if the goods are uninjured. During the whole process of delivery, until fully completed, the goods should remain in the care of the carrier, upon the full responsibility pertaining to him as such, and he ought not be allowed to lay aside that responsibility, until the owner of goods has had a fair and reasonable time and opportunity to receive them."

is a reasonable time, and in determining that question the circumstances of each case are to be considered, the time of the arrival of the goods, and the facilities at the warehouse for removal, but not the peculiar circumstances of the consignee.¹ The question

Graves v. Hartford, etc., Steamboat Co., 38 Conn. 143; 9 Am. Rep. 369; 12 Am. Law. Reg. N. S. 31.

In *The Mary Washington v. Ayres* (Md.), 5 Am. Law. Reg. N. S. 692, Chase, C. J., said: "The duty of the carrier by water is not fulfilled by simple transportation from port to port. The goods must be delivered, or at least landed, and a reasonable opportunity given to the consignee of ascertaining their condition. In order that opportunity for inspection, and for the removal of the goods, may be given, the consignee must be notified of the arrival of the goods. This is the general rule. If exceptions are made by usage, circumstances, or special arrangements, they must be shown by proof. . . .

In the present case, the question whether the respondents were liable, as common carriers or warehousemen, is of little importance, except as a question of jurisdiction. The proof shows a degree of negligence which would make them liable in either character. But if their liability were as warehousemen only, they would not be responsible in this court. A court of the Union has, in general, no jurisdiction of suits against warehousemen, by citizens of the same state."

The charter of the Michigan Central Railroad Company gives the company the right to charge storage upon all property transported by it, which shall have remained at any of its depots more than four days. It then provides for notices to the consignees, and declares "that in all cases the said company shall be responsible for goods on deposit in any of their depots, awaiting delivery, as warehousemen, and not as common carriers." This has been held to apply to property which has reached its final destination, and is there awaiting delivery to the owner, and not to property which is to be delivered to another carrier and is to be transported by him. *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 626; 6 Am. Rep. 152; *Michigan, Cent., R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318.

If the owner allows the goods to remain an unreasonable time, the carrier

is liable only as warehouseman. *Union Pac. R. Co. v. Mayer*, 40 Kan. 184; 10 Am. St. Rep. 183; *Missouri, etc., R. Co. v. Haynes*, 72 Tex. 175.

1. *Leavenworth, etc., R. Co. v. Maris*, 16 Kan. 333; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 350; *Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700; *Ouimit v. Henshaw*, 35 Vt. 601; *Lemke v. Chicago, etc., R. Co.*, 39 Wis. 449; *Hirsch v. Steamboat Quaker City*, 2 Disney (Ohio) 144; *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209.

The consignee is not bound to remove the goods on Sunday. *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121. If the removal is once begun the obligation of warehouseman as to the balance at once attaches. *Richardson v. Goddard*, 23 How. (U. S.) 28.

"The extent of the reasonable opportunity to be afforded him for that purpose is not, however, to be measured by any peculiar circumstances in his (the consignee's) own condition and situation, rendering it necessary, for his own convenience and accommodation, that he should have longer time or better opportunity than if he resided in the vicinity of the warehouse, and was prepared with means and facilities for taking the goods away. If his particular circumstances require a more extended opportunity, the goods must be considered, after such reasonable time as, but for those peculiar circumstances, would be deemed sufficient, to be kept by the company for his convenience, and under the responsibilities of depositaries or bailees for hire only." *Moses v. Boston, etc., R. Co.*, 32 N. H. 523; 64 Am. Dec. 381. In *Wood v. Crocker*, 18 Wis. 363; 86 Am. Dec. 773, the court, after quoting the foregoing language, adds: "This is fairly implied when it is said that the owner is entitled to only a reasonable opportunity to take his property from the possession of the company, after the transit is terminated, and, if he does not do it at the earliest practicable moment, he may thereby be deemed to have consented that it should remain in possession of the company under the more limited liability of a warehouseman."

of reasonable time is much affected by local custom.¹ Under either rule, notice to the consignee acts to reduce the liability of the carrier to that of warehouseman,² and the same result follows if the consignee refuses to receive the goods or cannot be found.³

2. Carrier as Warehouseman.—A full discussion of this subject is to be found elsewhere.⁴ It is here only necessary to remark that where a carrier is required to forward goods over a connecting line, some cases hold that his responsibility as carrier continues until the goods are actually delivered to the connecting line, although they may be stored in a warehouse awaiting such delivery;⁵ but the cases are not all agreed.⁶

Where goods are received by a common carrier for forwarding, but are not to be forwarded until further orders, or if anything remains to be done before shipment, he is liable as warehouseman only.⁷

3. When Liability Ends.—The liability of the warehouseman ends on his delivery of the property to the person rightfully entitled to it.⁸ Where the warehouseman is wrongfully divested

1. *Cork Distilleries Co. v. Great Southern, etc., R. Co.*, L. R., 7 H. L. 269; *Hurd v. Hartford, etc., Steamboat Co.*, 40 Conn. 48; *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Graff v. Bloomer*, 9 Pa. St. 114; *Pittsburgh, etc., R. Co. v. Nash*, 43 Ind. 423; *Nichols v. Smith*, 115 Mass. 332.

2. *Mitchell v. Lancashire, etc., R. Co.*, L. R., 10 Q. B. 256; *Goold v. Chapin*, 10 Barb. (N. Y.) 616; 20 N. Y. 259; 75 Am. Dec. 398; *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548; 90 Am. Dec. 734; *Goodwin v. Baltimore, etc., R. Co.*, 50 N. Y. 154; 10 Am. Rep. 457; *Louisville, etc., R. Co. v. Mahan*, 8 Bush (Ky.) 184; *Michigan Cent. R. Co. v. Ward*, 2 Mich. 538.

3. *Adams Express Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582; *American Express Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691; *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548; 90 Am. Dec. 734; *Indianapolis, etc., R. Co. v. Herndon*, 81 Ill. 143; *Duff v. Budd*, 3 B. & B. 17; *Hudson v. Baxendale*, 2 H. & N. 575; *Heugh v. London, etc., R. Co.*, L. R., 5 Exch. 51; *Wilson v. Royal Exch. Shipping Co.*, 24 Fed. Rep. 815; *Kremer v. Southern Express Co.*, 6 Coldw. (Tenn.) 356; *Williams v. Holland*, 22 How. Pr. (N. Y. C. Pl.) 137. So where the goods are delivered, and are sent back to the carrier's warehouse to await the owner's orders. *Cairns v. Robins*, 8 M. & W. 258.

If the consignee refuses to receive the goods, it is the duty of the carrier to hold them subject to the owner's orders. It is not proper for him to return them. *Cranch v. Great Western R. Co.*, 3 H. & N. 183.

"So when goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility, by placing the goods in store with some responsible third person in that business, at the place of delivery, for and on account of the owner." *Fisk v. Newton*, 1 Den. (N. Y.) 45; 43 Am. Dec. 649.

4. *CARRIERS OF GOODS*, vol. 2, p. 878.

5. *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *McDonald v. Western R. Co.*, 34 N. Y. 497; *Ackley v. Kellogg*, 8 Cow. (N. Y.) 223; *Ouimit v. Henshaw*, 35 Vt. 605; *Condon v. Marquette, etc., R. Co.*, 55 Mich. 218; 54 Am. Rep. 367.

6. *Garside v. Trent, etc., Nav. Co.*, 4 T. R. 581; *Baltimore, etc., R. Co. v. Schumacher*, 29 Md. 168; 96 Am. Dec. 510; *In re Webb*, 8 Taunt. 443.

7. *Barron v. Eldredge*, 100 Mass. 455; 1 Am. Rep. 126; *Michigan, etc., R. Co. v. Shurtz*, 7 Mich. 515; *O'Neill v. New York Cent., etc., R. Co.*, 60 N. Y. 138; *Rogers v. Wheeler*, 52 N. Y. 262.

8. Where wheat is delivered from a warehouse into a vessel by means of a

of the possession of goods, he is under no obligation to follow them.¹

4. Re-delivery of Property to the Bailor.—The warehouseman is responsible to his bailor for a re-delivery of the goods on demand, and is liable for conversion for delivery to the wrong person, even through the innocent mistake of himself or his servants.² He

pipe, the duty of the warehouseman is complete, and his liability ended, with the discharge of the wheat into the pipe. *The R. G. Winslow, 4 Biss. (U. S.) 13.*

A shipped a barouche to B, his salesman. B sent his servant to the wharf boat, which was used as a warehouse for the storage of freight, to get the barouche. The owner of the wharf boat let him have it, and, while B's servant was getting the barouche on shore, it slipped overboard. It was held that the owner of the wharf boat could not be made responsible. *Reamer v. Davis, 85 Ind. 201.*

1. S. stored cotton with F., and while F.'s warehouse was being seized by the military authorities, and the cotton thrown into the streets, S. was present and made no effort to save the cotton from being lost. F. was then absent under duress. It was held that S. could not recover from F. for the loss. *Smith v. Frost, 51 Ga. 336.*

The obligation of warehousemen, to exercise ordinary care for the protection and safety of goods committed to their custody, depends upon, and is co-extensive with, actual and continued possession. If they lose that possession through any omission of duty, they are liable for all the consequences that ensue from it. But, if the property is taken from their possession without fault on their part, or lost by means for which they are not responsible, they are not required to go in pursuit of it, or to incur any expense of time, labor, or money in endeavoring to discover or regain it. *Sessions v. Western R. Co., 16 Gray (Mass.) 132.*

2. *Pribble v. Kent, 10 Ind. 325; 71 Am. Dec. 327; Alabama, etc., R. Co. v. Kidd, 35 Ala. 209; Hudmon v. Du Bose, 85 Ala. 446; Willard v. Bridge, 4 Barb. (N. Y.) 361; Collins v. Burns, 63 N. Y. 1; Dufour v. Mephram, 31 Mo. 577; Jeffersonville R. Co. v. White, 6 Bush (Ky.) 251; Lubbock v. Inglis, 1 Stark. 104; Graves v. Smith, 14 Wis. 5; 80 Am. Dec. 762; Pierce v. O'Keefe, 11 Wis. 181; Devereux v. Barclay, 3 B. & A. 702; Sydes v. Hay, 4 T. R. 260; Coles v. Clark, 3 Cush. (Mass.) 399.*

28 C. of L.—42

The owner of cotton is the proper person to bring an action against a warehouseman for failure to discharge his duty, and not a person who has a special lien on it for money advanced, and who controlled the shipment. *Scott v. Jester, 13 Ark. 437.*

K., desiring to fill an order from a baker for flour, bought of G. a lot lying stored in a warehouse, but by mistake the warehouseman delivered, and the baker, not knowing the difference, received and consumed, a superior lot belonging to M. It was held that the baker was not liable to the warehouseman, either in contract for any part of the value, or in tort for the conversion. *Hills v. Snell, 104 Mass. 173; 6 Am. Rep. 216.*

A person indicted, under *Iowa Code, § 4088*, for selling, or removing beyond his control, wheat left with him for storage, and who had given a receipt to its owner, cannot show that he made the shipment in the presence of the owner and without any objection, or that the wheat was placed in a separate bin. *State v. Stevenson, 52 Iowa 701.*

So, though the delivery was only permissive, as where the goods were removed by a third person with the knowledge of the warehouseman, and it is no defense to show that he acted with ordinary care and prudence and the mistake was an honest one. *Lichtenhein v. Boston, etc., R. Co., 11 Cush. (Mass.) 70.*

In an action against a warehouseman for negligently delivering goods to the wrong person, it appeared that the plaintiff, when he left the goods, said that he would have them taken away in a day or two by a team; that two men, with a team, afterward called for the goods, saying that they were receipted for, and the charges paid, which was true, and that the defendant delivered the goods to them without asking their authority or inquiring who they were. It was held that the question whether the defendant was guilty of gross negligence was properly submitted to the jury. *Oderkirk v. Fargo (Supreme Ct.), 16 N. Y. Supp. 220.*

cannot refuse to re-deliver the goods even though they are claimed

A clause in the bill of lading, that goods not removed by the consignee on arrival at the end of the route, will be deposited in the carrier's warehouse, "at the expense of the consignee and at his risk of fire, loss, or injury," is no excuse to the warehouseman for a loss occasioned by his delivery to the wrong person. *Collins v. Burns*, 63 N. Y. 1; *Mitchell v. Lancashire, etc., R. Co.*, L. R., 10 Q. B. 256; 44 L. J. Q. B. 107; 33 L. T. 61; 23 N. R. 853.

Goods were marked T. F. and the warehouseman changed the marks to T. Flanagan, and the goods were attached as Flanagan's and sold. The warehouseman was held liable for the loss, as he had no business to re-mark the goods. *Forsythe v. Walker*, 9 Pa. St. 148.

Where eggs were stored, and the warehouseman delivered them to the wrong person, it was held that he could not tender other eggs of equal value to the bailor, even though the original eggs would have spoiled before delivery was demanded. The court, in *Fifth Nat. Bank v. Providence Warehouse Co.*, 17 R. I. 112, said: "However this may have been, we think it is clear that the plaintiff, under this receipt, has the right of a bailor, and is not bound to receive other property of this description in place of its own, which the bailee has intentionally delivered to another. The transferee has the right to suppose that the described property is held subject to his order. How is he to know that the warehouseman has mingled with it other like property, so as to be indistinguishable from it, if such were the case? Surely the warehouseman is bound to some degree of care and responsibility, to enable him to deliver what he receives. If it is enough that he deliver anything answering the same general description, a warehouse receipt is indeed a precarious security."

Demand.—A demand on the warehouseman is unnecessary when he has put it out of his power to deliver. *Allen v. Steers*, 39 La. Ann. 586.

An agent lawfully in charge of the business of a warehouse in which goods, the title to which is in dispute, are deposited, is the proper party upon whom to make demand for the delivery thereof. *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37.

A warehouse keeper gave a receipt to the depositor for cotton received on storage, with the stipulation in the receipt "to be delivered in the same condition and order, on presentation of this receipt or order." The depositor subsequently received a portion of the cotton for which he gave a receipt. It was held that the presentation of the order and the delivery of a part of the cotton was a sufficient demand for delivery of the whole. *Juillard v. Baer*, 21 La. Ann. 603.

Delivery to Assignee.—The warehouseman is justified in delivering the goods to one to whom the bailor has sold them, without taking up the receipt or seeing the indorsement. *Mortimore v. Ragsdale*, 62 Miss. 86.

A warehouseman was held not liable for conversion of cotton stored with him, because he refused to deliver it to one who claimed to be the assignee of the party who originally stored it with him, unless such assignee produced the receipt for the cotton, or accounted for its loss and gave good security to indemnify him. *Patten v. Baggs*, 43 Ga. 167.

"But if the bailee, being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey any title, this does not appear to have been held any evidence of a conversion." *Hoar, J., in Parker v. Lombard*, 100 Mass. 405.

When sued by the shipper, the warehouseman may plead delivery to the consignee. *Bliven v. Hudson R. Co.*, 36 N. Y. 403.

The plaintiff, in pursuance of an agreement with the defendants, advanced money to purchase wheat at Toledo, Ohio, and the same was consigned to it at Oswego, upon the defendants' vessel, to be held by it as security for advances, and to remain on board the vessel until sold. The bill of lading provided for the delivery to the plaintiff, and was indorsed over and delivered to it. A portion of the wheat was sold and delivered on the plaintiff's orders, but the rest was removed and disposed of without its consent by the defendants. It was held that the defendants were liable therefore as warehousemen, if not as carriers. *Oswego*

by a third person.¹ The rule is well established that a bailee is estopped to dispute his bailor's title, but the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount.² If the goods have been taken from the bailee by legal process,³ or by overwhelming force,⁴ he is excused from liability, but otherwise in an action by the bailor he can only defend upon the right and title of a third person under authority of that person, and he must

Bank v. Doyle, 91 N. Y. 32; 43 Am. Rep. 634.

1. *Gosling v. Birnie*, 7 Bing. 339; 20 E. C. L. 153; *Kieran v. Sandars*, 6 Al. & El. 515; 33 E. C. L. 135; *Holl v. Griffin*, 10 Bing. 246; 25 E. C. L. 118; *Stonard v. Dunkin*, 2 Campb. 344; *Harman v. Anderson*, 2 Campb. 243; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145; *Butler v. Kenner*, 2 Mart. N. S. (La.) 274; *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473; *Blivin v. Hudson River R. Co.*, 36 N. Y. 403; *King v. Richards*, 6 Whart. (Pa.) 418; *Stephenson v. Price*, 30 Tex. 715. But see *Ogle v. Atkinson*, 5 Taunt. 759; *Thorne v. Tilbury*, 3 H. & N. 534; *Bates v. Stanton*, 1 Duer (N. Y.) 79; *Pitt v. Albritton*, 12 Ired. (N. Car.) 77.

The bailee cannot set up title in himself. *Peebles v. Farrar*, 73 N. Car. 342; *Britton v. Aymar*, 23 La. Ann. 63.

2. *Biddle v. Bond*, 6 B. & S. 225; 118 E. C. L. 224; *Betteley v. Reed*, 4 Q. B. 511; 45 E. C. L. 509; *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473; *Estes v. Boothe*, 20 Ark. 583; *Butler v. Kenner*, 2 Mart. N. S. (La.) 274; *Gerber v. Monie*, 56 Barb. (N. Y.) 652.

"If the bailor has the temporary possession of property, holding the same as the property of the bailee, and asserting no title in himself, and in good faith, in fulfillment of the terms of the bailment, as expressed by the parties or implied by law, restores the property to the bailee before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done his duty." *Patterson v. Gaston*, 17 Ala. 223.

3. "By reason of his relation to the property, it was his duty to preserve it to the owner, and when seized by legal process which he could not resist, to seasonably inform the owner of the seizure, in order that he might assert his claim thereto; failing in this, his responsibility continues, and he is liable for all the loss which resulted." *Morti-*

more v. Ragsdale, 62 Miss. 86. See also *Ohio, etc., R. Co. v. Yoke*, 51 Ind. 181; *Bliven v. Hudson River R. Co.*, 36 N. Y. 403.

"The wharfinger is the agent of the person of whom he receives the goods, and cannot dispute the title of his principal in an action brought by the principal against him. But this cannot protect the goods, thus received, from an execution against the person thus depositing them; and if they are taken from the wharfinger or warehouseman, by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner. If the person from whom the wharfinger, or warehouseman, receives the goods, claims the same by a title illegal, so that he cannot lawfully hold them, and they are taken by the authority of the law out of the custody and care of the wharfinger, the latter may show this in excuse for not delivering them." *Burton v. Wilkinson*, 18 Vt. 186. And see 46 Am. Dec. 145; *Stiles v. Davis*, 1 Black (U. S.) 105; *Van Winkle v. U. S. Steamship Co.*, 37 Barb. (N. Y.) 122; *Welles v. Thornton*, 45 Barb. (N. Y.) 390; *Cook v. Holt*, 48 N. Y. 275.

4. B. stored in the warehouse of M., a number of bales of cotton, and subsequently B.'s agent, under compulsion, sold the cotton to the Confederate States, which took possession of the cotton, and also of the warehouse. At the close of the war, all the cotton in the warehouse was appropriated by the *United States*. It was held that M. was not responsible for the cotton. *Babcock v. Murphy*, 20 La. Ann. 399.

In order to avoid liability for the loss of cotton on storage, the warehouse keeper must show that the loss occurred without his fault. He cannot be relieved by showing that the loss occurred by an overpowering force. He must also show that he used all possible means to preserve it. *Schwartz v. Baer*, 21 La. Ann. 601; *Smith v. Frost*, 51 Ga. 336.

stand or fall by that title.¹ It is not enough that the bailee has become aware of the title or claim of a third person;² in spite of certain *dicta* to the contrary,³ the bailee cannot compel the

1. *Foltz v. Stevens*, 54 Ill. 180; *Dodge v. Meyer*, 61 Cal. 405; *Maxwell v. Houston*, 67 N. Car. 305.

"We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelby v. Scottford*, Yelv. 23, viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. . . . We assent to what is said by Pollock, C. B., in *Thorne v. Tilbury*, 3 H. & N. 537, that a bailee can set up the title of another only 'if he defends upon the right and title and by the authority of' that person." *Biddle v. Bond*, 6 B. & S. 225; 118 E. C. L. 224.

"The general doctrine is well established that, in ordinary cases, the bailee cannot dispute his bailor's title any more than a tenant can his landlord's. But the general rule has numerous exceptions, in which he will be permitted to do so; as in a case where it can be shown that the latter fraudulently obtained possession of the goods, or that they have been recovered from the former by suit or paramount title; or he has been notified by the true owner, before the suit was instituted by the bailor, not to deliver them to him, and like instances." *Kelly v. Patchell*, 5 W. Va. 585. See also *Whittier v. Smith*, 11 Mass. 211.

"Whatever may have once been the rule, it is believed to be now settled that the bailee can never be in a better situation than his bailor; and if the latter has no title, the real owner is entitled to recover his property, in whose hand soever it may be found." *Roberts v. Yarboro*, 41 Tex. 449. And see *Wilson v. Anderton*, 1 B. & Ad. 459; 20 E. C. L. 426. Also see *King v. Richards*, 6 Whart. (Pa.) 418; *Nelson v. King*, 25 Tex. 663.

"The bailee can protect himself against his bailor by showing that he has delivered possession, after demand, to the true owner." *Roberts v. Yarboro*, 41 Tex. 449. Also see *King v. Richards*, 6 Whart. (Pa.) 418; *Rogers v. Weir*, 34 N. Y. 463.

"The defendants were bailees of the

plaintiff. She placed the piano in their possession, to keep for her and return upon her demand. They were not at liberty to dispute her title except in one emergency and at one peril. . . . They had, however, the right to set up as a defense the *jus tertii*, and defend, if they could, upon the title of the testator which had passed to the executors. . . . They had taken upon themselves the risk of that title, but could defend upon it and justify under it." *Mullins v. Chickering*, 110 N. Y. 513.

2. A party receiving property for storage will not, upon demand of restitution, be permitted to deny the claimant's title, by interposing a claim of ownership in a third party. *Leoncini v. Post* (C. Pl.), 13 N. Y. Supp. 825.

Right of Inquiry.—"The defendant had a right to qualify his refusal to deliver the property to the plaintiff until he could, in good faith, investigate the facts as to the real ownership of the property, and he could properly retain the property for a brief period for that purpose. . . . But if the claim of Gregory had appeared to be more serious and better founded than it was, the defendant could not justify the detention of the property from the owner after he was offered a bond of indemnity, satisfactory to himself, against such claim. And, further, I can hardly conceive of a case where the bailee would be justified in retaining property from the real owner from May 15 to August 6, nearly three months, to inquire into the title." *Ball v. Liney*, 48 N. Y. 6; 8 Am. Rep. 511.

3. "If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property therefore may be tried in an action against the bailee, and a refusal like that stated in the case, has always been considered as evidence of a conversion. The situation of the bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor, must stand or fall by his

rival claimants to interplead, but must defend himself as best he can.¹

5. Liability for Baggage.—A railway company's liability as common carrier, as to baggage carried by it, continues until the baggage has arrived at the place to which it is checked, and a reasonable time has elapsed for it to be removed.² In *Illinois*, the rule is extended so that the carrier's liability continues until the

title." Lord Tenterden in *Wilson v. Anderton*, 1 B. & Ad. 450; 20 E. C. L. 426.

The fact that an adverse claim is made to the property, does not entitle a warehouseman to require a bond of indemnity from the true owner, as a condition of delivering the property. The remedy is by an interpleader. *Banfield v. Haeger*, 7 Abb. N. Cas. (N. Y. Super. Ct.) 318; 45 N. Y. Super. Ct. 428; *Mullins v. Chickering*, 110 N. Y. 513. See also *Ball v. Liney*, 48 N. Y. 6; 8 Am. Rep. 511.

1. Interpleader.—3 Pomeroy's Eq. Jur. (2d ed.), §§ 1326-1327; *DeZouche v. Garrison*, 140 Pa. St. 430; *Tyns v. Rust*, 37 Ga. 574; 95 Am. Dec. 365; *Hatfield v. McWhorter*, 40 Ga. 269; *U. S. Trust Co. v. Wiley*, 41 Barb. (N. Y.) 477.

"So far as appears by the bill, none of the parties claiming the property in the complainants' possession dispute complainants' lien for storage and charges. The complainants, therefore, have no interests of their own to assert or protect, further than to be relieved from liability to two or more different claimants of the property. None of the defendants claim title derived from the complainants. . . . The bill is a pure bill of interpleader, and presents the common case of a bailee who seeks to protect himself against the claim of his bailor, and that of a third person who asserts an adverse title to the bailor. The authorities are decisive against his right to maintain an interpleader. It is sufficient to refer to *Crawshay v. Thornton*, 2 Myl. & C. 1; *Marvin v. Elwood*, 11 Paige (N. Y.) 365; *First Nat. Bank v. Bininger*, 26 N. J. Eq. 345. The hardship of the case has frequently been adverted to by the authorities, and in *England* a remedy has been given by statute. *Com. Law Proc. Act 1860*, § 12. See *Attenborough v. London, etc., Dock Co.*, 3 C. P. Div. 373, 450. As is said by Judge Story: 'The party holding the property must defend himself as well as

he can at law, and he is not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles, upon a controversy between different parties, where there is no privity of contract between them and the third person who calls for an interpleader.' Story's Eq. Jur. (13th ed.), § 820." *Wallace, J., in Bartlett v. The Sultan*, 23 Fed. Rep. 257.

"It is true, as a general rule, the party seeking relief by an interpleader must not have incurred any independent liability to either of the rival claimants; if he have expressly acknowledged the title or right of one of them, and agreed to hold the property for him, or, disregarding the adverse claim of one, has by contract made himself liable in any event to the other, he cannot be said to stand indifferent between them. . . . The same rule prevails, also, where an independent liability must of necessity arise out of the very nature of the relation subsisting between the parties, with respect to the subject-matter of dispute, as between landlord and tenant, attorney and client, etc., . . . nor can a bailee ordinarily raise an interpleader between his bailor and one who asserts an independent antagonistic and paramount title." *Bechtel v. Sheaffer*, 117 Pa. St. 555.

Claims Subsequent to Bailment.—"So, in the case of an attorney, agent, or bailee, whenever the third person claims the debt or thing under a title derived from the bailor or principal, by assignment, sale, or mortgage, subsequent to the bailment or agency, he may compel the parties to interplead, for there is no denial of the original title or right, the only dispute is, as to the effect of the subsequent act." *Bechtel v. Sheaffer*, 117 Pa. St. 555.

2. *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; 1 Am. Rep. 212; *Louisville, etc., R. Co. v. Mahan*, 8 Bush (Ky.) 184; *Ross v. Missouri, etc., R. Co.*, 4 Mo. App. 582; *Dinny v. New York, etc., R. Co.*, 49 N. Y. 546; *Jones v.*

baggage has actually been stored in a safe place,¹ but as the passenger and his baggage usually arrive together, a "reasonable

Norwich, etc., Transp. Co., 50 Barb. (N. Y.) 193; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61; *Patscheider v. Great Western R. Co.*, 3 Exch. Div. 153.

Where a traveler sues a warehouseman, or forwarder, for the price of a trunk lost, the plaintiff may prove the contents. *Clark v. Spence*, 10 Watts (Pa.) 335.

1. In *Chicago, etc., R. Co. v. Fairclough*, 52 Ill. 106, the court said: "If the owner of the baggage fails to call for it on the arrival of the train, it is the duty of the company to deposit it in their baggage room, in which event, as in case of freight, their responsibility becomes that of warehousemen."

"When defendants in error, therefore, transported the trunk to Delhi, to relieve themselves from their liability as common carriers, they should have stored the trunk in a safe and secure warehouse, and then the new relation of warehousemen would have attached. But the burden of proof is upon the common carrier to show that the property was stored in a safe and secure warehouse, and until this appears, the company cannot be exonerated from the liability of a common carrier." *Bartholomew v. St. Louis, etc., R. Co.*, 53 Ill. 227; 5 Am. Rep. 45.

"The rule, as stated by text-writers, is that the responsibility continues until the owner has had reasonable time and opportunity to come and take away his baggage. If it be not called for within such reasonable time, the company may store it in a secure warehouse, and from thence its liability as a carrier ceases and that of a warehouseman is assumed." *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268.

The learned editor of the *Am. & Eng. Railroad Cases* criticises this rule in vol. 21, p. 312, and justly observes that, under it, a carrier would be liable where, after baggage had been received at the station and a reasonable time had elapsed for its removal, it was destroyed by an accidental fire, unless it had been stored in a safe place before its destruction. "The soundness of this rule," he says, "may be questioned." Its origin is explained in the case of *Bartholomew v. St. Louis, etc., R. Co.*, 53 Ill. 227; 5 Am. Rep. 45, where the court said: "It was held in the cases

of *Richards v. Michigan Southern, etc., R. Co.*, 20 Ill. 404, and *Porter v. Chicago, etc., R. Co.*, 20 Ill. 407; 71 Am. Dec. 286, that when a railroad transports goods and they reach their destination, the liability of the company ceases, as common carriers, when they are unloaded and placed safely and securely in their warehouse, under the charge of competent and careful servants, ready to be delivered, and the liability of a warehouseman for hire attaches."

In *Chicago, etc., R. Co. v. Scott*, 42 Ill. 132, it was said that to change the relation or duty of the company from that of a common carrier to that of a warehouseman, the warehouse must be a safe and secure place in which the goods are stored.

These cases all relate to freight in its ordinary sense, as distinguished from baggage, which is usually taken with and attends persons traveling. The *Illinois* court applies to the case of baggage, the rule prevailing in that state as to the termination of the carrier's liability for freight, *i. e.*, that it terminates as the freight has been received and safely stored, and that it does not continue until notice to the consignee, and a reasonable time to remove has been given. It is to be noticed, in the first place, that the court does not follow the rule in regard to freight in one respect. In regard to freight, the rule is that the railroad may put an end to its common carrier's liability, by storing the goods as soon as they are received; its liability is not continued until a reasonable time for removal has elapsed. While, in regard to baggage, it seems that the common carrier's liability does continue until such reasonable time has elapsed. But, there is, in reality, no analogy between the cases of freight and baggage. In the case of freight, the consignee has no means of knowing when goods consigned to him have arrived; and there is a conflict of authority as to whether the railroad company undertakes as a common carrier to notify the consignee of the arrival of goods and to hold them a reasonable time for delivery, or whether it contracts as common carrier to carry the goods to their place of destination, and to store them safely at that place till

time" for the removal of the baggage is not the same as that to be allowed for the removal of freight.¹ What is a reasonable time for the removal of baggage, and when it has elapsed, are mixed questions of law and fact, to be decided by the jury on instructions from the court, on the facts and circumstances of each case;² but after such reasonable time for removal of the baggage has elapsed, the carrier is liable only as warehouseman.³

VI. WAREHOUSEMAN'S LIEN.—A warehouseman has a lien on property stored with him, for his reasonable charges.⁴ The lien is a

called for. The *Illinois* court adopts the latter rule. It is evident that this rule relates to notice to the person who is to receive the goods; but in the case of baggage this question of notice is not involved, since the person checking the baggage, in general, travels with it on the same train.

In *Jones v. Norwich, etc., Transp. Co.*, 50 Barb. (N. Y.) 194, the court said: "The question is as to the liability for baggage, not freight, . . . and there is no question of notice, or the necessity of notice, on the part of the defendant in this case." Again, the passenger and his baggage arriving on the same train, it is generally possible for him to remove his baggage at once or very soon after its arrival. It is in the contemplation of the parties that baggage shall be removed soon after its arrival, but that if it is not it shall be safely stored. Hence it would seem that a very different rule should govern the case of baggage from that applied to the case of freight. It would seem that the contract to be implied, on the part of the railroad company, from receiving and checking baggage was, as stated in the *New York* cases above cited, to carry the baggage to the place to which it is checked and to hold it in readiness a reasonable time for its removal, after which the company's liability as common carrier ceases, and it becomes liable merely as warehouseman or bailee.

1. *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548; 90 Am. Dec. 734; *Quimit v. Henshaw*, 35 Vt. 605.

2. *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; 1 Am. Rep. 212; *Louisville, etc., R. Co. v. Mahan*, 8 Bush (Ky.) 184.

In *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548; 90 Am. Dec. 734, the passenger arrived at his destination at 10 o'clock at night, and went to a hotel without inquiring for or demanding his trunks. It was held that the company was not liable for the accidental de-

struction of the trunks by fire during the night.

In *Jones v. Norwich, etc., Transp. Co.*, 50 Barb. (N. Y.) 193, the plaintiff arrived at 1 o'clock a. m. Sunday, and remained in her stateroom until after 8 o'clock in the morning. She left the boat without inquiring for her baggage, which was placed in a warehouse early Sunday morning and was destroyed by an accidental fire in the afternoon. The company was held not liable for the loss.

The reasonable time begins to run from the arrival of the trunks and not from the arrival of the passenger; it was so held where the passenger "stopped over," and did not arrive at his destination until after the trunks had been there destroyed by an accidental fire. *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268; *Haeger v. Chicago, etc., R. Co.*, 63 Wis. 271; 21 Am. & Eng. R. Cas. 308; 53 Am. Rep. 271.

3. *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548; 90 Am. Dec. 734; *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; 1 Am. Rep. 212; *Mattison v. New York Cent. R. Co.*, 57 N. Y. 552; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61; *Redfield on Railways* (6th ed.), § 171.

Where the railway is at fault in not delivering the baggage, and it is afterward lost, see *Dininny v. New York, etc., R. Co.*, 49 N. Y. 546.

4. Story on Bailments (9th ed.), § 453a; *Jones on Liens* (2d ed.), § 967-977; *Low v. Martin*, 18 Ill. 286.

Consent of Owner.—"We are not aware that it has ever been held to be the duty of the carrier to notify the owner or consignor of goods of a refusal to accept them, before he can terminate his own liability as carrier, and thereafter hold them himself, or transfer them to another to hold as a warehouseman. It is for the owner or consignor of goods to have some one at

right to retain possession of the goods until the satisfaction of the charge imposed upon them;¹ it is specific upon the goods stored for the particular charges for such storage,² although the entire lien extends to every parcel of the goods stored at any one time;³ but the lien does not extend to securing a balance of

the place of delivery, when their transit is completed, to accept them. If he does not, the rule which imposes a duty upon the carrier to hold them himself as warehouseman, or to store them in some convenient place, sufficiently protects the goods he has shipped. It would be unreasonable that the carrier should not be allowed to terminate his contract of carriage until after notice to the consignor, and subsequent assent by him to the storage of the goods. The assent of the owner or consignor of goods that a lien thereon for storage shall, under certain circumstances, be created, is one to be inferred from the contract of shipment he has made. If his consignee cannot be found, or, being found, refuses to accept, he must be held to authorize the storage of the goods. If the carrier is authorized to store them, it does not require argument to show that he may subject them to a lien for the necessary storage charges, and that the owner cannot thereafter sell or transfer them so as to divest the lien." *Barker v. Brown*, 138 Mass. 340. But the consent of the owner must at least be implied. *Buxton v. Baughan*, 6 C. & P. 674; 25 E. C. L. 591.

Mortgaged Goods.—A warehouseman has no lien on mortgaged goods stored with him by the mortgagor thereof after default, and without the knowledge or assent of the mortgagee, as against the mortgagee, whose right to the possession of the goods became absolute on the default. *Eisler v. Union Transfer, etc., Co.* (C. Pl.), 12 N. Y. Supp. 732. *Following Baumann v. Post*, 12 N. Y. Supp. 213.

The lien of a chattel mortgage, as well as the lien of a warehouseman, is a common-law lien, and is therefore not postponed to the warehouseman's lien, where the mortgaged goods are stored with the warehouseman without the mortgagee's consent. *Baumann v. Post* (C. Pl.), 12 N. Y. Supp. 213; *Storms v. Smith*, 137 Mass. 201. *Compare Stallman v. Kimberley* (Supreme Ct.), 6 N. Y. Supp. 706.

Warehousemen who receive mortgaged goods for storage from the mort-

gagors, and thereafter deliver them to a third person on production of the warehouse receipt, are liable in trover to the mortgagee whose mortgages are recorded in another county, though they have no actual notice of his claim. *Hudmon v. Du Bose*, 85 Ala. 446.

1. *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; 24 Am. Dec. 143; 42 Am. Dec. 257, n.; 2 Kent's Com. (13th ed.) 634; *Schouler on Bailments* (2d ed.), § 542.

Statutes declaratory of the common law exist in some states. *Iowa Rev. Code* (1880), § 2117; *Louisiana Rev. Civil Code* (1870), arts. 3224-3226; *Minnesota Laws* 1885, ch. 81; *Oregon Laws* 1878, p. 102, § 2; *Missouri 2 Rev. Stat.* (1879), § 6277; *Tennessee Code* (1882), § 2753; *New York Laws* 1885, ch. 526.

2. *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466; 42 Am. Dec. 254.

A warehouseman's lien for storage, and his lien for freight paid, depends upon distinct principles of law, and distinct facts. *Bass v. Upton*, 1 Minn. 408.

Where a carrier stores the goods with a warehouseman, at the place of delivery, the lien of the warehouseman for storage is superior to that of the carrier for his freight. *Powers v. Sixty Tons of Marble*, 21 La. Ann. 402.

A warehouseman has a specific, not a general, lien; but he may deliver a part, and retain the residue for the price chargeable on all goods received by him under the same bailment, provided the ownership of the whole is in the same person. *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466; 42 Am. Dec. 254.

3. "The defendants had a lien on the whole and every part of the hemp, for their storage of the whole; it was but one parcel; the whole was deposited with them at the same time; it was but one transaction. It is admitted that the defendants might have refused to deliver any portion of the hemp until their storage for that particular portion was paid; but having parted with all but six and a half tons, it is contended that they have no right to retain that for their charges in relation to the other portions. This cannot be; it would be

account,¹ or advances, except by custom,² or a debt.³ Only a

found most inconvenient in practice. Restricting the lien to services rendered in relation to the whole quantity deposited at the same time, it becomes a just and reasonable rule, giving effect undoubtedly to the actual intentions and understanding of the parties, and promoting the convenience of trade and business." Sutherland, J., in *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; 24 Am. Dec. 143. And see *Morgan v. Congdon*, 4 N. Y. 552; *Garrard v. Moody*, 48 Ga. 96; *Blake v. Nicholson*, 3 M. & S. 167.

1. *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894.

A custom of warehousemen to hold for a balance of account, is bad, as unreasonable and unjust. *Leuckhart v. Cooper*, 2 Hodg. 150.

"Warehousemen certainly have not a general lien, authorizing a detention of goods, not only for demands arising out of the article retained, but for a balance of accounts relating to dealings of a like nature." *Scott v. Jester*, 13 Ark. 437.

"There is a well-known distinction between a commercial lien, which is the creature of usage, and a common-law lien, which is a creature of policy. The first gives a right to retain for a balance of accounts; the second, for services performed in relation to the particular property. Commercial or general liens, which have not been fastened on the law merchant by inveterate usage, are discountenanced by the courts as encroachments on the common law." *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466; 42 Am. Dec. 254.

2. "But, admitting the contract to have been performed, and the goods stored in the proper place, still the defendants acquired no lien for the money advanced. There was no contract to that effect by the plaintiff, nor anyone authorized by him; and they could only acquire it, if at all, by the custom of the place; and such a custom is not alleged in the answer." *Bass v. Upton*, 1 Minn. 408.

A warehouseman may stipulate that for the money which he advances to his customer to purchase produce to ship to him to sell, a lien shall attach to the produce so shipped. *Grange Warehouse Assoc. v. Owen*, 86 Tenn. 355.

Advances for Freight.—By the custom of warehousemen, known and established, they have the right to receive goods from a carrier, and advance to him his reasonable charges for the carriage of them, and to hold them subject to the lien of the carrier for the amount so advanced; and if delivered to the owner without immediate payment at the owner's request, a suit may be maintained to recover of him the amount advanced to the carrier. *Sage v. Gittner*, 11 Barb. (N. Y.) 120; *Alden v. Carver*, 13 Iowa 253; 81 Am. Dec. 430. And see *Lee v. Salter*, Hill & D. Supp. (N. Y.) 163. See also *California Civil Code*, § 2876. Compare *Bass v. Upton*, 1 Minn. 408.

By Statute.—*Missouri Rev. Stat.*, § 6281; *Colorado Gen. Stat.* (1883), § 2119; *Wyoming Comp. Laws* (1876), p. 462, § 2.

New York Laws 1885, ch. 526, provide that a warehouseman shall have a lien for his storage charges for moneys advanced by him to pay for cartage, etc., on goods stored with him, and such lien shall include all legal demands for storage which he may have against the owner of the goods. It was held that a lien for storage charges is not confined to the particular goods upon which the charges arose, but the warehouseman has a general lien upon any goods in his possession for a balance due on the general account of the owner. *Stallman v. Kimberly*, 121 N. Y. 393, *affirming* 53 Hun (N. Y.) 531; 23 Abb. N. Cas. (N. Y.) 241.

A warehouseman who advances money to a commission merchant, on grain that has been consigned to him for sale, cannot retain possession of the grain as security for his advances, under the *New York* factors' act, as against the true owner, if he knew at the time that the commission merchant was wrongfully using the property to raise money for himself, as that act only protects persons dealing in good faith with the apparent owners of property. *Dorrance v. Dean*, 106 N. Y. 203.

3. *Picquet v. McKay*, 2 Blackf. (Ind.) 465; *Jarvis v. Rogers*, 13 Mass. 389; *Allen v. Meguire*, 13 Mass. 490.

A warehouseman cannot retain the goods of the principal for a debt of the agent. *Wesling v. Noonan*, 31 Miss. 599.

warehouseman in the strict sense can claim this lien.¹ If the contract of storage provides for a particular time or mode of payment inconsistent with what the law would imply, there is no lien.²

The lien is lost by giving credit to the bailor,³ or by intentionally parting with the property without payment of the charges,⁴ and is not revived by accidental recovery of possession.⁵ The lien is waived if a refusal to deliver the goods is based on any other ground than that of lien;⁶ the lien is also waived by an

1. *Alt v. Weidenberg*, 6 Bosw. (N. Y.) 176; *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292; *Rivara v. Ghio*, 3 E. D. Smith (N. Y.) 264; *In re Kelly*, 18 Fed. Rep. 528.

Statute.—By statute in some states, anyone storing property has a lien on it for reasonable charges. Such is the law in *Oregon*, *Colorado*, *Montana*, *Wyoming*. See also *New York Stat.* (1885), ch. 526; *Minnesota Stat.*, ch. 90, § 17; *Missouri Stat.*, § 6277.

Possession.—A merchant leased part of his store to a warehouse company, who, without taking possession, issued to him warehouse receipts for wool, which he placed on the leased premises. He retained control of the wool, and removed or changed it at pleasure. The wool called for by the various receipts was not set apart or marked in any way, and the wool in the store was of different grades, which were not specified in the receipts. The merchant made an assignment for the benefit of his creditors, and his assignee took possession of the wool. It was held that the warehouse company and its receipt holders had no lien on the wools, as against the other creditors, the receipts being void for indefiniteness and want of possession. *Union Trust Co. v. Trumbull* (Ill. 1890), 23 N. E. Rep. 355.

2. *Chase v. Westmore*, 5 M. & S. 180; *Cowell v. Simpson*, 16 Ves. 275; *Walker v. Birch*, 6 T. R. 258; *Chandler v. Belden*, 18 Johns. (N. Y.) 157; 9 Am. Dec. 193; *Stoddard Woolen Mfg. v. Huntley*, 8 N. H. 441; *Cummings v. Harris*, 3 Vt. 244; 23 Am. Dec. 206.

"The distinction that there can be no lien where the day or time for payment is regulated and fixed by the parties, is as old as the year books, and it is manifest that the law could not be otherwise." *Daly, J.*, in *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292.

Where it appears from the course of dealing of the warehouseman, or by

the agreement of the parties, that the goods stored will be delivered without requiring the immediate payment of the storage, the warehouseman relying on the personal credit of the parties, there is no lien, because such a course of dealing is inconsistent with an implied agreement at the time of the deposit, that the property is not to be taken away unless the storage is paid. *Dunham v. Pettee*, 1 Daly (N. Y.) 112.

So where it appears from the usual course of dealings that the storage is to be paid at Christmas following the delivery to the bailee, whether the goods are removed or not, there is no lien. *Crawshay v. Homfray*, 4 B. & Ald. 50. Compare *Fisher v. Smith*, 39 L. T. 430.

3. *Dunham v. Pettee*, 1 Daly (N. Y.) 112.

Acceptance of a note for the amount due for storage is a waiver of the lien. *Hale v. Barrett*, 26 Ill. 195; 79 Am. Dec. 367.

A warehouseman does not lose his claim against the holder of the warehouse receipt for storage charges, by delivery to him of the property stored. *Cole v. Tyng*, 24 Ill. 99; 76 Am. Dec. 735.

4. *Robinson v. Larrabee*, 63 Me. 116; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *Blackman v. Pierce*, 23 Cal. 508.

5. *Hale v. Barrett*, 26 Ill. 195; 79 Am. Dec. 367; *Robinson v. Larrabee*, 63 Me. 116.

6. *Scott v. Jester*, 13 Ark. 437; *Long Island Brewery Co. v. Fitzpatrick*, 18 Hun (N. Y.) 389; *Everett v. Coffin*, 6 Wend. (N. Y.) 608; 22 Am. Dec. 351; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; 35 Am. Dec. 607; *Ohio, etc., R. Co. v. McCarthy*, 96 U. S. 258; *Weeks v. Goode*, 6 C. B. N. S. 367; 95 E. C. L. 365; *Boardman v. Sill*, 1 Campb. 410 n.

A warehouseman who refuses to deliver grain on the ground that it is

express disclaimer.¹ The lien ends when it is claimed and no further charge can be made for the storage of the goods.² Except by statute, the lien can be enforced only by continued possession.³

VII. CHARGES FOR STORAGE.—The employment of a warehouseman imports an agreement to pay for his services;⁴ and this agreement is implied against each assignee of the original bailor who permits the goods to remain in store.⁵ In the absence of a special agreement as to charges, the law implies a contract to pay a reasonable compensation.⁶ Replevin cannot be maintained

claimed by a third person, cannot place his refusal, when sued for a conversion, on the ground that the charges have not been paid by the plaintiff. *Wallace v. Minneapolis, etc., Elevator Co.*, 37 Minn. 464.

One claiming adversely to the owner has no lien for storage paid by him. *Allen v. Ogden*, 1 Wash. (U. S.) 174.

1. *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Saltus v. Everett*, 20 Wend. (N. Y.) 268; 32 Am. Dec. 541.

When a warehouseman states to a person who is about to take possession of goods in his custody, by legal process, that he has no charge on the goods, he waives any lien he may have had on them for his charges. *Blackman v. Pierce*, 23 Cal. 508.

Expressly reserving a claim of two cents per bushel waives all other claim of lien. *Chicago Board of Trade v. Buckingham*, 65 Ill. 72.

2. *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338; *Hartley v. Hitchcock*, 1 Stark. 408.

3. 1 Jones on Liens (2d ed.), § 976; *Alabama Code* (1876), § 2143; *Indiana Rev. Stat.*, § 531; *Wisconsin Rev. Stat.* (1878), § 3347; *Iowa Rev. Code* (1880), §§ 2178-2180.

In an action for the value of a carriage, sold to pay a storage lien, the defendant is entitled to be allowed the amount of his lien, whether the sale was made in accordance with plaintiff's instructions as to price, or not. *Richmond v. Brewster* (City Ct.), 2 N. Y. Supp. 400.

Where goods are erroneously shipped to a fictitious person, and, after remaining unclaimed, are sold by the warehousemen, the surplus proceeds, after paying charges, belong to the shipper. *Boilvin v. Moore*, 22 Ill. 318.

4. *Graves v. Smith*, 14 Wis. 5; 80 Am. Dec. 762.

In an action against a warehouseman to recover the value of household

goods, it appeared that nothing was said as to payment for storage, though the plaintiff expected to pay something, and told the defendant's agent that it would be an accommodation, and would save him drayage. It was held that the defendants were gratuitous bailees, and liable for gross negligence only. *Whiting v. Chicago, etc., R. Co.*, 5 Dakota 90.

5. The purchaser of cotton stored in a warehouse by the vendor, which he suffers to remain there after his purchase, is personally liable for the storage accruing since his ownership, although his ownership was unknown to the warehouseman. But he is not so liable for the storage accrued prior to the purchase, without a special agreement to that effect. *Lehman v. Skelton*, 46 Ala. 310; *Leonard v. Dunton*, 51 Ill. 482; 99 Am. Dec. 568.

6. A stored goods with B, and nothing was said as to B's compensation for storage. It was held that the law would imply a contract that B should be paid a reasonable compensation therefor, unless there was something in the relation of the parties or the circumstances of the case, which would preclude the idea of such compensation, in which case there would be an implied agreement, or understanding, that no such compensation was to be paid. *Rea v. Trotter*, 26 Gratt. (Va.) 585.

Cotton was stored with a warehouseman in 1862, and was there stored up to the time of trial. The rates of storage at that time were 25 cents per bale the first month, and 12½ cents for each subsequent month. It was admitted that the custom of warehousemen was to make "no change in charges on cotton already in store." It was held that the warehouseman was entitled to collect but the rates customary at the time of the storing. *Garmany v. Rust*, 35 Ga. 108.

A stored a lot of wood with B, a

against a warehouseman for property stored with him, unless the charges are paid or tendered him.¹ Where the warehouse is in its nature public, as, for example, a grain elevator, the legislature has the right to fix the maximum charges for storage.²

VIII. CONFUSION OF GOODS—(See ACCESSION, vol. 1, p. 54; CARRIERS OF GOODS, vol. 2, p. 883).—When the warehouseman receives goods for storage, of the same general nature and kind as goods already in store, and mixes them together in a common mass, *e. g.*, grain in an elevator, the authorities are not agreed as to the rights of the bailor, when the mixing has been done with his assent. In grain elevators, the warehouseman, by custom and agreement, has the *jus disponendi* over the grain stored with him, and may take any portion of the mass and appropriate the same to the use of himself and others, on the condition of procuring other grain of like quality and value to supply its place.

The older view held that the deposit passed the title in the grain to the warehouseman, placing the transaction on the same basis as the deposit of money in a bank.³ But this view occasioned

warehouseman, at 12½ cents per ton per month, the contract to be terminated by B at the end of any month. B thereafter leased the warehouse to C, who assumed all the outstanding contracts. C afterward wrote to B to remove the wood at the end of the month, otherwise the charge would thereafter be \$2 per ton per month. B showed the letter to A, who declined to pay the increased rate, and did not remove the wood. The market price of storage did not exceed 12½ cents per month. In an action by C to foreclose his lien for storage, it was held that permitting the wood to remain did not create an implied contract by A to pay the price stated in C's letter; that although C would have been justified in depositing the wood elsewhere at the risk and expense of A, yet having retained it, C could only charge the rate agreed on. *Hazeltine v. Weld*, 73 N. Y. 156.

1. Replevin cannot be maintained for property stored with a warehouseman, unless it is shown that the plaintiff, or his agent, tendered the amount due for storage and necessary expenses connected therewith, and demanded the property; and such tender must have been actually produced, and been equal to the whole amount due. *Burr v. Daugherty*, 21 Ark. 559.

2. *Munn v. Illinois*, 94 U. S. 113; *Belcher Sugar Refining Co. v. St. Louis Grain El. Co.*, 101 Mo. 192. Compare *Allnutt v. Inglis*, 12 East 527.

The provision of *New York Act* of 1888, ch. 581, § 1, fixing the maximum charge for receiving, weighing, and discharging grains by means of elevators, that "actual cost" only shall be charged for trimming and shoveling grain to the leg of the elevator, cannot be evaded by the elevator owner's hiring his shoveling apparatus to others, and receiving out of the amount charged for its use such sum as may be agreed on between him and the hirers. *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460. See *California Const.*, ch. 4, § 33.

3. "But if the wheat be thrown into the common heap, with the understanding or agreement that the person receiving it may take from it at pleasure and appropriate the same to the use of himself or others, on the condition of his procuring other wheat to supply its place, the dominion over the wheat passes to the depositary, and the transaction is a sale and not a bailment." *Chase v. Washburn*, 1 Ohio St. 244; 55 Am. Dec. 623.

"Supposing that there was an implied option to claim an equal quantity of the like quality at any time after delivery, there could be no right of claiming an aliquot part of the identical bulk with which his wheat was mixed up to the time of delivery, for this was consumable at the will and pleasure of the miller, as part of the current stock, liable to fluctuation, from time to time, both in quantity and quality.

much injustice to depositors of grain, and now generally, either by statute or by judicial determination, it is the law that a deposit of grain in an elevator is a mere bailment and does not pass the title to the grain. The depositor becomes the owner of a portion of the mass, equal in quantity and value to what he has deposited.¹ If the mass is diminished beyond the amount necessary

Moreover, it appears to their lordships, that there is no sound distinction, in principle, between this and the case of money deposited with a banker on a deposit receipt. . . . By the deposit it is placed in the disposing power of the banker; and surely he who has acquired the disposing power over property for his own benefit, without the control of another, has the beneficial ownership." *South Australian Ins. Co. v. Randell, L. R.*, 3 P. C. 101. See also *Wilson v. Cooper*, 10 Iowa 565, where the depositor was entitled to call for wheat, bran, or flour.

Where grain is received by a dealer into his warehouse, under a contract to pay the owner the market price on any day he may choose to call for it, and such grain is mixed with other grain in bins from which shipments are being made every day, the dealer becomes the owner of the grain, and liable to pay for it whenever called on, and is not a mere bailee; and he continues the owner, notwithstanding that, after such grain has all been delivered, the party delivering it, not needing the money, and believing the price will be higher, proposes to leave the grain in the warehouse of the dealer until a specified time, to which the dealer agrees for a consideration to be paid him. The effect of the last contract is simply to give the party delivering until the time specified to name the day on which he will take the market price. *Richardson v. Olmstead*, 74 Ill. 213.

Where a person puts grain in a warehouse for the purpose of storage, and the warehouseman converts the grain to his own use, by manufacturing it into flour and selling the flour, the owner of the grain may waive the tort, and recover from the warehouseman the sum he received for the flour, in an action for money had and received. *Ives v. Hartley*, 51 Ill. 520.

Where corn is delivered to a warehouseman with the understanding that he may sell all, or any part of it, and either return other corn on demand, or pay for the corn at the market price

on the day the return is demanded, and he sells so much of the corn in his warehouse that he has not enough left to replace all the corn that has been so delivered to him, and the warehouse and its contents are then destroyed by fire, the warehouseman is responsible for the value of such corn, since the transaction is a sale, and not a bailment. *Cloke v. Shafroth*, 137 Ill. 393.

1. "It is admitted by the appellant to have been expressly determined, under the act of 1871, passed to give effect to article 13 of the *Illinois* constitution, that, in a deposit of grain in a public warehouse in this state, to be mixed with the grain of other persons under the warehouse act, such depositor becomes the owner of an equal quantity of grain of the same kind and quality as that deposited, and that the title to such deposited grain does not pass to the warehouseman; that, in short, it is a bailment and not a sale." *Pontiac Nat. Bank v. Langan*, 28 Ill. App. 401, citing *Meadowcroft v. German Nat. Bank*, 95 Ill. 124, and *Canadian Bank v. McCrea*, 106 Ill. 281. See also *Hall v. Pillsbury*, 43 Minn. 33; 19 Am. St. Rep. 209; *Sexton v. Graham*, 53 Iowa 181; *Irons v. Kentner*, 51 Iowa 88; 33 Am. Dec. 119; *Cushing v. Breed*, 14 Allen (Mass.) 376; 92 Am. Dec. 777; *Warren v. Milliken*, 57 Me. 97.

A warehouseman who receives grain and stores it in a common bin with his own and that of other depositors, always retaining enough to meet all demands, is a bailee, and not liable for its destruction by a fire, not attributable to his negligence. *Rice v. Nixon*, 97 Ind. 97; 49 Am. Rep. 430; *Bottenberg v. Nixon*, 97 Ind. 106.

A warehouseman, having in store wheat of his own, may effectually pledge part of it, to secure his own debt, by his warehouse receipt and without separating the wheat from the mass. *Merchants', etc., Bank v. Hibbard*, 48 Mich. 118; 42 Am. Rep. 465.

When one deposits wheat for storage in a warehouse, knowing that the warehouseman will sell from the common mass, such depositor cannot assert

to reimburse all the depositors, each one must bear a loss *pro rata* to his deposit.¹

IX. INSURABLE INTEREST.—The warehouseman has an insurable interest in property stored with him,² and may insure such property in his own name, and collect the full amount of the insur-

ownership as against an innocent purchaser. *Preston v. Witherspoon*, 109 Ind. 457; 58 Am. Rep. 417.

A deposit of wheat in a public warehouse is a bailment, and the depositor does not lose the right to reclaim it from the common mass in which that of other depositors has been mingled. *McBee v. Caesar*, 15 Oregon 62.

A warehouseman received wheat and stored it, giving receipts in the following form: "Rec'd of L. 173 bu. 20-60 one hundred & seventy-three bus. twenty lbs. of No. 2 wheat. Owner of stored wheat at their own risk. E. & Bro." Nothing was charged for storage, and no time was fixed during which the wheat should remain in store, except that it was to be left until the person storing it should be ready to sell. There was no agreement that the wheat should be mixed with other wheat, or that the warehouseman might sell, ship, or consume it. The warehouseman mixed it with wheat of his own, of the same grade and quality, and sold from the common mass, but never more than his own quantity, always reserving enough to return to the depositors their proper quantity. It was held that the transaction with each depositor constituted a bailment and not a sale. The title of the depositors was not extinguished, or transferred to the warehouseman, by mixing it with other wheat belonging to him; but each depositor retained a property in his share of the common stock, and the warehouseman could not take from it more than his appropriate share, without a violation of his contract of bailment. *O'Dell v. Leyda*, 46 Ohio St. 244. And see *James v. Plank*, 48 Ohio St. 255.

Minnesota Gen. Stat. (1878), p. 1012, provides that whenever any grain is delivered for storage, such delivery shall be treated as a bailment; that the grain so stored shall not be subject to the process of any court against the bailee; that upon demand by the bailor it shall be the duty of the bailee to deliver the amount of grain called for by the receipt; and that upon the refusal of the bailee to so comply with the de-

mand of the bailor, the former shall be deemed guilty of larceny, and the bailor may institute proceedings to recover possession of a quantity of grain equal to that deposited, or, if the grain cannot be had, for a money judgment for its value. It is held that the remedies so provided are not exclusive, but are in addition to such as previously existed at common law, or by statute, in case of the conversion of personal property by a bailee. *Daniels v. Palmer*, 41 Minn. 116.

1. *Dows v. Ekstrone*, 1 McCrary (U. S.) 434; *Sexton v. Graham*, 53 Iowa 181.

When wheat is stored in mass in a warehouse by several depositors, and there is a deficiency not occasioned by the fault of either, each must share it, and if one has withdrawn the full quantity deposited by him, he is liable for his share of the loss. *Brown v. Northcutt*, 14 Oregon 529.

If a warehouseman sells as his own any grain beyond the excess of that in his warehouse, above the amount called for by his outstanding receipts, without express consent of the depositors, his sale passes no title, and the owners, the depositors, may follow the grain into the hands of the purchaser, and recover of him for a conversion. *Hall v. Pillsbury*, 43 Minn. 33; 19 Am. St. Rep. 209.

Where wheat was, with the owner's consent, stored in mass with that of others, in a warehouse, it was held that the remainder of the mass, after shipments had been made therefrom until the quantity left was no greater than that due him, was his absolute property as against the warehouseman; and a sale by the warehouseman was a wrongful conversion, and the owner could follow and recover it wherever it could be identified. *Young v. Miles*, 23 Wis. 643.

2. No permission of, or notice to, the owner is necessary to enable the warehouseman to effect insurance. *Waters v. Monarch L. and F. Ins. Co.*, 5 El. & Bl. 870; 25 L. J. Q. B. 102; *Ex p. Bate-man*, 2 Jur. N. S. 265; 25 L. J. Bankr. 19; 8 De G. M. & G. 263; *Baxter v. Hartford F. Ins. Co.*, 11 Biss. (U. S.)

ance;¹ but he is liable to the owner for all he collects above his charges.²

Where a warehouseman agrees to insure the property stored with him, he is liable to the owner for any loss arising from his failure to do so.³

306; *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586.

1. "It is undoubtedly the law that wharfingers, warehousemen, and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners." *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527. See also *Waters v. Monarch L. & F. Ins. Co.*, 5 El. & Bl. 870; *London, etc., R. Co. v. Glyn*, 1 El. & El. 652; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 136.

"The law seems to be well settled that a person having goods in his possession as consignee, or on commission, may insure them in his own name, and, in the event of loss, recover the full amount of the insurance, and, after satisfying his own claim, hold the balance as trustee for the owner." *Hough v. Peoples' F. Ins. Co.*, 36 Md. 398. And see *Aetna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Lee v. Adsit*, 37 N. Y. 90; *Siter v. Morris*, 13 Pa. St. 218.

2. *Sideways v. Todd*, 2 Stark. 400; *Waters v. Monarch L. & F. Ins. Co.*, 5 El. & Bl. 870; 85 E. C. L. 870; *London, etc., R. Co. v. Glyn*, 1 El. & Bl. 652; *Siter v. Morris*, 13 Pa. St. 218. Such policies usually read, as to the goods, "their own or held by them in trust." *Pelzer Mfg. Co. v. St. Paul F., etc., Ins. Co.*, 41 Fed. Rep. 271.

"The words 'merchandise held in trust,' aptly describe the property of the depositors. The warehouse company held merchandise in trust for their customers, not, it is true, as technical trustees, but as trustees in the sense that the goods had been intrusted to them. . . . Hence, when they sought insurance of merchandise held by them in trust, it must have been intended of such as they held in trust—in a mercantile sense, goods intrusted to them by the legal owners." *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

A warehouse company effected an insurance against fire on the goods con-

tained in their warehouse, in two companies. In the one policy, the insurance was "on merchandise generally, . . . held by them, or in trust;" in the other, the insurance was "on merchandise, . . . their own, or held by them in trust, or in which they had an interest or liability." A had cotton on storage with the company, and had taken out specific policies of insurance thereon, which he had assigned to the company to secure advances made to him by them. The warehouse was destroyed by fire, and of the cotton stored therein, some was saved uninjured, some was saved in a damaged condition, and some was totally destroyed. In an action by A on his policies, it was held that the policies sued on, having been made payable to the warehouse company, insured to the benefit of the company, and might be considered as in favor of the same assured, on the same interest in the same subject, and against the same risks, as the policies which were issued directly to the company; they, with the latter, constituted double policies, and the companies issuing them were therefore bound to contribute their respective proportions of the loss. *Hough v. People's F. Ins. Co.*, 36 Md. 398.

3. *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306.

But if the owner has effected insurance for himself, the warehouseman cannot be held. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586.

A warehouseman agreed to have a lot of barrels, which were stored with him, insured, which he did in his name to their full value, and, on a loss by fire, prosecuted the company in good faith on the policy, but was defeated on the ground that he had given a receipt to the owner, at his request; and that he had received the same to be held up to a day anterior to the loss. It was held that the warehouseman was not liable to the owner on the ground that he failed to recover of the insurance company, he having complied with his contract. *Cole v. Favorite*, 69 Ill. 457.

X. WAREHOUSE RECEIPTS—1. Form.—A warehouse receipt is a receipt issued by a warehouseman for goods deposited in his warehouse. It need not be in any particular form,¹ but it usually, after describing the property, contains an agreement on the part of the warehouseman to re-deliver the property on demand to the bailor or his order.² Under the statutes regulating the

Where the owner insures the goods and the warehouseman agrees to give him notice of any change in the storage of the goods, and the goods are removed to another warehouse and are there destroyed by fire, no notice of the change having been given, and the insurance policies being thereby avoided, the warehouseman is liable for the loss. *Conover v. Wood*, 48 Minn. 438.

1. Warehouse Receipts.—An instrument executed and signed by warehousemen in the following words: "Received in store for account of B. & W., 3,000 sacks of corn," is a warehouse receipt, and has an assignable or negotiable value. *Harris v. Bradley*, 2 Dill. (U. S.) 284.

"A warehouse receipt need not be in a particular form. An instrument intended simply as a memorandum of the amount of goods on storage, if signed by the warehouseman, has an assignable quality, and an indorsement and delivery of it to one who makes advances upon the faith of it, renders the warehouseman liable to the holder of it for the goods it represents." *Jones on Pledges*, § 298.

Where wheat was stored with a warehouseman, under an agreement to "store the said wheat" "until a return thereof should be demanded," and upon receipt of each load of the wheat, a memorandum was given by the warehouseman, containing the date, amount and quality of the wheat, and name of person delivering it, it was held that as such memoranda did not contain or profess to contain the terms of the agreement under which the wheat was delivered, nor any representation that the warehouseman had agreed to deliver wheat of the quality mentioned, he was not estopped by the depositors from showing what was the grade of wheat delivered to him, or from showing that he was entitled to discharge his contract by returning the same wheat which he received. Such memoranda are not analogous to bills of lading, or to regular and formal warehouse receipts. *Robson v. Swart*, 14 Minn. 371; 100 Am. Dec. 238.

"To uphold the receipt as a proper warehouse document, transferring the title to the property and operating as a good constructive delivery of it to the vendee, it must in all cases distinctly appear that it was executed by a warehouseman—one openly engaged in that business—and in the usual course of trade, without fraud, or intention of fraud or bad faith on the part of the person receiving and seeking to enforce title under it." *Shepardson v. Cary*, 29 Wis. 34.

2. In a warehouse receipt, there was a clause whereby the warehouseman stipulated to deliver a specified number of gallons of whisky, on return of the receipts and "payment of the whisky, the U. S. government and state tax, interest, and charges." It was held that, though the words "payment of the whisky" were indefinite and ambiguous, it was obvious that a prepayment of some character was required in addition to the government and state tax, interest, and charges, and the clause was sufficient to put a purchaser of the receipt on inquiry as to its meaning. *Stein v. Rheinstrom*, 47 Minn. 476.

A warehouse receipt may be both a receipt and a contract. The receipt may be contradicted by oral testimony, *Hughes v. Stanley*, 45 Iowa 622; but the contract cannot be so contradicted. *Johnston v. Browne*, 37 Iowa 200.

"The stipulation, upon the face of the receipt, that the articles mentioned will be delivered only upon the return of the receipt, is a contract upon which the assignee has a right to rely, upon the faith of which he has acted, and for the breach of which he has his action against the warehouseman. It is, therefore, as between the makers of the receipt, and an assignee who has, in good faith, taken it as security for money advanced, not simply a receipt subject to be explained and contradicted by parol proof, but a contract, and subject to the rules applicable to other contracts. This is not upon the ground that they are negotiable strictly, but they are *sui generis*, and stand upon grounds

negotiability of warehouse receipts, certain formalities in the receipts may be insisted on.¹

2. Negotiability.—A warehouse receipt is regarded as representing the property described in it, and an assignment and indorsement of it is considered as equivalent to a delivery of the property itself.² It is not, in the absence of statute, a negotiable instrument, and an innocent holder or indorsee for value, does not occupy the position of one taking a promissory note before maturity.³ The principle applied in all cases is that the delivery of

applicable to that class of paper." *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 104.

1. A receipt by A. B. & Co., in form: "Received on storage in my canning house, from E. B. M. & Co., seventeen hundred and twenty cases 3x tomatoes, my own packing. Deliverable to order of E. B. M. & Co., only on production of this receipt properly indorsed," was held not a "warehouse or storage" receipt, within *Maryland* Acts 1876, ch. 262, punishing the unlawful delivery to unauthorized persons of goods mentioned in such receipts. *State v. Bryant*, 63 Md. 66.

A receipt for a quantity of petroleum, given to the owner by the superintendent of his factory, where a larger quantity was stored, no oil being set apart as covered by the receipt, which was subsequently transferred by the owner, by indorsement, as collateral security for a loan, was held not a warehouse receipt within the meaning of the *New York* statute (Laws 1858, ch. 326), providing that any person to whom warehouse receipts are transferred by indorsement shall be deemed the owner, so far as to give validity to any pledge, lien, or transfer by such person. *Yenni v. McNamee*, 45 N. Y. 614.

A weighmaster's ticket, with the word "stored" written on its face, is not a warehouseman's receipt entitling the holder to recover thereon, under *Iowa* Code, § 2171, regardless of the disposal of the grain covered thereby. *Cathcart v. Snow*, 64 Iowa 584.

Under the *Pennsylvania* act of September 24, 1866, declaring storage receipts given by warehousemen negotiable, a receipt given by the overseer of a warehouse is not negotiable. *Peoples' Bank v. Gayley*, 12 Phila. (Pa.) 183; 92 Pa. St. 518; *Troutman v. Peoples' Bank*, 12 Phila. (Pa.) 276.

Under a statute making warehouse

receipts for goods stored or deposited negotiable, an order for "corn to be loaded into sacks, and when loaded to be sent down," is not a warehouse receipt, but merely an agreement for transportation. *Union Sav. Assoc. v. St. Louis Grain Elevator Co.*, 81 Mo. 341.

2. *Young v. Lambert*, L. R., 3 P. C. 142; *Gibson v. Stevens*, 8 How. (U. S.) 384; *McNeil v. Hill*, 1 Woolw. (C. C.) 96; *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 104; *Horr v. Barker*, 8 Cal. 603; *Second Nat. Bank v. Wallridge*, 19 Ohio St. 419; 2 Am. Rep. 408; *Gibson v. Chillicothe Bank*, 11 Ohio St. 311; *Newcomb v. Cabell*, 10 Bush (Ky.) 460; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350; *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399.

"The indorsement and delivery of the receipt of the warehouseman, in the course of trade, passes the title and right of possession of the property to the party to whom it is so indorsed and delivered. Such is the law and such is the understanding of the business community. The legal title to the property passed to the plaintiffs by the indorsement and delivery to them of the evidence of the title." *Harris v. Bradley*, 2 Dill. (U. S.) 284.

3. *Canadian Bank v. McCrea*, 106 Ill. 281; *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Sargent v. Central Warehouse Co.*, 15 Ill. App. 553; *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557; *Cochran v. Rippey*, 13 Bush (Ky.) 495; *First Nat. Bank v. Boyce*, 78 Ky. 42; 39 Am. Rep. 198; *Durr v. Hervey*, 44 Ark. 301; 51 Am. Rep. 594; *Griswold v. Haven*, 25 N. Y. 595; 82 Am. Dec. 380.

Early in this century there was an

warehouse receipts is a symbolical delivery of the property itself; that it has the same effect as such delivery, and can have no greater, and that a transfer of a warehouse receipt, by the person in possession of it, gives no higher title than would the transfer of the property by the same person.¹ The transfer, by indorsement and delivery, of the receipt, transfers the legal title to the property and the constructive possession, and the warehouseman becomes the bailee of the transferee from the time of transfer, without notice to or attornment by him,² although on this

attempt to make the title pass on the transfer of the warehouse receipt, where there was no title in the transferor. *Keyser v. Suse, Gow* 58; *Zwinger v. Samuda*, 7 Taunt. 265; *Lucas v. Dorian*, 7 Taunt. 278.

Private Warehousemen.—A warehouse receipt, issued by one who is not a public warehouseman, gives the holder no lien on the goods named in the receipt, as against the creditors of the receiptor. *Union Trust Co. v. Trumbull* (Ill. 1890), 23 N. E. Rep. 355.

Warehouse receipts issued by others than those designated by the statute as public warehousemen, have a *quasi* negotiable character. The assignee of such a receipt is not affected by a secret arrangement between the parties as to a claim of the party holding the property. *Northrop v. First Nat. Bank*, 27 Ill. App. 527.

1. *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350; *Spangler v. Butterfield*, 6 Colo. 356.

"The holder of such a receipt takes no better title, nor occupies any more advantageous position, than if the goods themselves were held by him. A receipt given by a warehouseman, for property placed in his possession for storage, is not, in a technical sense, like a bill of exchange, a negotiable instrument, but it merely stands in place of the property it represents, and a delivery of the receipt has the same effect in transferring the title to the property as the delivery of the property." *Solomon v. Bushnell*, 11 Oregon 277; 50 Am. Rep. 475.

"In the opinion of the court it [the certificate] transferred to him the legal title and constructive possession of the property; and the warehousemen from the time of this transfer became his bailees and held the pork and flour for him. The delivery of the evidences of title, and the orders indorsed upon them, was equivalent . . . to the

delivery of the property itself." *Taney C. J., in Gibson v. Stevens*, 8 How. (U. S.) 384.

"A receipt given by a warehouseman, for property placed in his possession for storage, is not, in a technical sense, like a bill of exchange, a negotiable instrument, but it merely stands in the place of the property it represents, and a delivery of the receipt has the same effect in transferring the title to the property as the delivery of the property." *Second Nat. Bank v. Wallridge*, 19 Ohio St. 419; 2 Am. Rep. 408.

The purchaser of a warehouse receipt, expressing that the goods are subject to storage charges, holds subject to the warehouseman's lien, and becomes personally liable for the storage. *Cole v. Tyng*, 24 Ill. 99; 76 Am. Dec. 735.

The assignee can sue in his own name for the conversion or for the recovery of the property. *Harris v. Bradley*, 2 Dill. (U. S.) 284; *McNeil v. Hill*, 1 Woolw. (U. S.) 96; *First Nat. Bank v. Bates*, 1 Fed. Rep. 702.

2. *Gibson v. Stevens*, 8 How. (U. S.) 384; *Harris v. Bradley*, 2 Dill. (U. S.) 284; *McNeil v. Hill*, 1 Woolw. (U. S.) 96; *First Nat. Bank v. Bates*, 5 Cin. Law Bull. No. 5; *Yenni v. McNamee*, 45 N. Y. 614; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335; 4 Am. Dec. 364.

Receipts were issued by storage and forwarding agents for goods to be forwarded to consignees named in the receipts. The shippers sent the receipts to the consignees, who accepted drafts in reliance thereon. The goods were attached before they were shipped, as the property of the shipper, but it was held that the delivery of the receipts to the consignees vested the title and possession in them, at least to the extent of their advances. *Davis v. Bradley*, 28 Vt. 118; 24 Vt. 55; 65 Am. Dec. 226; *Bryans v. Nix*, 4 M. & W. 775; *Broadwell v. Howard*, 77 Ill. 305.

latter point there is some conflict of authority.¹ It is the duty of

In *Horr v. Barker*, 8 Cal. 603, it is said that delivery alone will pass the title if it is made with that intent.

A warehouse receipt, which recites that the property therein mentioned is "deliverable to bearer," may be transferred by the owner without indorsement. The *Wisconsin* act of 1860, providing that such receipts may be transferred by indorsement, is permissive, and not imperative when the receipt is in the hands of the owner. *Rice v. Cutler*, 17 Wis. 351; 84 Am. Dec. 747.

Warehouse receipts made payable to bearer are not negotiable; they are made negotiable only by written indorsement and delivery. *Erie, etc., Dispatch v. St. Louis Cotton Compress Co.*, 6 Mo. App. 172.

Constructive Delivery.—A tender of a warehouse receipt, or other document of title, may constitute such a performance on the part of the seller of goods, as to defeat any action for non-delivery of the goods. *Salter v. Woolams*, 2 M. & G. 650; *Wood v. Manley*, 11 Ad. & El. 34; 39 E. C. L. 19; *First Nat. Bank v. Dearborn*, 115 Mass. 219; 15 Am. Rep. 92; *Davis v. Jones*, 3 Houst. (Del.) 68; *Hayden v. DeMets*, 53 N. Y. 426; *Russell v. Carrington*, 42 N. Y. 118; 1 Am. Rep. 498; *McKee v. Garcelon*, 60 Me. 167; 11 Am. Rep. 200; *Gibson v. Stevens*, 8 How. (U. S.) 399.

The holder of a warehouse receipt by indorsement, has a right of action against the warehouse company for injury to the goods stored, whether injured before or after the assignment. *Sargent v. Central Warehouse Co.*, 15 Ill. App. 553.

1. In *Spangler v. Butterfield*, 6 Colo. 356, the court said that after notice and attornment this was certainly so.

The transfer of a warehouseman's receipt clothes the transferee with constructive possession of the goods, although the warehouseman has no notice, and does not agree to hold for the transferee. *Durr v. Hervey*, 44 Ark. 301; 51 Am. Rep. 594.

"It was held in many cases in the English courts, that the assignment of such a receipt does not amount to a constructive delivery of the goods until the warehouseman is notified thereof, and agrees to hold the goods for the assignee. No substantial reason is offered for giving to the assignment of such an instrument an effect differing

materially from that of an assignment of a bill of lading." *Davis v. Russell*, 52 Cal. 611; 28 Am. Rep. 647. See also *Puckett v. Reed*, 31 Ark. 131; *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350; *Cool v. Phillips*, 66 Ill. 217; *Broadwell v. Howard*, 77 Ill. 305; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419; 2 Am. Rep. 408; *Gibson v. Chillicothe Bank*, 11 Ohio St. 311; *Lehman v. Marshall*, 47 Ala. 362; *Allen v. Maury*, 66 Ala. 10; *Mottram v. Heyer*, 5 Den. (N. Y.) 629; *Gardiner v. Suydam*, 7 N. Y. 357; *Waldron v. Romaine*, 22 N. Y. 368; *Cartwright v. Wilmerding*, 24 N. Y. 521; *British Columbia Bank v. Marshall*, 11 Fed. Rep. 19; *Cochran v. Ripy*, 13 Bush (Ky.) 495; *Robson v. Swart*, 14 Minn. 370; 100 Am. Dec. 238; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482; 9 Am. Rep. 603; *Whitney v. Tibbitts*, 17 Wis. 359; *Waller v. Parker*, 5 Coldw. (Tenn.) 476; *Glasgow v. Nicholson*, 25 Mo. 29.

There is no duty on a pledgee of a warehouse receipt to notify the warehouseman of the pledge. *First Nat. Bank v. Bates*, 1 Fed. Rep. 702.

Contra.—Where there is no statute making warehouse receipts negotiable, and a receipt is not made payable to order, its transfer does not operate as a constructive delivery of the goods, until the bailee has recognized the rights of the transferee. If, before that, the goods are attached in the bailee's hands as the property of him to whom the receipt runs, the attachment is effective. *Gill v. Frank*, 12 Oregon 507; 53 Am. Rep. 378.

"When a private warehouseman, who has an unfettered right to choose the persons for whom he will hold, gives a receipt containing only an undertaking to his bailor personally, without the words 'or order,' or any other form of offer or assent to hold for anyone else, it is impossible to say that a mere indorsement over of that receipt will make him bailee for a stranger. He has not consented to become so, even under the principles argued for by Mr. Benjamin. And, until he has consented to hold for someone else, he remains the bailee of the party who intrusted him with the goods. . . . The appeal to commercial usage cannot help the plaintiff's case. If there be any usage to treat such documents

the warehouseman to deliver the property to the holder of the receipt.¹

In some states, statutes make warehouse receipts negotiable and transferable by indorsement, in the same manner as negotiable paper, and with like remedies.²

as this as symbols of property, in the sense of the argument for the plaintiffs, it is simply a usage to disregard well-settled rules of law affecting the rights of third persons." *Hallgarten v. Oldham*, 135 Mass. 1; 46 Am. Rep. 433.

1. *Harris v. Bradley*, 2 Dill. (U. S.) 284; *Hale v. Milwaukee Dock Co.*, 29 Wis. 492; 9 Am. Rep. 603; *Shepardson v. Cary*, 29 Wis. 34; *Cool v. Phillips*, 66 Ill. 216; *Greenbaum v. Megibben*, 10 Bush (Ky.) 419.

Under a custom, grain was sampled on the cars by an agent of the board of trade, a sampler's ticket of quality given, and when a sale was made by the board, the seller would deliver the ticket to the buyer, with the buyer's name and the price marked on it, and with an order on the warehouseman for delivery. It was held that for grain delivered on the presentation of the the sampler's ticket so marked, but unaccompanied by an order for delivery, the warehouseman was liable. *Peoria, etc., R. Co. v. Buckley*, 114 Ill. 337.

The heading to a warehouseman's receipt contained the following clauses among others: "No goods delivered without a written order, or presentation of original receipt." "Goods will not be delivered to any person unless identified and authorized to receive the same." It was held that, upon demand by a vendee of the party who stored the goods, the original receipt being present, and he being accompanied by the person who, in the matter of the storage, acted for the party who stored the goods, and who was there to identify the person making the demand as being the vendee, the above clauses did not warrant a refusal to deliver; and that it was not necessary to produce a written order. *Willner v. Morrell*, 40 N. Y. Super Ct. 222.

Warehousemen who received from a carrier a cargo of grain, issuing their receipt therefor to the carrier, which the carrier indorsed to the person named as the consignee's agent in the bill of lading, were not liable in trover, to the consignee, or his pledgee of the bill of lading, for delivering the grain upon the order of such agent, without

notice of the pledge. *Hazard v. Abel*, 15 Abb. Pr. N. S. (Buffalo Super. Ct.) 413.

A warehouseman may deliver the goods stored with him to a person to whom the bailor has unconditionally sold them, without taking up the receipt, or seeing that it has been indorsed to the vendee. *Mortimore v. Ragsdale*, 62 Miss. 86.

An indorsement in blank of a warehouse receipt, by an agent of the warehouse, does not render the agent liable to the purchaser. *Mida v. Geissmann*, 17 Ill. App. 207.

2. *Newcomb v. Cabell*, 10 Bush (Ky.) 460; *Central Sav. Bank v. Garrison*, 2 Mo. App. 58. But negotiability is not extended beyond the strict terms of the statute. For example, where the statute requires indorsement, a receipt payable to bearer must be indorsed to be protected by the statute. *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333; *Erie etc., Dispatch Co. v. St. Louis Cotton Compress Co.*, 6 Mo. App. 172.

The *Kentucky* statute reads as follows: "All warehouse receipts issued by any warehouseman, as provided by this act, shall be negotiable and transferable by indorsement in blank, or by special indorsement, and with like liabilities as bills of exchange now are, and with like remedy thereon." *Kentucky Stat.* 1869, § 3. See *Ferguson v. Northern Bank*, 14 Bush (Ky.) 555; 29 Am. Rep. 418; *Greenbaum v. Megibben*, 10 Bush (Ky.) 419; *Van Schoonhoven v. Curley*, 86 N. Y. 187. Under the *Alabama Code*, § 2049, indorsement is necessary. *Allen v. Maury*, 66 Ala. 10; *Lehman v. Marshall*, 47 Ala. 362.

In *Missouri* (Rev. Stat. 1879, §§ 558, 559) and *Pennsylvania* (Brightly Purdon's Dig. 1873, p. 114, § 1) the statute is the same as that applying to bills of lading. Such statutes exist in *California*, *Connecticut* and *Illinois*. See *Chicago Dock Co. v. Foster*, 48 Ill. 507.

So in *Indiana*. But here the statute does not apply to the receipt of a private warehouseman for his own prop-

3. Estoppel.—A warehouseman is estopped, by his statement in the receipt, to deny that he has the property actually in his possession, in an action by a holder of such receipt, who has purchased it for value, without notice of any defect;¹ but there is

erty in his own warehouse. *E. g.*, a man wanted to buy apples on a loan from a bank. At the bank's suggestion he got a permit to convert his storehouse into a warehouse, and issued a warehouse receipt as collateral to the loan. On his bankruptcy it was held that the apples passed to his assignee. *Adams v. Merchants' Nat. Bank*, 2 Fed. Rep. 174; 9 Biss. (U. S.) 396.

As to the *Minnesota* statute, see *Fishback v. Van Dusen*, 33 Minn. 111. See also the statutes of *Iowa, Kansas, Maine, Massachusetts, Maryland, New York, and Virginia*.

As to the *Tennessee* statute, see *Rome Bank v. Haselton*, 15 Lea (Tenn.) 216.

As to the *Wisconsin* statute, see *Price v. Wisconsin M. & F. Ins. Co.*, 43 Wis. 267.

Under some statutes, a receipt marked "non-negotiable" across its face is not affected by the statute, as in *California, Connecticut, New York, and Wisconsin*.

Under the *California* statute, a warehouse receipt not marked non-negotiable across its face, is negotiable, and its indorsement passes the absolute title to the property mentioned therein. *Bishop v. Fulkerth*, 68 Cal. 607. See also *Cleveland v. Shoeman*, 40 Ohio St. 176; *State v. Loomis*, 27 Minn. 521; *National Exch. Bank v. Wilder*, 34 Minn. 140; *Brooks v. Hanover Nat. Bank*, 26 Fed. Rep. 301.

A warehouse receipt is not included in, nor negotiable under, a statute providing that only "those instruments shall be negotiable whereby one promises or agrees to pay any sum of money or articles of personal property, or any sum of money in negotiable property, or acknowledge any sum of money or personal property to be due to any other person," for this does not embrace agreements for personal services, or to pay money, or deliver property, on uncertain contingencies. *Canadian Bank v. McCrea*, 106 Ill. 281.

Effect of the Statute.—"Although warehouse receipts are made negotiable by the law of this state, the holder of the receipt takes no better title and stands in no better attitude than if the goods themselves were held by him.

Such receipts, no matter under what section of the act of 1869 they are issued, are in lieu of, and represent the property to which they refer, and their negotiability serves only to cut off any defense the warehouse-keeper may have. Any other construction would enable any one fraudulently depositing the goods of another, to pass title, as against the true owner, by obtaining a warehouse receipt in his own name." *First Nat. Bank v. Boyce*, 78 Ky. 42; 39 Am. Rep. 198.

Where the statute provides that warehouse receipts "shall be transferable by indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another," the receipt is not negotiable. The statute relates to the mode of transfer only, and does not authorize the transfer of a title not possessed by the indorser. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557; *Canadian Bank v. McCrea*, 106 Ill. 281; *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350.

1. "Instruments of this kind are *sui generis*. From long use in trade, they have come to have, among commercial men, a well-understood meaning. And the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named, as would a bill of sale. [Citing authorities.] When a warehouseman issues such a receipt, he puts it in the power of the holder to treat with the public on the faith of it. He enables him to say, and to induce others to believe, that he has certain property which he can sell or pledge for a loan of money. If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict the statement which he has made in the receipt, so as to injure a party who has been misled by it. This is within the most exact definition of estoppel. If A gives to B his note for \$100, although he has received no value therefor, and may defend against the note in a suit brought by B, yet if B sells the note to a third party who

does not know of the facts, A then must pay the note. Just so in case of a warehouse receipt. If A issues such a paper to B, for articles which he has never received, a third party treating with B on the faith of the statement and promise contained in the receipt, will hold A for the goods or their value. It is of no consequence what the transaction may be between the original parties, whether the receipt, as is claimed here, was intended as security for a loan, or was entirely false." *Miller, J., in McNeil v. Hill, 1 Woolw. (U. S.) 96.*

Where a warehouseman had given a receipt for grain, and had stated to one who made advances on the strength of the statement, that the holder of the receipt had grain on storage, when in fact he had none, and the party making the advances, relying on the estoppel, brought suit against the warehouseman as for a conversion of the grain, it was held that the measure of damages was the market value of ordinary merchantable grain, of the kind alleged to have been in store. *Griswold v. Haven, 25 N. Y. 595; 82 Am. Dec. 380; Rowley v. Bigelow, 12 Pick. (Mass.) 307; 23 Am. Dec. 607; Armour v. Michigan Cent. R. Co., 65 N. Y. 111; 22 Am. Rep. 603 (doubting Grant v. Norway, 10 C. B. 665); Van Santen v. Standard Oil Co., 81 N. Y. 171; Brooke v. New York, etc., R. Co., 108 Pa. St. 529; 56 Am. Rep. 235; Coventry v. Great Eastern R. Co., 11 Q. B. Div. 776; Stewart v. Phoenix Ins. Co., 9 Lea (Tenn.) 104; Fourth Nat. Bank v. St. Louis Cotton Compress Co., 11 Mo. App. 333.*

A recital in warehouse receipts that the goods, consisting of liquors, are stored in a free warehouse, whereas in fact they are in a bonded warehouse, and subject to a government tax, estops the warehouseman from claiming that they are subject to such tax, as against a *bona fide* transferee, who has thereby been induced to make advances to an amount exceeding their value; and, if the warehouseman require the transferee to pay the tax as a condition precedent to delivery, he is guilty of conversion. *First Nat. Bank v. Dean (Super. Ct.), 16 N. Y. Supp. 107; 27 Abb. N. Cas. (N. Y.) 281.*

Not a Guarantor of Title.—A warehouse receipt does not make the warehouseman a guarantor of the title of goods placed in his custody. *Mechanics', etc., Ins. Co. v. Kiger, 103 U. S. 352.*

"The receipt of a warehouseman or wharfinger, and the receipt or bill of lading of a common carrier, are contracts of precisely the same general nature and effect, and should obviously be governed by the same rules and principles as to the application of the doctrine of estoppel or negotiability, which, with respect to such contracts, mean one and the same thing. They are or may be said to be negotiable or conclusive, in the hands of a *bona fide* assignee or holder for value, so far as the party executing them, warehouseman or carrier, has made, or is bound by, the representations contained in them. They are negotiable, or conclusive and valid in the hands of such a holder, because the signer, or party by whom they are executed, is estopped, or not permitted to deny the existence of the facts represented in or by them, and which are presumed to have been within his knowledge at the time of their execution. Negotiability, or *quasi* negotiability, as it has sometimes been more properly called, and estoppel, when spoken of with respect to such instruments, mean, therefore, one and the same thing. . . . A bill of lading or carrier's receipt for goods to be transported, and the receipt of a warehouseman or wharfinger for goods in store, or to be forwarded, are both contracts of bailment." *Hale v. Milwaukee Dock Co., 29 Wis. 486; 9 Am. Rep. 603.*

Warehousemen who give their receipts for goods on storage, are estopped from setting up a want of segregation of the goods receipted for from other goods, in an action against them, by the holder of the receipt, for a conversion of the goods by a seizure, in an action against a vendor of the plaintiff. *Goodwin v. Scannell, 6 Cal. 541; Adams v. Gorham, 6 Cal. 68.*

"Warehouse receipts, pure and simple, with only the incidents annexed to them by law, and none superadded by special contract, conduct or representation, are no more obligatory in the hands of *bona fide* holders for value, than in the hands of the original bailor of the property stored. . . . If warehouse receipts of a special form and character be adopted and issued in due course of business, for the express purpose of being pledged as security to obtain money, and if, as a part of the regular system of using them, the warehouseman acknowledge in writing on each receipt notice of assignment by the pledgor to the pledgee

no estoppel against one who has notice of a defect, or gives no value.¹ In some states, it is provided by statute that a warehouseman must have the goods actually in store before a receipt is issued.² The principle of estoppel, however, is not held to apply, where the description in the receipt does not accord with the goods it represents; thus, where the receipt described the goods stored as "mess pork," while the barrels in fact contained salt, it was held that the warehouseman was not estopped to deny the truth of statements in his receipt that could not be within his knowledge.³ It is also held in a few cases that where a receipt is issued by mistake, the warehouseman is not estopped to

before the latter advances his money thereon, the pledgee, after advancing his money in good faith, is entitled to stand on the terms of the pledged receipt as importing a genuine business transaction of the nature described in the instrument. Thus, though in fact no goods had been received for storage, the recital in the special receipt being utterly false, nevertheless the recital will have the same effect in protecting such *bona fide* pledgee as if the goods had been received and stored." *Planters' Rice-Mill Co. v. Merchants' Nat. Bank*, 78 Ga. 582.

1. *Barnard v. Campbell*, 55 N. Y. 456; *Root v. French*, 13 Wend. (N. Y.) 573; 28 Am. Dec. 482; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Hoffman v. Noble*, 6 Met. (Mass.) 68; 39 Am. Dec. 711; *Commercial Bank v. Colt*, 15 Barb. (N. Y.) 506; *Whitlock v. Hay*, 58 N. Y. 484.

An estoppel takes place, however, where a pledgee is led to advance money on the faith of the receipt, or to refrain from at once attempting to recover money so advanced. *Voorhis v. Olmstead*, 66 N. Y. 113; *Knights v. Wiffin*, L. R., 5 Q. B. 660.

2. Under such a statute, the receipt does not pass title to goods not in the store, to the injury of innocent third persons. If, however, the goods are subsequently received, the receipt covers them subject to any intervening rights of third persons. If a new receipt is issued, it takes effect at once, but does not relate back so as to cut out any rights of third persons, even though the receipt is dated back. *Cochran v. Rippy*, 13 Bush (Ky.) 495.

By *Kentucky Act of 1869*, forbidding the issuance of a second warehouse receipt without the written consent of the holder of the prior receipt, the holder of the first one is estopped to deny the

other's oral authority to sell. *Farmer v. Gregory*, 78 Ky. 475.

The plaintiffs sold flour to H., a fraudulent purchaser, but before any action was taken for the disaffirmance of the sale, the flour was delivered to the defendant, as warehouseman. The defendant, before all the flour had been received, issued a receipt, stating that he held the flour for T. & B., and H. transferred the receipt to T. & B., who made advances thereon without notice of H.'s fraud. In an action by the plaintiffs to recover possession of the flour from defendant, it was held that the receipt was good, and conveyed title to T. & B., so far as it represented the flour actually in store at the time it was issued, but no further. In such an action, upon the question whether the defendant issued a receipt before all the flour was in the store, evidence is inadmissible to show that the defendant had, upon another occasion, given a receipt for other flour before it was received at his warehouse. *McCombie v. Spader*, 3 Thomp. & C. (N. Y.) 690; 1 Hun (N. Y.) 193; *First Nat. Bank v. Dean*, 27 Abb. N. Cas. (N. Y. Super. Ct.) 281; 16 N. Y. Supp. 107.

3. *Hale v. Milwaukee Dock Co.*, 23 Wis. 276; 99 Am. Dec. 169. In this case, *Cole, C. J.*, said: "Now, it seems to us that the defendant, being a warehouseman, may well be estopped, as against one who takes the warehouse receipt for a valuable consideration, from denying the truth of the statements to which it gives credit by its signature, so far as those statements relate to matters which are or ought to be within its knowledge or the knowledge of its agents; but that in respect to things not open to inspection, and visible, like the contents of pork barrels, it ought not to be concluded by a description of the property in the receipt. This is the

set up his mistake, even against an innocent holder for value; thus, where a clerk issued a warehouse receipt for goods, and failed to record the receipt on the books, and a second receipt was issued by mistake, it was held that, in the absence of fraud, the warehouseman was not estopped from showing his mistake.¹

4. Pledge.—A warehouse receipt may be pledged, and the pledgee is entitled to hold the goods represented by the receipt

rule applied in the case of receipts or bills of lading given by common carriers, as to the interior condition of property shipped, and we cannot see why it is not applicable to the case at bar." In this case, the defendant, being authorized by its charter to receive upon storage provisions, etc., and to advance money and give receipts thereon (which receipts should be *prima facie* evidence of the holder's title to the property), issued warehouse receipts, "for account of bearer," for a certain number of "barrels of mess pork, deliverable on return" of said receipts. The barrels receipted for were found to contain only salt; and defendant, though offering to deliver the identical barrels stored, refused to deliver mess pork. In an action by an innocent holder of the receipts for value, it was held that the defendant was entitled to show that, among all persons purchasing or dealing in pork, it is the uniform practice to require warehouse receipts for well-known brands, and buy upon the reputation of the packer, or, in other cases, to require an inspection of the commodity to attend the purchase and be a condition of it, and that parties rely upon the warehouseman's receipt only for the custody of the property, and not for the quality or contents of the barrels. See the same case reported 29 Wis. 482; 9 Am. Rep. 603; *Grier v. Nickle*, 1 Am. Law. Reg. 119, where it was held that the warehouseman is under no obligation to open packages to see what they contain. *Williams v. Wilmington, etc., R. Co.*, 93 N. Car. 42; *Blanchet v. Powell's Llantwit Collieries Co., L. R.*, 9 Exch. 74; *Robson v. Swart*, 14 Minn. 370; 100 Am. Dec. 238.

1. Second Nat. Bank v. Walbridge, 19 Ohio St. 419; 2 Am. Rep. 408.

Bigelow, in his work on Estoppel (5th ed.), p. 475, n. 3, says: "As this is a case of estoppel by contract, the situation should be exceptional in which mistake can be an answer to the estoppel. The case is often treated as one of purchase for value of a title tainted with

fraud. If the purchase is without notice, the right of the defrauded party is cut off. See *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Hide & Leather Nat. Bank v. West*, 20 Ill. App. 61. But see *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350; *Solomon v. Bushnell*, 11 Oregon 277; 50 Am. Rep. 475. The doctrine of purchase for value applies to equities, and there is no equity here. Estoppel *in pais* by contract appears to be the better ground." He goes on to say: "Some courts, in a class of cases already considered, in regard to warehouse receipts and bills of lading, have gone a doubtful length. In a recent case in *Ohio* (Second Nat. Bank v. Walbridge, 19 Ohio St. 419), it appeared that the defendant, a warehouseman, had given two receipts by mistake for the same grain. The second receipt came into the plaintiff's hands *bona fide* and for value, after the grain had been delivered on the first receipt. In an action for the non-delivery of the grain on the second receipt, the court allowed the defendant to show that it had been given by mistake. (See also *Blanchet v. Powell's Llantwit Collieries Co., L. R.*, 9 Exch. 74; *Ferguson v. Northern Bank*, 14 Bush (Ky.) 555; 29 Am. Rep. 418.) But this, while not without support (*Williams v. Wilmington, etc., R. Co.*, 93 N. Car. 42; *Solomon v. Bushnell*, 11 Oregon 277; 50 Am. Rep. 475), is contrary to many other authorities (*Coventry v. Great Eastern R. Co.*, 11 Q. B. Div. 776; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111; 22 Am. Rep. 603). If, from the nature or situation of the property, the case were such that the party making the admission might not be bound to know the facts, it might be right to hold that there was no estoppel. (See *Hale v. Milwaukee Dock Co.*, 29 Wis. 482; 9 Am. Rep. 603.)"

The *bona fide* possession of a warehouse receipt is legal evidence of possession; and where different parties are

against the vendor of the goods, where the latter has permitted his vendee to have possession of the receipt in such a way as to enable him to pledge it; this on the principle of estoppel.¹ Unless, however, the true owner of the goods is estopped to set up his claim, the pledgee takes no higher title than a vendee of the receipt, who merely takes such title as his vendor has,² and a mere

in possession of such receipts, the earliest must prevail. *Martin v. Creditors*, 14 La. Ann. 394.

1. *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333; *Coombs v. Chandler*, 33 Ohio St. 178; *Cleveland v. Shoeman*, 40 Ohio St. 176.

In *Moors v. Kidder*, 106 N. Y. 32, affirming 34 Hun (N. Y.) 534, it was held that where a commercial correspondent advances his own money or credit for the purchase of property, and takes the bill of lading in his own name, looking to the property as the means of reimbursement, he is not a pledgee, but is the owner of the property, until the mover in the transaction pays the purchase price. And where he lets his principal have the papers, indorsed in blank, for the sole purpose of enabling him to enter and warehouse them on account of the owner, and the principal takes a warehouse receipt in his own name, and then obtains a loan from one who relies on his representations and the warehouse receipt, the latter cannot hold the property against the owner. *Rapallo, Earl, and Peckham, JJ., dissenting*. See also *Root v. French*, 13 Wend. (N. Y.) 570; 28 Am. Dec. 482; *Hoffman v. Noble*, 6 Met. (Mass.) 68; 39 Am. Dec. 711; *Ditson v. Randall*, 33 Me. 202; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Babcock v. Lawson*, 4 Q. B. Div. 394; 5 Q. B. Div. 284; 42 L. T. N. S. 289; *Hazard v. Fiske*, 83 N. Y. 287; *Barnard v. Campbell*, 58 N. Y. 73; 17 Am. Rep. 208; *Winne v. McDonald*, 39 N. Y. 233; *Caldwell v. Bartlett*, 3 Duer (N. Y.) 341; *Durbrow v. McDonald*, 5 Bosw. (N. Y.) 130; *Gibson v. Stevens*, 8 How. (U. S.) 384.

Such a pledge gives no general lien for debts not arising from the pledge. *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894.

Where the receipt is pledged by a factor, the pledge cannot hold beyond the extent of the factor's lien. *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

A factor, who had goods of his prin-

cipal in his own warehouse, obtained a loan from a bank, giving as collateral a receipt stating that the goods had been placed "in the control and possession of said bank, to be used by said bank as its property, for the reimbursement of the loan, and if paid when due, or before said property is disposed of by the said bank for its reimbursement, then to be returned unto" the borrower. As against the true owner, this pledge was not sustained, as the bank was held to have no possession, and was also chargeable with constructive notice that the pledgor was a factor whose duty was to sell, and not to pledge for his own debt. *First Nat. Bank v. Nelson*, 38 Ga. 391; 95 Am. Dec. 400.

In an action by A against B, to recover the value of certain cotton, it appeared that A, by false representations of C that C was authorized, by a certain mill company, to buy it for them, and desired to ship it forthwith, sold the same to C, and, according to custom, gave C a delivery order on a warehouse, where C had it loaded on a truck, and tagged with the company's address. C afterward stored it in another warehouse, took receipts in his own name, and had the tags removed. B, through brokers, bought the cotton in good faith and for value, receiving the warehouseman's receipts therefor, and shipped it to Liverpool. C absconded without paying A. It was held: First, that B acquired no title, C's conversion being larceny; second, that as A had merely intrusted C with the temporary possession to enable C to ship it to the pretended buyer, A was not estopped from reclaiming the same from B [*overruling Craig v. Marsh*, 2 Daly (N. Y.) 61], and third, that B was not protected by *New York Laws* 1858, ch. 326, § 6, providing that the transferee of a warehouse receipt shall be deemed the true owner, etc. *Collins v. Ralli*, 20 Hun (N. Y.) 246.

2. *Western Union R. Co. v. Wagner*, 65 Ill. 197; *McCombie v. Spader*, 1

delivery of the receipt to the pledgee constitutes a valid pledge.¹ Such a pledge is not a chattel mortgage and does not come under statutes requiring the recording of such instruments.²

5. Receipt for Own Goods.—A warehouseman with his own goods in store may issue a warehouse receipt therefor which he may pledge to secure his own debt,³ but it is generally held that

Hun (N. Y.) 193; *Paddon v. Taylor*, 44 N. Y. 371; *Hazard v. Abel*, 15 Abb. Pr. N. S. (Buffalo Super. Ct.) 413; *Hoyt v. Baker*, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 405.

"It is asked what security there is in loaning money upon a pledge of warehouse receipts? We answer, precisely the same security as in loaning upon the pledge and delivery of the property itself. If the person pledging the property is the owner, the security is good to the extent of its value, and so of the warehouse receipts. But if he is not the owner, if he has stolen it, or if he is a bailee merely, and is attempting to make a fraudulent use of the property intrusted to his keeping, a person purchasing or receiving the property as security, does so in subordination to the title of the true owner. These are risks which men engaged in business must be content to encounter, and against which the law can afford no protection. The law can punish roguery, but it cannot secure innocent persons against losses from its multifarious devices." *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350.

"The receipt says that Roberts had received this corn in storage of appellees in well-covered cribs, which he agreed to hold and deliver to them subject to their order. Roberts being a warehouseman, having an elevator, and handling grain for himself and others, we would expect him to give such a receipt in the due course of his business, and by adding the words at the end of the receipt, 'for advances of money on same,' did not convert this receipt into a mere pledge." *Cool v. Phillips*, 66 Ill. 216.

1. "The delivery of the warehouse receipt would be as effectual as the delivery of the cotton itself, and it could make no difference that the warehouse receipt was not indorsed by the pledgor. There is nothing in this at variance with anything decided or said by this court, in *Erie*, etc., *Dispatch v. St. Louis Cotton Compress Co.*, 6 Mo. App. 172. The transfer of a ware-

house receipt, not made negotiable by indorsement and delivery, can convey to the transferee no greater rights than would be acquired by a transfer of the goods which the receipt represents. That we have said. But it does not follow from this, that one may not pledge cotton by delivering the unindorsed cotton note, as effectually as by delivering to the pledgor the bales themselves." *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399. See also *Conrad v. Fisher*, 37 Mo. App. 367; *Meyerstein v. Barber*, L. R., 2 C. P. 38; L. R., 4 H. L. 319; *First Nat. Bank v. Dearborn*, 115 Mass. 219; 15 Am. Rep. 92; *Parshall v. Eggert*, 54 N. Y. 18; *Cochran v. Rippey*, 13 Bush (Ky.) 495; *Whitney v. Tibbitts*, 17 Wis. 359; *Taylor v. Turner*, 87 Ill. 296.

Under *Louisiana Code*, the pledgee on an assignment of a warehouse receipt has no special privilege, without an express contract of pledge for the specific debt. *Martin v. Creditors*, 15 La. Ann. 165; *Cater v. Merrell*, 14 La. Ann. 376.

2. The transfer of title and delivery of possession by the issuance of a warehouse receipt, more in the nature of a pledge than a mortgage, and the right so to pledge goods as a security for advances or payment of a debt, rests on the common law, and is, therefore, not embraced in the statute relating to the acknowledgment and recording of chattel mortgages. *Spangler v. Butterfield*, 6 Colo. 356.

3. Merchants', etc., *Bank v. Hibbard*, 48 Mich. 118; 42 Am. Rep. 465.

Where a warehouseman pledges his own grain in his own elevator, by issuing to the pledgee a warehouse receipt, this is equivalent to an actual transfer of the possession, and renders the warehouseman bailee of the pledgee. The bailee is a "depositor," under the *Minnesota Laws* 1876, ch. 86, and, under that statute, if the warehouseman ships out the specific grain pledged, the lien attaches to other grain of the same kind and quality afterward substituted. *National Exch. Bank v. Wilder*, 34 Minn.

such a pledge is not valid as against an attaching creditor, unless there has been an actual or symbolical delivery of the goods;¹ nor is it valid as against a subsequent bill of sale, nor an assignment for the benefit of creditors,² but the transfer of such a receipt by way of sale conveys an indefeasible title.³ This matter, however, is regulated by statute in some states. In *Iowa*, for example, a warehouseman is forbidden to issue a receipt on his own property to be used as collateral security,⁴ while in *Nebraska*, on the other hand, any packer of pork or beef, or a distiller, having his own warehouse, and any elevator man, may issue a receipt for his own stock in store, which shall have the same force and effect as a regular warehouse receipt.⁵

6. Receipt for Goods in Bulk.—The transfer of a warehouse

149; *Eggers v. National Bank*, 40 Minn. 182.

The pledgee may recover on an insurance policy assigned to him with such a receipt. *Hoyt v. Hartford F. Ins. Co.*, 26 Hun (N. Y.) 416.

1. *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Geddes v. Bennett*, 6 La. Ann. 516; *Parshall v. Eggert*, 52 Barb. (N. Y.) 367; 54 N. Y. 18; *First Nat. Bank v. Nelson*, 38 Ga. 391; 95 Am. Dec. 400.

2. *Thurber v. Oliver*, 26 Fed. Rep. 224; *Sexton v. Graham*, 53 Iowa 181; *Shepardson v. Green*, 21 Wis. 539; *Fishback v. Van Dusen*, 33 Minn. 111; *Gibson v. Stevens*, 8 How. (U. S.) 384; *Gibson v. Chillicothe Bank*, 11 Ohio St. 311; *In re Gurney*, 7 Biss. (U. S.) 414; *Miller v. Jones*, 15 Nat. Bank Reg. 150; *Allen v. Massey*, 17 Wall. (U. S.) 351.

"There was, therefore, never any valid pledge by the borrower, nor any actual warehouse receipt. What was so called operated in each instance to transfer the title of the property described, as between the borrower and the bank, and such transfer, being collateral to the payment of a debt, could operate only as a mortgage." *Farmers', etc., Nat. Bank v. Lang*, 87 N. Y. 209. Such a receipt is not even a mortgage, but only a contract between the parties, not valid as against creditors. *Adams v. Merchants' Nat. Bank*, 2 Fed. Rep. 174; 9 Biss. (U. S.) 396; *Yenni v. McNamee*, 45 N. Y. 614.

3. *Gibson v. Stevens*, 8 How. (U. S.) 384; *Gibson v. Chillicothe Bank*, 11 Ohio St. 311; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Hoyt v. Hartford F. Ins. Co.*, 26 Hun (N. Y.) 416; *Farmers', etc., Nat. Bank v. Lang*, 87

N. Y. 209; *Yenni v. McNamee*, 45 N. Y. 614; *Adams v. Merchants' Nat. Bank*, 2 Fed. Rep. 174; 9 Biss. (U. S.) 396.

A vendor may convert himself into a warehouseman by giving a warehouse receipt. *Sherman v. Traders' Nat. Bank*, 9 Biss. (U. S.) 216.

4. *Iowa Code*, § 2171; *Sexton v. Graham*, 53 Iowa 181; *Yenni v. McNamee*, 45 N. Y. 614.

Under *New York Laws* 1858, ch. 326, as amended by *Laws* 1866, ch. 440, making warehousemen liable for damages for issuing a receipt for any article unless actually received in their store, the defendant, who issued his receipts for a number of barrels, described as containing "Portland Cement," and undertook to deliver same on return of the receipts, is not liable on the delivery of the article received by him unless it is shown not to be "Portland Cement." *Dean v. Driggs*, 44 Hun (N. Y.) 480.

Pennsylvania Act Sept. 24, 1866, makes it a penal offense for any "warehouseman, wharfinger, or other person," to issue warehouse receipts for goods, etc., unless he has actually received them into store, and to part with goods so received, without requiring the surrender of the receipt. It was held that the words "other person" in the act, meant one *ejusdem generis* as a warehouseman or wharfinger, and that a grain dealer who received goods in store without compensation could not be indicted for an offense within the act. *Bucher v. Com.*, 103 Pa. St. 528.

5. *Nebraska Laws* (1879), p. 73, § 1; *Comp. Stat.* 1881, ch. 92, § 13.

In *Kentucky*, the act of March 6, 1869, impliedly authorizes a warehouseman to give a receipt for his own goods.

receipt, for a portion of goods in bulk, passes no title, until the segregation of the goods, unless the receipt itself provides means for making the separation;¹ but there is an exception to this rule, by usage, in the case of grain in bulk in elevators.²

Cochran v. Ripy, 13 Bush (Ky.) 495; *Ferguson v. Northern Bank*, 14 Bush (Ky.) 555; 29 Am. Rep. 418; *Farmer v. Gregory*, 78 Ky. 475; *Newcomb v. Cabell*, 10 Bush (Ky.) 460.

1. *Ferguson v. Northern Bank*, 14 Bush (Ky.) 555; 29 Am. Rep. 418.

But a transfer of a warehouse receipt will transfer constructive possession of grain in bulk. *Gibson v. Stevens*, 8 How. (U. S.) 384; *Cushing v. Breed*, 14 Allen (Mass.) 376; 92 Am. Dec. 777; *Broadwell v. Howard*, 77 Ill. 305; *Gregory v. Wendell*, 40 Mich. 432.

2. *Cushing v. Breed*, 14 Allen (Mass.) 376; 92 Am. Dec. 777; *Keeler v. Goodwin*, 111 Mass. 490; *Dole v. Olmstead*, 36 Ill. 150; 85 Am. Dec. 397; *Greenleaf v. Dows*, 3 McCrary (U. S.) 27.

"When the grain was put in the elevator, the plaintiff and the other owner of the grain stored therein became tenants in common in proportion to their respective interests. And a tenant in common of personal property may maintain trover against a stranger who converts the property or his interest in it. At the time of the delivery to the consignee, the plaintiff was the owner of the grain entitled to the immediate possession. Such a delivery was a separation of their grain, and a misappropriation of it, and was a conversion for which the appropriate remedy is an action of tort, in the nature of trover." *Forbes v. Fitchburg R. Co.*, 133 Mass. 154.

The provisions of the *Indiana* statutes relating to public warehouses (*Indiana* Rev. Stat. (1881), §§ 6625-6650), which forbid warehousemen to issue receipts for goods not actually in store, can have no effect to invalidate the title of *bona fide* holders of warehouse receipts for wheat, which in fact has become so mingled with other wheat in an elevator as to no longer represent any one specific lot of wheat. *Preston v. Witherspoon*, 109 Ind. 457; 58 Am. Rep. 417.

But the pledgee of such a receipt has no preference over holders of other receipts. *Sawyer v. Taggart*, 14 Bush (Ky.) 727; *May v. Hoaglan*, 9 Bush (Ky.) 172.

This exception, however, is confined

to grain, and does not extend to other articles, as flour, *Gardiner v. Suydam*, 7 N. Y. 357; nor hams, *Ferguson v. Kentucky Northern Bank*, 14 Bush (Ky.) 555; nor cotton bales, *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 104. In case the warehouseman issues more receipts than he has grain, or fraudulently disposes of part of it, the holders of the outstanding receipts must share *pro rata* in the mass. *Dows v. Elkstrone*, 3 Fed. Rep. 19; *Dole v. Olmstead*, 36 Ill. 150.

"During the last fifty years, grain of all kinds has been handled by merchants in bulk; and for the more convenient transportation and transfer of the same, it is kept in bulk in public warehouses, called elevators, where all the grain received is stored in large bins according to quality, and irrespective of any prior ownership. Upon receiving the grain, the warehouseman or elevator company issues documents, in which the receipt of a certain quantity of grain of a certain quality and kind is acknowledged, and the promise is made to deliver it to the order of the depositor. These warehouse receipts are taken by the depositor or the exchanges of the cities, as the representative of the grain itself; and when the grain which they represent is sold, the certificates are transferred by indorsement and delivery, or by delivery alone, if made deliverable to bearer or indorsed in blank; and the title to the grain will be as effectually transferred as if the grain itself had been delivered." *Tiedeman on Sales*, § 320.

The editors of Smith's leading cases, in the notes to *Lickbarrow v. Mason*, vol. 1, pt. 2 (7th Am. ed.) 1197, observe that "the exigencies of trade have called a class of instruments into being, which are, substantially, acknowledgments by public or private agents that they have received merchandise, and from whom or on whose account, and usage has made the possession of such documents equivalent to the possession of the property itself, and to this class belong warehouse receipts." *Quoted* with approval in *Broadwell v. Howard*, 77 Ill. 307. *Benton v. Curyea*, 40 Ill. 320, also fully recognizes this doctrine.

WARRANT OF ATTORNEY.

1. To Confess a Judgment, 685.
 1. *Nature and Requisites of Warrants of Attorney and Judgment Notes*, 685.
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- II. To Bring or Defend an Action, 707.

I. TO CONFESS A JUDGMENT—1. **Nature and Requisites of Warrants of Attorney and Judgment Notes.**—A warrant of attorney is an instrument in writing, addressed to one or more attorneys therein named, authorizing them generally to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him.¹ Where such a warrant, or any other power of attorney to confess judgment, is contained in a promissory note, the note is termed a judgment note. The general subject of judgment by confession has been treated elsewhere;² but it will be necessary here, in order to explain fully the law relating to warrants of attorney, to treat incidentally of judgments by confession without action, so far as the subject is not covered by the previous article.

Where a party gives a warrant of attorney, as security for a debt on which no suit is pending, it is usual at the same time to execute a bond conditioned for the payment of the debt, with interest, either immediately or within a stipulated time after the date, to which bond the warrant refers, authorizing a confession of judgment for the penalty.³

The warrant should contain the grant of an authority clearly given, and the designation of a person by whom it is to be exercised, either by name or description.⁴ Ordinarily, it is given to

1. Bouvier's L. Dict.

2. JUDGMENTS, vol. 12, p. 149*g*.

3. 1 Troub. & Hal. Pa. Prac., § 434;

1 Dunl. Pr. 359.

In the absence of statutory prohibition, the warrant of attorney may be made a part of the bond or other instrument of indebtedness, so that a single signature may manifest the obligor's assent, both to the obligation and the warrant. *Sloane v. Anderson*, 57 Wis. 123. Otherwise, where there is such prohibition. *Vliet v. Camp*, 13 Wis. 198; *Richards v. Globe Bank*, 12 Wis. 693.

4. *Rabe v. Heslip*, 4 Pa. St. 139.

Where a note and warrant are included in one instrument, the fact that the blank spaces, in which the person giving the power should be indicted, are left unfilled, does not invalidate the power, which will be considered as given by the maker of the note. *Packer v. Roberts*, 140 Ill. 9.

And where the printed part of the warrant authorized a confession in favor of one party, while the name of another was written in the note as payee, the writing must prevail, and will authorize a confession of judgment in favor of the payee. *Holmes v. Parker*, 125 Ill. 478.

"any attorney" of some court or in a particular state.¹ It should also state the cause of action, where that is not set forth in a declaration or statement, or an annexed instrument.² Where the judgment is confessed in open court, the evidence of the execution of the warrant before the confession need not appear on the record;³

Where the name of the payee in a judgment note is altered, no change being made in the warrant of attorney, judgment may be entered on the note in favor of the payee. *Packer v. Roberts*, 140 Ill. 9.

A mere written acknowledgment of indebtedness, filed by a debtor with a justice, which contains neither a formal confession of judgment, nor written authority to the justice to enter judgment, is not sufficient as the basis of a judgment, where there is no antecedent process, and no voluntary appearance of the parties. *Loth v. Lacconesowich*, 22 Mo. App. 68.

Judgment cannot be entered on a note "with leave to enter judgment," unless an attorney appear and confess the judgment, or the signing of the warrant be proved. *Wilkins v. Croft*, 2 N. J. L. 91.

A warrant to "enter" judgment will be considered equivalent to a warrant to "confess" judgment. *Mason v. Smith*, 8 Ind. 73.

A deed of conveyance to the grantee, his heirs and assigns, with full covenants of warranty and seisin, conveying lands to him, to be held in trust for the use and benefit of the grantor, with power to control and convey, and manage for the use of the grantor and for the payment of his debts, accompanied by a power of attorney authorizing such grantee and attorney to collect the debts of the grantor, gives such trustee and attorney no power to confess judgment; and though the grantor join in the confession of judgment, and it be valid to the extent of his interest, such interest cannot be sold and conveyed by an execution at law, but can be reached only through a court of chancery. *Hoppe v. Cray* (N. J. 1891), 21 Atl. Rep. 624.

1. *Cooper v. Shaver*, 101 Pa. St. 549; *Poppers v. Meager*, 33 Ill. App. 19.

Where the power was to "any attorney within the United States or elsewhere, to appear and confess judgment as of any term," this was held too indefinite to authorize judgment in another state. *Carlin v. Taylor*, 7 Lea (Tenn.) 666.

"Any attorney" will not include a prothonotary or clerk, *Grover, etc., Sewing Mach. Co. v. Radcliffe*, 66 Md. 511; except where, by special statutory provision, the prothonotary is authorized, as in *Pennsylvania*, to enter judgment without the intervention of an attorney. *Troub. & Hal. Pa. Prac.*, § 436.

Where the warrant authorized S., or any other attorney, to confess judgment, it was held that a confession by both S. & B., attorneys, was good. *Patton v. Stewart*, 19 Ind. 233.

A provision in a lease, authorizing any attorney to appear for the lessee and confess judgment in ejectment, is a sufficient warrant of attorney. *Betz v. Valer* (Pa.), 39 Leg. Int. 190.

2. *Gambia v. Howe*, 8 Blackf. (Ind.) 133; *Glassmire v. Neill*, 10 Pa. Co. Ct. Rep. 418.

A warrant to confess judgment on a note, described it as "bearing even date herewith." The warrant was a printed blank in which, through inadvertence apparently, the date was omitted. The note and warrant were upon the same piece of paper, and there could be no doubt as to what the note referred. It was held that the warrant was sufficient. *Richards v. Globe Bank*, 12 Wis. 692.

A warrant in a lease is not void for uncertainty because some of the blanks in the printed form are not filled in, when the omissions thus made do not render the instrument so ambiguous that its meaning cannot be ascertained. *Links v. Mayer*, 22 Ill. App. 489. And see *Sweesey v. Kitchen*, 80 Pa. St. 160. But the warrant is insufficient where it is uncertain what should be inserted. *Chase v. Dana*, 44 Ill. 262; *Morris v. Bank of Commerce*, 67 Tex. 602.

3. *Iglehart v. Chicago, etc., Ins. Co.*, 35 Ill. 514; *Gambia v. Howe*, 8 Blackf. (Ind.) 133. But see *Rapley v. Price*, 9 Ark. 428.

Where the warrant does not appear in the record, the court will presume that it was sufficient to justify them in entering the judgment. *Gibboney v. Gibboney*, 2 Ill. App. 322.

In *Brown v. Little*, 9 Ala. 416, it

otherwise, where the confession was out of court.¹ The warrant is revocable where it is unsupported by a consideration, or not given as a security for a debt, or to render a security effectual;² but in these cases it is irrevocable.³ It need not be under seal.⁴ The person to whom the warrant is given has all the benefits of a judgment and execution against the debtor's person and property, without being delayed by any intermediate process, as in the case of a regular suit.⁵

2. Jurisdiction.—A judgment by confession without action, on a warrant of attorney or otherwise, though founded on an agreement of the parties, is as much a judicial act as an ordinary judgment in an action, and it is essential that the court should have jurisdiction of the subject-matter.⁶ Where the jurisdiction of the court is a limited one, the fact that the subject-matter comes within that jurisdiction should appear on the record.⁷ Where the warrant authorizes judgment only in a particular court, or in

was held that although it was unnecessary to set out the warrant, or its proof on the record, yet the record must show that the authority was verified and sufficient to authorize the particular judgment.

A warrant of attorney need not be proved, to maintain a confession of judgment taken thereunder within a year and a day after its execution. *Elliott v. Ives*, 44 Mich. 190. And see *infra*, this title, *The Judgment*.

1. *Stein v. Good*, 115 Ill. 93; *Martin v. Judd*, 60 Ill. 78; *Gardner v. Bunn*, 132 Ill. 403.

The authority of one who confesses judgment for another, must always be proved, otherwise the judgment is void. *Conery v. Rotchford*, 34 La. Ann. 520; *Sherrard v. Nevins*, 2 Ind. 241; 52 Am. Dec. 508; *Jarrett v. Andrews*, 19 Ind. 403.

As to when the affidavit of execution will make out a *prima facie* case, see *Joliet Electric Light, etc., Co. v. Ingalls*, 23 Ill. App. 45.

2. *Evans v. Fearnie*, 16 Ala. 689; 50 Am. Dec. 197.

3. In *Spencer v. Reynolds*, 9 Pa. Co. Ct. Rep. 249, it was held that the subsequent insanity of the principal would not prevent the entry of judgment, *Wassell v. Reardon*, 11 Ark. 705; 54 Am. Dec. 245; the reason assigned being that it was a power coupled with an interest.

It is proper to show by parol the actual consideration for a confession of judgment. *Wolf v. Kohr*, 133 Pa. St. 13.

4. *Kneedler's Appeal*, 92 Pa. St. 428;

Alexander v. Alexander, 85 Va. 353; *Kinnersley v. Mussen*, 5 Taunt. 264.

Though it was held otherwise where the warrant contained a release of errors, in *Brutton v. Burton*, 1 Chit. 707.

5. 1 Comp. Pr. 316; *Troub. & Hal. Pa. Prac.*, § 434.

The right to be served with citation before judgment, is one that may be waived by the maker of a note, desiring to confess judgment thereon, at the time of the execution of the note, and such waiver may be afterwards enforced against him according to his agreement. *Stein v. Brunner*, 42 La. Ann. 772.

6. *Caley v. Morgan*, 114 Ind. 350; *Black on Judgments*, § 53; *Freeman on Judgments* (4th ed.), § 547. See also *JUDGMENTS*, vol. 12, p. 149.

Jurisdiction to render judgment on a judgment note, may be acquired by the appearance of the party's authorized agent. *Teel v. Yost*, 128 N. Y. 387; *Baldwin v. Freyendall*, 10 Ill. App. 106. And see *Spier v. Corll*, 33 Ohio St. 236. But a warrant of attorney to confess judgment remains in force only so long as the judgment remains unpaid; and where the payee, after receiving satisfaction thereof, fraudulently conceals the fact, and procures an attorney to appear and confess judgment, without the maker's knowledge or consent, such appearance confers no jurisdiction on the court, and the judgment is void. *First Nat. Bank v. Cunningham*, 48 Fed. Rep. 510.

7. *Camp v. Wood*, 10 Watts (Pa.) 118; *Tenny v. Filer*, 8 Wend. (N. Y.) 569. And see *Albertz v. Dawson*, 1 Binn. (Pa.) 105.

a particular state, it must be followed,¹ but the parties may be estopped from excepting to the jurisdiction, by not making such exception in time.²

3. Compliance with Statute.—The entering of judgment by confession, without action, being principally a matter regulated by statute, the statutory method must in all cases be complied with.³

1. Manufacturers', etc., *Bank v. Boyd*, 3 Den. (N. Y.) 257; Manufacturers', etc., *Bank v. St. John*, 5 Hill (N. Y.) 497.

In *Hamilton v. Schoenberger*, 47 Iowa 385, it was held that a confession of judgment by warrant of attorney pertains to the remedy, and that a warrant made in one state will not authorize confession of judgment in another, without special statutory provision therefor.

A judgment rendered in one state on a warrant of attorney is entitled to full faith and credit in another. *Coleman v. Waters*, 13 W. Va. 278; *Teel v. Yost*, 128 N. Y. 387; *Sipes v. Whitney*, 30 Ohio St. 69; *Kingman v. Paulson*, 126 Ind. 507; 22 Am. St. Rep. 611; *Nicholas v. Farwell*, 24 Neb. 180.

But a judgment entered in one state, upon a warrant of attorney contained in a note, without notice to the defendant, may, when sued on in another, be attacked for fraud and duress in the procurement of the note, since the defendant has never had his day in court. *Trebilcox v. McAlpine*, 62 Hun (N. Y.) 317. And see *Spier v. Corll*, 33 Ohio St. 236.

A judgment rendered in *Ohio*, upon a power of attorney to confess judgment executed in *Pennsylvania* against a person resident in *Tennessee*, without personal or constructive service of process, is void, and *nul tiel* record is a good plea to an action thereon in *Tennessee*. *Carlin v. Taylor*, 7 Lea (Tenn.) 666.

A judgment entered in one court, by virtue of a warrant of attorney authorizing the entry of such judgment in a court of concurrent jurisdiction, will not be set aside as erroneous at the instance of a subsequent judgment creditor. *Haner's Appeal*, 5 W. & S. (Pa.) 473.

2. *Lyons v. Kelly*, 40 La. Ann. 498. Where the defendants come and move the court to vacate the judgment, and afterward voluntarily consent to the dismissal of such motion, they will not be afterward allowed on error to allege a want of jurisdiction in the court,

of the persons of the defendants. *Marsden v. Soper*, 11 Ohio St. 503.

When a party submits himself to the jurisdiction of a competent court and confesses judgment, and the court enters judgment for the amount admitted to be due, it will be presumed that all the preliminary steps necessary to confer jurisdiction have been taken. *Caley v. Morgan*, 114 Ind. 350.

3. *Eakin v. Smith*, 21 N. J. L. 97; *Rosebrough v. Ansley*, 35 Ohio St. 107; *Barker v. Beeber*, 112 Pa. St. 216; *Hawes v. Pritchard*, 71 Ind. 166; *Henry v. Estes*, 127 Mass. 474; *Grubbs v. Blum*, 62 Tex. 426; *Liberty Grotto No. 1 v. Meade*, 11 Pa. Co. Ct. Rep. 340; *Beach v. Botsford*, 1 Dougl. (Mich.) 199; 40 Am. Dec. 45.

But, on compliance with the statute, there can be no further exactions. *Johnston v. Glasgow*, 5 Ark. 311; *Marbury v. Pace*, 29 La. Ann. 557; *Jewett v. Fink*, 47 Wis. 446.

In *Bush v. Hanson*, 70 Ill. 483, it is said: "A warrant of attorney to confess judgment, is a familiar common-law security. The entry of judgment by *cognovit* thereunder, is a proceeding according to the course of the common law, which courts have ever entertained, in the ordinary exercise of their authority as courts of general jurisdiction. The fact that the statute has regulated the mode of procedure, does not convert the proceeding into one of such a special statutory character that the same presumptions do not obtain as in the case of ordinary judgments of superior courts of general jurisdiction."

In *Schuster v. Rader*, 13 Colo. 335, it is said: "As a check against abuses which might follow from committing so important a matter as the entry of judgments to the clerk without judicial supervision, it has been asserted that statutes authorizing such judgments must be strictly pursued or the judgments will be void. The rule thus stated is too broad under many circumstances. Without undertaking to lay down a rule applicable to all cases, we are satisfied that, where a judgment has been entered by confession, with-

In some states judgment by confession on warrant of attorney is not allowed;¹ in others, a confessed judgment is not final, but must afterward come before the court for confirmation.² It is not ordinarily requisite that a declaration should be filed;³ and in many cases it is sufficient if the judgment be entered by a prothonotary or clerk, and either in term time, or vacation.⁴ The

out action, unless the statute authorizing such entry has been complied with in all substantial particulars, the enforcement of the judgment may be enjoined upon principles of equity, at the suit of a third party prejudiced thereby; also that, if a judgment by confession be not entered in fact substantially as required by the statute, an execution in advance of such entry will be postponed in favor of a junior execution or attachment creditor, who has regularly made a levy based upon valid proceedings. Freeman on Judgments (4th ed.), §§ 543, 557, 558; Freeman on Executions (2d ed.), § 20; Ling v. King, 91 Ill. 571; Chapin v. Thompson, 20 Cal. 681; King v. French, 2 Sawy. (U. S.) 441; Edgar v. Greer, 7 Iowa 136; Criswell v. Ragsdale, 18 Tex. 443; Brown v. Hathaway, 10 Minn. 303.

1. See O'Hara v. Lannier, 1 B. Mon. (Ky.) 100; Rankin v. Lawrence, 4 Rich. (S. Car.) 267; Burns v. Nash, 23 Ill. App. 552; Hamilton v. Schoenberger, 47 Iowa 385; Allen v. Smillie, 12 How. Pr. (N. Y.) 158.

2. See Bass v. Estill, 50 Miss. 300.

"While we have met with no adjudications upon the subject, we presume that when the confirmation of the court is procured, it may be regarded, unless set aside, as curing all irregularities not going to the jurisdiction of the court." Freeman on Judgments (4th ed.), § 543.

3. Johnson v. Glasgow, 5 Ark. 311; Matthews v. Thompson, 3 Ohio 272; Gayle v. Foster, Minor (Ala.) 125.

Judgment may be entered on a warrant of attorney without a declaration, though the warrant requires one to be filed. Montelins v. Montelins, Bright. (Pa.) 79. See *infra*, this title, *The Statement*.

4. Kellogg v. Keith, 4 Ill. App. 386; First Nat. Bank v. Daly, 34 Ill. App. 173; Keith v. Kellogg, 97 Ill. 147; Sharp v. Danville, etc., R. Co., 106 N. Car. 308; 19 Am. St. Rep. 533. See Abbott v. Yuma Co., 18 Colo. 6.

A judgment note, which authorizes any attorney at law of the state to appear before any court of record and

confess judgment for the face of the note and a reasonable attorney's fee, gives to the court before whom confession is made, and not to the attorney signing the *cognovit*, the right to determine what is a reasonable fee; therefore, a judgment for attorney's fee entered upon such warrant by the clerk in vacation, is unauthorized. Campbell v. Goddard, 123 Ill. 220. And, generally, such a judgment cannot be entered upon an instrument which does not show upon its face the amount due, unless it can be rendered certain by mere calculation. Connay v. Halstead, 73 Pa. St. 354.

The mere fact that the docketing of a judgment by confession, was made, not in open court by the clerk, but in his office by a deputy, does not invalidate the judgment, or justify striking it out on motion, after the expiration of the term. Johns v. Fritehey, 39 Md. 258.

It has been held that an act giving the prothonotary power to enter up judgment on a warrant of attorney, without the intervention of an attorney, does not confer upon him the general authority of an attorney of the court, who may appear and confess judgment and arrange the details thereof. Connay v. Halstead, 73 Pa. St. 354.

He cannot enter a waiver of inquiry and exemption, though contained in the instrument, so as to make it a part of the record. Hope v. Everhart, 70 Pa. St. 231.

He can enter judgment on a paper containing a promise of the defendant to treat his wife kindly, and acknowledging the receipt of money for which he hereby confesses judgment in case of violation of his agreement, and gives a bond for faithful performance of same, as the confession is not dependent on a condition, the happening of which cannot be ascertained from the instrument itself, as the intention appears to be to confess judgment for the money and give bond for the kindly treatment. Richards v. Richards, 135 Pa. St. 239.

So he can enter judgment on a contract for payment of money in annual

statutes regulating these judgments do not apply where an action is regularly commenced and in which process is issued and served.¹ As to whether a judgment not complying with the statute is void or voidable, see *infra*, this title, *The Judgment*.

4. Compliance with Warrant.—Where judgment is confessed under a warrant or power of attorney, the authority must be strictly pursued.² Under a power to confess judgment “at any time hereafter,” it may be confessed on the same day the power is executed;³ and before the note matures, or the demand becomes due.⁴ But where it is to confess judgment “for such amount as may appear to be unpaid” on the note, this has been held not to authorize a confession before maturity.⁵ But this

installments, with a confession of judgment in case of default in any payment for three months, as it can be ascertained *prima facie* from the indorsements thereon, whether a default has been made and the amount is due. *Whitney v. Hopkins*, 135 Pa. St. 246.

1. *Hoguet v. Wallace*, 28 N. J. L. 524; *Crouse v. Derbyshire*, 10 Mich. 479; 82 Am. Dec. 51; *Chestnutt v. Pollard*, 77 Tex. 86; *Freeman on Judgments*, § 544.

2. *Manufacturers, etc., Bank v. St. John*, 5 Hill (N. Y.) 500; *Baldwin v. Freyendall*, 10 Ill. App. 106; *Reed v. Bainbridge*, 4 N. J. L. 351.

A warrant of attorney to appear in an action and confess judgment therein, is a sufficient authority to agree to an amicable action. *Van Beil v. Shive*, 41 Leg. Int. (Pa.) 154.

The court will not strike off a judgment confessed by an attorney, under a warrant executed with a blank which he has properly filled up; the remedy, if any, is against the attorney. *Sweesey v. Kitchen*, 80 Pa. St. 160.

3. *Holbird v. Anderson*, 5 T. R. 235; *Thomas v. Mueller*, 106 Ill. 36; *Cummins v. Holmes*, 11 Ill. App. 158. But see *Waterman v. Jones*, 28 Ill. 54.

In an action on an account stated, the defendant, to stay proceeding, gave his note payable at a certain bank on a certain date “without grace,” and stipulated that if the note was not paid according to its terms, the plaintiff could immediately, on such default, enter judgment. It was held that, where the note was presented for payment on the day of maturity, at the named bank, within the usual banking hours, and payment was refused, judgment entered on the note shortly after banking hours on the same day was proper. *Osborn v. Rogers*, 112 N. Y. 573.

4. *Alldritt v. First Nat. Bank*, 22 Ill. App. 192; *Towle v. Gonter*, 5 Ill. App. 409; *McDonald v. Chisholm*, 131 Ill. 273; *Sherman v. Baddely*, 11 Ill. 622.

So, where the words in the statute are “money due or to become due.” *Mechanics’ Bank v. Mayer*, 93 Mo. 417; *Mendel v. Mayer* (Mo. 1888), 7 S. W. Rep. 5. Otherwise, where the words are simply “debts due.” *Baldwin v. Freyendall*, 10 Ill. App. 106.

A judgment confessed before the expiration of an extension of the note is valid. *Alldritt v. First Nat. Bank*, 22 Ill. App. 24.

Where a note, dated April 1, 1888, and payable one year after date, contains a warrant of attorney empowering any attorney of any court of record “to appear for me and confess judgment against me, as of any term,” for the amount of the note, a judgment entered August 24, 1886, is valid, as the date at the head of the note has nothing to do with the warrant of attorney, which was evidently intended to become operative on delivery of the note. *Volkenand v. Drum*, 143 Pa. St. 525.

The fact that a note, upon which an office confession of judgment is taken, was not due when the judgment was rendered, does not deprive the court of jurisdiction, and the judgment will not be vacated on that account. *Black v. Pattison*, 61 Miss. 599.

5. *Reid v. Southworth*, 71 Wis. 288; *Sloane v. Anderson*, 57 Wis. 123. In the former case it was said: “A power to confess judgment for a debt not due, should be ‘clearly granted and expressed, and not left to mere inference or implication. The word “unpaid” is more commonly and properly applied to a debt due than to a debt undue, and may at least as well mean a debt due as undue; therefore, no

rule of strict construction has its reasonable limitations, and must not be applied with such strictness as to defeat the obvious intention of the party granting the power.¹ For examples of the way in which powers to confess judgment have been construed, with especial reference to the negotiability of judgment notes, see the appended note.²

power to confess a judgment for a debt undue is even implied by it."

It was held in *Spier v. Corll*, 33 Ohio St. 236, that a warrant of attorney to confess judgment in a promissory note does not authorize the entry of an appearance, etc., before the maturity of the note, and that an appearance prematurely entered by virtue of such warrant, confers on the court in which it is entered no jurisdiction of the person of the maker. The action was brought on judgment entered in a *Pennsylvania* court: The court said: "When a note is made payable, three, six, or nine months after date, it is clear that the maker does not intend that its payment may be enforced by judgment and execution immediately upon its delivery. These warrants of attorney, construed in connection with their context, can only be understood as authorizing the entry of an appearance, confession of judgment, etc., after the maturity of the respective notes. A different construction would be a fraud upon the makers."

But in *Teel v. Yost*, 128 N. Y. 387, it was held that since the settled practice in *Pennsylvania* authorized the entry of judgment by confession on a judgment note, before the maturity of the note, the fact that a judgment was so entered in the courts of that state constituted no objection to the maintenance of an action on the judgment in the courts of *New York*.

Before the maturity of a note held by a bank, which discounted it for the maker, there is nothing due or to become due from the maker to an indorser, and a confession of judgment on the note by the maker, in favor of the indorser, will be set aside at the instance of subsequent judgment creditors of the maker. *Forrester v. Strauss* (Supreme Ct.), 18 N. Y. Supp. 41.

When a warrant of attorney confers authority, in a certain contingency, to confess judgment on a note before it is due, the record must show that the specified contingency has happened, otherwise a judgment is unwarranted. *Roundy v. Hunt*, 24 Ill. 598.

1. In *Holmes v. Parker*, 125 Ill. 478, H. & E. being indebted by note to P. and pressed for payment, H. induced his wife to give her note of the same amount, payable to H. or order, and upon the same paper a warrant of attorney authorizing the confession of judgment thereon in favor of "H. & Bro., or their assigns." There had been such a firm as H. & Bro., but it did not appear that it was then in existence. It was held that the note and warrant of attorney should be construed together, and that it was the intention of the maker of the note and power of attorney that judgment might be confessed in favor of the payee of the note, or his assignee. In such case the words "& Bro.," contained in the warrant of attorney, should be rejected as surplusage.

2. **Examples.**—A warrant of attorney given by two persons, authorizing an attorney to appear to an action to be brought "against us" and confess judgment "against us," will not authorize the confession and entry of a judgment against one of them, though the other be dead at the time the judgment is entered. *Hunt v. Chamberlin*, 8 N. J. L. 336; 14 Am. Dec. 427. And see *Morris v. Bank of Commerce*, 67 Tex. 602.

But where three persons gave a note for borrowed money—"We or either of us promise to pay," etc., with warrant of attorney, "and we empower any attorney to appear for us and confess judgment against us," etc.—it was held under the *Pennsylvania* statutes that, upon the death of one of the makers, the warrant could be treated as joint, and judgment entered against the two survivors. *Croasdell v. Talant*, 83 Pa. St. 193.

Under a warrant of attorney to confess a judgment upon and according to the tenor and effect of a joint and several promissory note, executed by seven persons and payable on the order of two of the makers, by whom it was indorsed to a third person, it was held that the power was substantially pursued in the confession of a judgment

against five of the makers jointly, excluding the two latter. *Knox v. Winsted Sav. Bank*, 57 Ill. 330.

A promissory note containing a power of attorney to confess judgment, without process, in favor of the "holder," at any time, even if a non-negotiable instrument in form, imports that it was drawn on the assumption that it would be negotiable, the word "holder" being used in a sense which embraces an indorsee; hence, judgment by confession taken by an indorsee of the payee is valid, and will sustain an action thereon, although the judgment by confession was taken in another state. *Richards v. Barlow*, 140 Mass. 218. And see *Clements v. Hull*, 35 Ohio St. 141.

But where a warrant of attorney attached to a sealed note, payable to the payee or bearer, authorized "any attorney at law, at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the State of *Ohio*, and confess judgment against us for the amount then due thereon, with interest and costs, and to release all errors and the right of appeal," it was held that such warrant of attorney conferred no authority to confess judgment against the maker of the note in favor of the holder, to whom the payee had transferred the note by delivery. *Spence v. Emerine*, 46 Ohio St. 433; 16 Am. St. Rep. 433. The court said: "In this state, it is held that if the note is in itself certain and perfect, without conditions, it may remain negotiable, although the power of attorney to confess judgment attached to and forming a part of the note, may not, by its terms, operate in favor of an indorsee or transferee of the note. *Osborn v. Hawley*, 19 Ohio 130. Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee, must depend upon the language of the warrant itself. . . . It will thus be seen, that where it has been adjudged by the court that a power of attorney to confess a judgment may be executed in favor of a party other than the payee, it has been in cases where authority was expressly conferred to confess a judgment in favor of a legal holder or holder of the note. The decisions have all been based upon a strict interpretation of the power granted, without aiding any omission or defect in its terms by liberal intendment or construction."

As to the note in suit, the court said: "The power of attorney attached to the note in controversy, does not, in express language, authorize a confession of judgment in favor of any one, not even of the payee; but if such authority might be implied as to the payee, we cannot, under the rule of a strict interpretation, extend that implication in favor of the defendant in error, to whom the note was transferred by delivery."

That a judgment note is not a negotiable instrument under the law merchant, see *Overton v. Tyler*, 3 Pa. St. 346; 45 Am. Dec. 645. See also *Sweeny v. Thickstun*, 77 Pa. St. 131, in which *Osborn v. Hawley*, 19 Ohio 130, is commented on.

In *Randolph on Com. Paper*, § 207, it is said: "What effect a warrant to confess judgment, contained in a note, will have upon its negotiability, is still perhaps an unsettled question." And in *Tiedeman on Com. Paper*, § 29e, it is said: "It has been quite common to insert in promissory notes an authority to the holder or some one else, in default of payment, to confess judgment for the amount of the note. . . . At first, the courts were designed to hold that the insertion of such stipulations would destroy the negotiability of the note. But these stipulations have become more common since the day when the case of *Overton v. Tyler*, 3 Pa. St. 346; 45 Am. Dec. 645, was decided; 'and the declaration of Chief Justice Gibson in that case, that a "negotiable bill or note is a courier without luggage," is answered by the assertion that such provisions facilitate rather than encumber the circulation of such instruments. They are not luggage, but ballast.' 1 *Daniel on Negotiable Inst.*, § 61. Such stipulations are now generally held to have no effect upon the negotiable character of the instrument in which they appear."

Where a judgment was entered on a warrant of attorney for the correct amount honestly due, the fact that the attorney waived the defendants' appeal, which he was not authorized by the warrant to do, is no ground for setting aside the judgment, no equitable ground being shown. *Hansen v. Schlesinger*, 125 Ill. 230.

A warrant of attorney which authorizes the confession of judgment upon a note therein described, and also upon other indebtedness to be "afterwards incurred" by the maker to the payee,

5. **Consent of Creditor.**—In order that a creditor may not be prevented from pursuing a claim, only a portion of which may have been confessed, the rule has been established that the confession of judgment must have been with his express or implied consent, or subsequent ratification; otherwise it is void.¹ But knowledge and consent on the part of the creditor's attorney are sufficient.² A subsequent ratification, however, though binding between the parties, cannot affect rights acquired by other parties prior to the ratification.³

6. **Parties to the Confession.**—This subject having been incidentally treated elsewhere,⁴ it will be sufficient to make some supplementary remarks here. Anyone capable of suing or being sued to

upon other notes made or to be made, will not authorize the confession of a judgment upon other notes payable to the same payee, and bearing the same date as the notes particularly described in the warrant. *Frye v. Jones*, 78 Ill. 627.

A judgment entered on a bond and warrant of attorney, under the statute, is not void, although the warrant authorizes the confession of judgment for the sum mentioned in the condition, and the judgment is entered for the amount of the penalty. *Den v. Zellers*, 7 N. J. L. 153.

Where there was a power of attorney to confess judgment on a note for \$26,000—the note was described in the declaration which claimed \$50,000 damages—and the plea of confession admitted an indebtedness and confessed judgment for the latter sum, and the clerk entered judgment for \$26,000, it was held that the attorney confessing the judgment exceeded his power; that the clerk did not have power to deviate from the plea of confession, and the judgment was void. *Tucker v. Gill*, 61 Ill. 236.

A warrant of attorney was absolute on its face to enter judgment for \$1,000. On the back was a writing signed by the defendant, stating that it was to secure an indebtedness of \$500, for goods to be sold on the day of the date of the warrant, and a similar amount to be afterwards sold, and it was agreed that if the plaintiff should deem himself insecure he might issue execution for whatever sum might be due him. It was held that the general expression in the agreement must be controlled by the particular provisions, and that the plaintiff could not enter judgment for an amount due him before the day

of the date of the warrant. *Chapin v. Clemitson*, 1 Barb. (N. Y.) 311.

After a traveling salesman had given duebills for money collected by him for the firm, and appropriated to his own use, he gave a bond to the sum of \$2,000, with a warrant of attorney to confess judgment, conditioned that he should account for all moneys which might come into his possession. It was held that a judgment could not be confessed for the amount of the duebills. *Bennett v. Haley*, 142 Pa. St. 253.

1. *Farmers', etc., Bank v. Mather*, 30 Iowa 283; *McCalmont v. Peters*, 13 S. & R. (Pa.) 196; *Wilcoxson v. Burton*, 27 Cal. 228; 87 Am. Dec. 66; *Ingersoll v. Dyott*, 1 Miles (Pa.) 245.

Where the creditor has brought an action against a debtor, to recover a specified sum of money upon a claim, and the debtor appears before the justice and confesses judgment for the amount claimed, and costs, the assent of the plaintiff will be presumed; and to entitle him to have the judgment set aside, he must make it appear to the justice that he has been prejudiced by such confession. *Flanagan v. Continental Ins. Co.*, 22 Neb. 235.

A bond with warrant of attorney to confess judgment, given to a creditor for an amount which includes his own debt and that of certain other creditors, is valid, if they sanction the transaction and he agrees to account to them, although they are not named in the bond. *Nickerson v. Hazel*, 1 Houst. (Del.) 176.

2. *Chapin v. McLaren*, 105 Ind. 563.

3. *Wilcoxson v. Burton*, 27 Cal. 228; 87 Am. Dec. 66.

4. See JUDGMENTS, vol. 12, pp. 1497-1498.

judgment is, as a general rule, capable of receiving or giving a confession of judgment.¹ With regard to persons under disabilities, the rule is that if the disability is one that may be waived, the confession will be held such a waiver, but where it consists in a total inability to contract, the confession will be void.² Judgment for a sum of money may be confessed to a state as well as to an individual.³ A clerk acting purely as a ministerial officer may enter his own confession of judgment in favor of his creditor, and it will be valid.⁴ Judgment on a warrant of attorney cannot be entered, after the obligee's death, in his name, but may be in that of his executors.⁵ Judgments confessed by a father to a son, cannot be held fraudulent as to creditors of the former, without collusion between the two to hinder, delay, and defraud such creditors.⁶ A public officer who is liable to be sued for services rendered for the public, at his request may confess a judgment, in his official capacity, for the amount.⁷ An agent within the scope of his authority may confess judgment against his principal.⁸

A judgment cannot be confessed by one of several joint debtors, so as to bind the debtors not joining in the confession.⁹ So, a partner cannot bind his firm by a confession of judgment, although he will himself be bound.¹⁰ But under such judgment,

1. Freeman on Judgments (4th ed.), § 545; Black on Judgments, § 54.

2. Black on Judgments, § 54.

3. *State v. Love*, 1 Ired. (N. Car.) 264.

4. *Smith v. Mayo*, 83 Va. 910.

5. *Guyer v. Guyer*, 6 Houst. (Del.) 430; *Gealy v. Gealy*, 26 Pitts. L. J. (Pa.) 153.

A judgment entered against a defendant, whom the record shows to have been dead at the time of entry, will be stricken off. *Tobias v. Dorsey*, 2 W. N. C. (Pa.) 15.

6. *Collins v. Cronin*, 117 Pa. St. 35; *Brown's Appeal*, 86 Pa. St. 524.

7. *Gere v. Cayuga Co.*, 7 How. Pr. (N. Y.) 255.

8. See JUDGMENTS, vol. 12, p. 1497.

9. *Tripp v. Saunders*, 59 How. Pr. (N. Y.) 379; *Ballinger v. Sherron*, 14 N. J. L. 144; 1 Lindley on Partnership (4th ed.), § 474.

Where, by statute, a judgment by confession is invalid, unless the instrument authorizing its entry is signed by each of the persons against whom it authorizes judgment to be entered, it has been held that a judgment entered, where two persons signed a confession against themselves and two others, being void as to those not signing, was equally so as to those signing. *Chapin v. Thompson*, 20 Cal. 681. But see next note.

In *New York*, one or more joint debtors may confess judgment for the joint debt, and where all the joint debtors do not unite in the confession, such judgment is not a bar to an action against all the joint debtors upon the same demand. *New York Code Civ. Proc.*, § 1278; *Kantrowitz v. Kulla*, 20 Abb. N. Cas. (N. Y.) 321; *Harbeck v. Pupin*, 55 Hun (N. Y.) 335.

Under this provision, a judgment confessed by one or more co-partners, is no bar to an action in equity by the creditor to reach and appropriate to the payment of the partnership debt, the assets of a partner who did not join in the confession, and afterward died. *Harbeck v. Pupin*, 123 N. Y. 115.

In *Pennsylvania*, on a joint warrant of attorney, the prothonotary may enter judgment against the surviving obligors. *Croasdell v. Tallant*, 83 Pa. St. 193. But if, in such case, judgment is entered against all the obligors, it is irregular and will be set aside. *Lewis v. Ash*, 2 Miles (Pa.) 110.

10. *Fairbanks v. Krest*, 43 Mo. App. 121; *McCleery v. Thompson*, 130 Pa. St. 443; JUDGMENTS, vol. 12, p. 1498; PARTNERSHIP, vol. 17, p. 1042.

A confession of judgment under seal, in the name of a partnership and of a member of the firm, is binding only on such member. *Perth Amboy Terra-*

partnership goods can be taken in execution.¹ Nor can a trustee confess judgment against the trust estate.² The managing agents of a corporation have authority to confess judgment whenever, in the exercise of their discretion, they deem this to be for the interest of the corporation.³ An infant's warrant of attorney to

Cotta Co.'s Appeal (Pa. 1889), 17 Atl. Rep. 4.

But a confession of judgment made under a power of attorney, executed under seal in the firm name by a member of the firm, will be held valid as against all the members of the firm on collateral attack, and, in the absence of proof that all the members were not consenting thereto, although a partner cannot usually bind his co-partners under seal, a seal not being requisite to such a power of attorney. *Alexander v. Alexander*, 85 Va. 353.

Where a partner asks that judgment may be opened as confessed by another member for an individual debt, an issue may be directed as to the existence of such partnership and whether anything is due by the firm on such judgment. *Perth Amboy Terra-Cotta Co.'s Appeal* (Pa. 1889), 17 Atl. Rep. 4.

A judgment confessed in an action against two partners, first by one partner and afterward during the same term by the other, is valid as against the latter, the cause of action not being merged by the rendition of the first judgment. *Pitts v. Spotts*, 86 Va. 71.

Where one of two partners confesses a judgment on a note given by him for money used by the firm; under which the judgment creditor purchases property of the firm, and, in order to perfect the title, both members subsequently confess a judgment, under which the creditor again purchases the property, no fraud being intended, the title of the latter will be good as against another creditor of the firm. *Stevens v. Diehl*, 127 Pa. St. 416.

The assumption that judgments are necessarily entireties, and, therefore, if void as to some defendants, void as to all, appears to be overthrown. See *Freeman on Judgments* (4th ed.), § 557; 19 Am. L. Reg. (N. S.) 673; *Black on Judgments*, § 212. See also *PARTNERSHIP*, vol. 17, p. 1042.

1. *McCleery v. Thompson*, 130 Pa. St. 443; *Ross v. Howell*, 84 Pa. St. 129; *Grier v. Hood*, 25 Pa. St. 430.

If the judgment note is for an amount greater than is owing by the firm, judg-

ment will be reduced to the proper amount. *Budd v. Shoch*, 11 Pa. Co. Ct. Rep. 480.

Yet, where, after a partnership has been dissolved, such a note is executed by one partner and judgment entered thereon, the judgment against the firm and the other partner will be stricken off, even though the obligation was given for a partnership indebtedness to the plaintiffs. *McCleery v. Thompson*, 130 Pa. St. 443. And see *Conery v. Rotchford*, 30 La. Ann. 692.

Nor will such a judgment bind property assigned by the firm to a remaining partner, under terms of agreement to pay firm debts. *Mair v. Beck* (Pa. 1886), 2 Atl. Rep. 218.

A judgment, upon a judgment note given by one member of a firm for a partnership debt, entered against the other partner by the one who made the note, after dissolution of the firm and division of the assets, under an agreement that each partner shall pay half the debts and pay over to the other, half the moneys collected on the accounts due the firm, will not be set aside for a settlement of the firm's affairs, where the partner entering the judgment does not propose to collect more than half the amount. *Stickel v. Null*, 22 Pitts. Leg. J. N. S. (Pa.) 403.

2. See *JUDGMENTS*, vol. 12, p. 149s.

3. *Morawetz on Corp.*, § 430; *Sharp v. Danville, etc., R. Co.*, 106 N. Car. 308; 19 Am. St. Rep. 533.

A judgment confessed against a corporation will be set aside when authorized only by a majority of the stockholders, at a meeting not regularly called and without the sanction of the board of directors. *Nimocks v. Cape Fear Shingle Co.*, 110 N. Car. 20.

The president cannot alone or jointly with the treasurer confess judgment against the corporation, or execute a warrant of attorney authorizing another to do so. They can only exercise such power when it has been given to them in express terms by the board of directors. *Adams v. Cross Wood Printing Co.*, 27 Ill. App. 313; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L.

confess judgment against him, is void.¹ A judgment confessed by, or under the warrant of attorney of, a married woman is invalid, unless it is founded on such a contract as she is permitted by statute to make. In that case, the obligation being valid, the warrant of attorney and confession of judgment will be so likewise.² Where the judgment against a married woman is invalid in the first instance, it will not become binding by revival, on the principle of estoppel.³ If husband and wife execute a bond and warrant of attorney to confess judgment, judgment cannot be

237; *Joliet Electric Light, etc., Co. v. Ingalls*, 23 Ill. App. 45; *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377.

In *Oregon*, confession of judgment must be made by the person who at the time sustains such a relation to the corporation as would authorize the service of a summons upon him. *Miller v. Bank of British Columbia*, 2 Oregon 291; *Miller v. Oregon City Paper Mfg., etc., Co.*, 3 Oregon 24.

Where a private corporation executed its note with power of attorney to confess judgment, waiving service of process, etc., and judgment was confessed thereon, it cannot object that it was not served with process in the particular manner provided in its charter, as by its warrant of attorney it has waived such service. *Millard v. St. Francis Xavier Female Academy*, 8 Ill. App. 341.

Upon a confession of judgment by a corporation, the court in which the action is pending must, of necessity, judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation, must be conclusive in all other proceedings where the same judgment is drawn in question, and not open to collateral attack. *White v. Crow*, 17 Fed. Rep. 98. See also OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 149; JUDGMENTS, vol. 12, p. 1497, n. 1.

1. *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Knox v. Flack*, 22 Pa. St. 337; *Lutes v. Thompson*, 5 Pa. Co. Ct. Rep. 451.

In *Black on Judgments*, § 54, it is said: "This statement is probably too strong. The marked tendency of the authorities . . . is to regard a judgment against an infant, duly before the court, as valid and effectual for all purposes, unless, indeed, time is given to him

to show cause against it after his majority. And if his defense of infancy is taken away by his failure to duly plead it, when sued, it is certain that it is equally waived by his voluntary confession of judgment."

2. *Koechling v. Henkel*, 114 Pa. St. 215; *Turner v. State* (Ala. 1891), 9 So. Rep. 531; *Black on Judgments*, § 55; *Freeman on Judgments*, (4th ed.), § 545. See also JUDGMENTS, vol. 12, p. 1495.

For the statutory extensions of a married woman's power to contract, see MARRIED WOMEN, vol. 14, p. 609.

In *Koechling v. Henkel*, 114 Pa. St. 215, it is said: "A judgment confessed by a married woman was absolutely void at common law. The reason was that she possessed no power to contract. . . . A married woman may now engage in business, and enter into contracts in regard to it, or the management of her separate estate, as fully as a *feme sole*. This extension of her powers necessarily involves the right to sue and the liability to be sued; and when she may be sued she may confess judgment." In this case it was held that a confessed judgment, regular on its face, which does not show that defendant was a married woman, and which was given upon full consideration, will not be set aside on the objection of a subsequent lien creditor that it was confessed by a married woman, and not for a purpose within the act, in the absence of any complaint against it by defendant. See also *Real Estate Investment Co. v. Roop*, 132 Pa. St. 496; *Singer Mfg. Co. v. Cole*, 11 Pa. Co. Ct. Rep. 214.

3. *Dorrance v. Scott*, 3 Whart. (Pa.) 309; 39 Am. Dec. 509.

In *Crenshaw v. Julian*, 26 S. Car. 283; 4 Am. St. Rep. 719, it was held that a confession of judgment by a married woman, which had been twice revived by default, became valid, an intervening constitution making the doctrine

entered against them jointly, because the warrant of the wife is void; nor against the husband alone, because that is not in pursuance of the warrant.¹ She may confess judgment for her debts contracted before marriage;² though not for her husband's debt.³ But a *bona fide* judgment, confessed under a warrant of attorney by the husband to secure the wife's separate estate, will not be treated as void because of the legal unity of the parties.⁴

7. For What Judgment May Be Confessed.—It has been held in some cases that the confession must be for an unconditional amount, and cannot depend on a contingency, as in the case of a surety or indorser;⁵ but in many of the states the rule is much

of estoppel apply to a married woman, notwithstanding her coverture.

1. *Mendenhall v. Springer*, 3 Harr. (Del.) 87.

But in *Shallcross v. Smith*, 81 Pa. St. 132, it was held that in such a case the bond was the husband's alone, and judgment as to him should not be stricken off.

2. *Travis v. Willis*, 55 Miss. 557. The court there said: "At the common law, when the effect of the wife's admission was to impose a liability on the husband, she could not bind him. But when the statute has exonerated the husband from responsibility on the wife's ante-nuptial contracts, no solid reason is perceived why she may not allow judgment by *nil dicit*, or confession, especially with the consent and concurrence of the husband. . . .

We have been referred to several cases holding that the wife cannot give a warrant of attorney to confess judgment, and that she cannot make admissions competent as evidence in a joint suit against her husband and herself. Such is the rule where the admissions or confessions would affect the husband's interests. *Brown v. Lasselle*, 6 Blackf. (Ind.) 147; 38 Am. Dec. 135, and cases there cited. The rule at common law is as broad as contended for by counsel. But the rule has its foundation in the principles of that system respecting the relations of husband and wife, and the effect of marriage on the rights of the husband in the wife's property. The statute here relieves the husband from the obligation to pay ante-nuptial debts. He stands in relation to them as a stranger. Her confession or admission in nowise affects his rights."

3. *Edwards v. Edwards*, 29 La. Ann. 597. And see *Real Estate Investment Co. v. Roop*, 132 Pa. St. 496, where it was held that, though the fact of cover-

ture did not appear upon the record, a judgment confessed by a married woman, to secure the repayment of money borrowed by her to aid her husband in his business, was void as to her.

4. In *Williams' Appeal*, 47 Pa. St. 307, the court said: "Law and equity protecting the estate represented in the judgment, we will not lend the power of the court to inquire into the fact of marriage, and thus destroy the fruits of the judgment in the absence of fraud, while the wife is in the act of extending her hand to receive the fund from the court."

So in *Thomas v. Mueller*, 106 Ill. 42, it is said: "There can be no question that . . . had ample power to confess a judgment at the time he did to his wife, and that she could avail of all the benefits it conferred; and had there been no note under which to confess it, there seems to be no question that it would have been valid until impeached for fraud—as valid as if confessed on a note admitted on all hands to be perfectly valid and binding. If he owed her for money or property, that was a sufficient consideration to support the judgment, and on an attempt to impeach the judgment, the true question should be whether it was confessed without sufficient consideration and for fraudulent purposes."

But in *Countz v. Marking*, 30 Ark. 17, it was held that a judgment by confession, rendered against a husband in favor of the wife, is void and will be quashed on *certiorari*.

On a bond and warrant given to a *feme dum sola*, who afterwards marries, judgment may be entered in favor of *baron and feme*. *Sheble v. Cummins*, 1 Browne (Pa.) 253.

5. *Sterling v. Fleming*, 53 N. J. L. 652, where it was held that an accommodation indorser of notes, who was

more liberal.¹ It may be made for the purpose of securing future advances,² but cannot, as against third persons, be held to meet and cover new and distinct engagements subsequently entered into by the parties.³ The amount for which judgment is confessed must be certain, or, at least, capable of liquidation.⁴ The question whether judgment can be entered on a note before its maturity, has been discussed.⁵ Judgment cannot be confessed for a tort,⁶ but it may be confessed for a debt barred by the

secured by the maker of a bond with warrant of attorney to confess judgment, was not entitled to judgment by confession on the bond, before he had paid the notes indorsed by him, although he had assumed their payment, when the payee of the notes had not released the maker, the statute in *New Jersey* providing that the affidavit shall set forth that the "debt or demand for which the judgment is confessed is justly and honestly due and owing" to the person to whom the judgment is confessed. See also *Blackwell v. Rankin*, 7 N. J. Eq. 152; *Sayre v. Hewes*, 32 N. J. Eq. 652.

1. *Sharp v. Danville, etc.*, R. Co., 106 N. Car. 308; 19 Am. St. Rep. 533; *Miller v. Howry*, 3 P. & W. (Pa.) 374; 24 Am. Dec. 320; *Stewart v. Stocker*, 1 Watts (Pa.) 135; *Allen v. Norton*, 6 Oregon 344; *Ford v. Elkin*, 2 Spears (S. Car.) 146; *New York Code Civ. Proc.*, §§ 1273, 1274. See *Adams v. Tator*, 57 Hun (N. Y.) 302.

So, a confession is valid though the judgment is not to be entered up except upon the happening of a contingency. *Keep v. Leckie*, 8 Rich. (S. Car.) 164.

2. *Cook v. Whipple*, 55 N. Y. 150; 14 Am. Rep. 202; *Lansing v. Woodworth*, 1 Sandf. Ch. (N. Y.) 43; *Stewart v. Stocker*, 1 Watts (Pa.) 135.

Where a note on which judgment had been confessed was given to secure future advances, such judgment will not be set aside because the judgment exceeds the advances made, when it appears that the judgment creditor has incurred indebtedness for which further advances must be made to a greater amount than such excess. *McDonald v. Chisholm*, 131 Ill. 273.

3. *Averill v. Loucks*, 6 Barb. (N. Y.) 19.

In *Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 320, it is said: "In *Livingston v. M'Inlay*, 16 Johns. (N. Y.) 165, the supreme court observed that if it was part of the original agreement, a judgment may be entered as a security for future advances, beyond the amount

then actually due, in like manner as a mortgage may be held as a security for future advances. The limitation to this doctrine, I should think would be, that when a subsequent judgment or mortgage intervened, further advances after that period could not be covered."

4. In *Nichols v. Hewit*, 4 Johns. (N. Y.) 423, it was held that the action of a justice, in entering judgment on a confession for such sum as should be awarded, made before the award, was erroneous. And see *Connay v. Halstead*, 73 Pa. St. 354; *Cook v. Cooper*, 4 Harr. (Del.) 189.

Where a power of attorney authorizes a judgment to be confessed for "an amount that may be found due" on the note therein described, and is in sufficient form in all other particulars to give the court jurisdiction over the subject-matter and the parties, it gives sufficient authority to confess a judgment, which cannot be collaterally impeached for mere irregularity. *Patterson v. Indiana*, 2 Greene (Iowa) 492.

In *Holden v. Bull*, 1 P. & W. (Pa.) 460, it was held that judgment could be entered on a warrant of attorney conditioned for the payment of an unascertained sum, but the amount must be liquidated before execution can issue.

Under *Illinois Rev. St.*, ch. 110, § 66, which provides that any person may confess judgment without process for a debt *bona fide* due, a confession of judgment entered by attorney, for rent due under a lease containing authority for any attorney to confess judgment for the tenant, "for any rent which may be due by the terms of this lease," is void, where the lease provides that all sums paid by the landlord for water or gas, or for cleaning the demised premises, shall be "so much additional rent," since power cannot be given to confess judgment on an unliquidated claim. *Little v. Dyer*, 138 Ill. 272.

5. See *supra*, this title, *Compliance with the Warrant*.

6. See JUDGMENTS, vol. 12, p. 149r.

Statute of Limitations, or discharged by bankruptcy proceedings, the confession in that case constituting a waiver of the defense.¹ The subject of confessing judgment for a fraudulent purpose will be considered below.²

8. The Affidavit.—An affidavit that the debt is due should ordinarily accompany the confession;³ though a judgment filed without such affidavit is valid between the parties, and void only as to creditors.⁴ A substantial compliance with the statute is all that is necessary.⁵ The question as to the affidavit necessary to prevent the operation of the Statute of Limitations, will be discussed below.⁶

9. The Statement.—The requisite of the statement of facts out of which the indebtedness arose, generally directed by statute to be filed with the confession of judgment, has been discussed, but some later additional cases are given in the note.⁷

1. *Dewey v. Moyer*, 72 N. Y. 70; *Keen v. Kleckner*, 42 Pa. St. 529.

2. See *infra*, this title, *Relieving Against the Judgment*.

3. *Aldrich v. Minard*, 12 Ind. 551.

4. *Caley v. Morgan*, 114 Ind. 350; *Den v. Gaston*, 24 N. J. L. 818.

5. *Lanning v. Carpenter*, 20 N. Y. 447; *Mulford v. Stratton*, 41 N. J. L. 466.

In *McCabe v. Sumner*, 40 Wis. 390, it is said: "When the plaintiff himself makes the affidavit, it would probably be sufficient merely to state the amount due, in the terms of the statute, because he is presumed to know the precise sum due upon the contract which he holds. But when some one else on his behalf makes the affidavit, we are inclined to think that the affidavit should disclose why it is not made by the plaintiff, and we are quite clear that it should state the means of knowledge of the person making it, within the rule of *Crane v. Wiley*, 14 Wis. 658. It is true that the statute does not in terms require this, as in the verification of a complaint; but the reasoning of that case applies as forcibly to the affidavit annexed to the complaint in cases of confession, and the necessity of a strict rule is far greater. Without stating his means of knowledge, a person not a privy to the contract may well be presumed to found his affidavit upon the tenor and effect of the contract only; saying no more than the contract says, as well or better, and giving no assurance to the court of the justice of the judgment, which the contract itself does not give. Such an affidavit, made by a stranger not disclos-

ing his means of knowledge, has little significance. A reasonable effect must be given to the provisions of a statute, according to its object, and a mere literal compliance will not always do. The statute here requires an affidavit of one knowing the fact. And there is no presumption that a stranger knows the fact, unless he discloses how he came to know it. A plaintiff taking judgment on a warrant of attorney cannot be allowed to cheat the statute by getting the affidavit of one knowing nothing of the matter, not disclosed by the contract itself."

A judgment was held not to be void because the affidavit of the plaintiff's agent did not state his means of knowledge, but only irregular, and the court will not vacate it, especially where the warrant contains a release of errors. *Pirie v. Hughes*, 43 Wis. 531.

In *Missouri*, where a judgment by confession is rendered under a power of attorney from the debtor, it is held that the affidavit required of the plaintiff must be made by himself; his attorney in fact or agent cannot make it. *Bryant v. Harding*, 29 Mo. 347.

6. See *infra*, this title, *The Judgment*.

7. See JUDGMENTS, vol. 12, pp. 1498, 1499.

The statement is sufficient if it contains enough to enable creditors and others to investigate the *bona fides* of the judgment. *Atwater v. Manchester Sav. Bank*, 45 Minn. 341.

Under *New York Code Civ. Proc.*, § 1274, which provides that a statement for judgment by confession must state concisely the facts out of which the

10. **The Judgment.**—If the judgment is for an amount greater than that authorized by the warrant of attorney, it is void as to such excess.¹ If it is entered on a *narr.* reciting the warrant, but without any appearance for the defendant, or formal confession of judgment, it will be set aside as irregular.² So it is void if not entered in the judgment book.³ But it may be valid though

debt arose, a statement that recites that the debt is a balance due plaintiff of various sums loaned and advanced by him to defendant during a period of nearly two years, including interest upon such loans and advances, is too indefinite. *Wood v. Mitchell*, 117 N. Y. 439.

But this case was distinguished in *Tilles v. Albright*, 63 Hun (N. Y.) 633, where it was held that a statement in which no uncertainty exists as to the amount due for moneys loaned between specified dates, and stating how much is due for principal and how much for interest, sufficiently complies with the statute.

For examples of statements held sufficient under the statutes of various states, see *Dullard v. Phelan*, 83 Iowa 471; *Brown v. Miller*, 11 Colo. 431; *Clafin v. Dodson*, 111 Mo. 195; *Hard v. Foster*, 98 Mo. 297; *Mechanics' Bank v. Mayer*, 93 Mo. 417; *Uzzle v. Vinson* 111 N. Car. 138.

As to the verification of the statement, see *Cook v. Whipple*, 55 N. Y. 150; 14 Am. Rep. 202; *Ingram v. Robins*, 33 N. Y. 409; 88 Am. Dec. 393; *Grattan v. Matteson*, 54 Iowa 229; *Black on Judgments*, § 65.

The motion to amend the statement is one addressed to the discretion of the court. *Symson v. Selheimer*, 105 N. Y. 660.

1. *Davenport v. Wright*, 51 Pa. St. 292; *Adam v. Arnold*, 86 Ill. 185. See *McDonald v. Chisholm*, 131 Ill. 273; *JUDGMENTS*, vol. 12, p. 1497.

Any excess is to be corrected by the defendant on motion. A creditor not a party cannot intervene therefor. *Adam v. Arnold*, 86 Ill. 185.

A judgment confessed under a warrant of attorney in a tax collector's bond, must be for the whole penal sum, and one confessed for a less sum will be stricken off and execution set aside, and leave given to enter judgment for the full penal sum. *Com. v. Evans*, 8 Pa. Co. Ct. Rep. 665. And see *Den v. Zellers*, 7 N. J. L. 153.

2. *Lytte v. Colts*, 27 Pa. St. 193.

But, in the absence of any showing

of a meritorious defense, it has been held that the appellate court will presume that a judgment by confession was rightfully entered, although no warrant of attorney appears in the record. *Giboney v. Giboney*, 2 Ill. App. 322.

Although it is unnecessary to set out the warrant or its proof on the record, the judgment must show that the authority was verified, and sufficient to authorize the particular judgment. *Brown v. Little*, 9 Ala. 416.

Judgment cannot be entered before the warrant of attorney is actually filed in the prothonotary's office. *Chambers v. Denie*, 2 Pa. St. 421.

Parol evidence is admissible as to the precise time of the day on which judgment was entered by warrant of attorney, in order to avoid it, by proof of the prior death of the defendant. *Lanning v. Pawson*, 38 Pa. St. 480.

3. *King v. French*, 2 Sawy. (U. S.) 441.

The prothonotary may receive and file a warrant of attorney, enter judgment thereon at his residence after office hours, and docket it the next day, as of the time when filed. *Polhemus' Appeal*, 32 Pa. St. 328.

In *Schuster v. Rader*, 13 Colo. 333, it was said: "Discriminating law writers speak of judgments by confession as being 'entered,' while other judgments are spoken of as being 'given' or 'rendered.' Such is the language of the code. The distinction is significant. At common law the giving of judgment was a judicial act to be performed only by the court sitting at stated times and places. . . . Under statutes authorizing judgments by confession in vacation through the agency of the clerk, there being no judicial determination of the controversy, the act of giving judgment in such cases is called the 'entering' rather than the 'rendering' of judgment. Nevertheless, judgments by confession are the sentence of the law upon the matter contained in record, the matter being supposed to be so plain, by the written admission of the defendant, as to require

founded on an unauthorized instrument.¹ It may include the attorney's fees, if that be authorized in the warrant.² If it fails to comply with the provisions of the statute under which it is entered, it is voidable only as to creditors,³ though valid as

no judicial consideration. Hence, the sentence in such cases is not required to be pronounced by the court, but may be indorsed by the clerk upon the statement, and entered in the record without any order therefor, except the direction of the statute itself, when the conditions thereof are complied with."

An entry by the prothonotary on his docket of a writ, and that a judgment bond was filed of record therein, stating the particulars and the date of entry, is a good entry of judgment. *Helvete v. Rapp*, 7 S. & R. (Pa.) 306; *Troub. & Hal. Pa. Prac.*, § 438. And see *Com. v. Conard*, 1 Rawle (Pa.) 249. And his omission to note on the docket the date and tenor of the instrument on which the judgment is founded, as between the parties, will not vitiate the judgment. *Montelins v. Montelins*, *Bright* (Pa.) 79.

If the judgment is not actually entered, an execution issued thereon is void and may be attacked collaterally. *Ling v. King*, 91 Ill. 571.

1. A judgment by confession in forcible entry, entered upon a warrant of attorney contained in a lease duly executed under seal by the lessee, is valid, though the lease was executed by an unauthorized agent on the part of the lessor, the plaintiff. *Johnson v. Crane*, 22 Ill. App. 366.

2. See *JUDGMENT*, vol. 12, p. 1497.

But it must be expressly authorized. *Sweeney v. Stroud* (N. J. 1892), 25 Atl. Rep. 273.

Where a "reasonable attorney's fee" is allowed, it is for the court to determine what is reasonable. *Campbell v. Goddard*, 117 Ill. 251; 123 Ill. 220.

So, where a client confesses judgment for \$2,500, in favor of his attorney for professional services, and the confession merely states that the attorney had rendered services of the reasonable value of \$2,500, the receiver of the client is entitled to inquire into the justness of the attorney's bill and reduce the judgment in case of overcharge. *Seligman v. Franco-American Trading Co.*, 17 Civ. Pro. Rep. (N. Y.) 342. And see *McAllister's Appeal*, 59 Pa. St. 204.

Where a judgment note authorizes

the inclusion in the judgments to be confessed of "attorney's commissions of five per cent. for collection," the debtor cannot be compelled to pay such commission when he does not dispute the claim and pays at maturity. *Moore's Appeal*, 110 Pa. St. 433.

Where a failing debtor gave certain of his creditors his notes for the sums actually due them, and about fifteen per cent. of their amount in addition as attorney's fees, with a power of attorney to confess judgment for the full amount of the notes, including the attorney's fees, the attorneys knowing at the time the notes were given that the debtor was insolvent, it was held that, as to the other creditors not preferred, the amount of the attorney's fees was a gift to the preferred creditors and fraudulent and void. *Hulse v. Mereshon*, 125 Ill. 52.

If the attorney's fee is not included in the judgment, it cannot be collected by execution. *Mahoning Co. Bank's Appeal*, 32 Pa. St. 158; *McAllister's Appeal*, 59 Pa. St. 204.

Although attorney's fees included in a judgment confessed by an insolvent are fraudulent as to his other creditors, yet, where the insolvent's assets are not sufficient to pay the judgment without the attorney's fees, the other creditors, not being harmed thereby, have no right to complain. *Young v. Clapp*, 147 Ill. 176.

3. *Richards v. McMillan*, 6 Cal. 419; 65 Am. Dec. 521; *Sheldon v. Stryker*, 34 Barb. (N. Y.) 116; *Dean v. Thatcher*, 32 N. J. L. 470.

In *Edgar v. Greer*, 10 Iowa 282, it is said: "The proceeding in confession of judgment is a special one under our statute. All the authority the clerk has to render judgment on confession is given by the statute; and unless its provisions are strictly complied with, the power of attorney under which the clerk acts is a nullity." See also *Bacon v. Raybould*, 4 Utah 357.

The distinction would seem to be as stated in *Freeman on Judgments* (4th ed.), § 557: "Where the court acts with the parties before it and subject to its jurisdiction, the judgment which it renders and directs to be entered cannot,

between the parties.¹ A judgment cannot be confessed on a warrant of attorney more than a year and a day old, unless an affidavit is filed showing that the defendant is alive, and the debt, or some portion of it, is still due, and a rule of court or order of judge in vacation must be obtained granting leave.² Various decisions on the Statute of Limitations in this connection, are set forth in the note.³ After the entry of a judgment by virtue of a

upon principle, be adjudged void. . . . If, on the other hand, the judgment is entered by the clerk, without first being directed by the court, it may be essential that every pre-requisite of the statute be shown to exist, on the ground that the clerk, being a mere ministerial officer, cannot act except under the conditions prescribed by the statute."

1. *Miller v. Earle*, 24 N. Y. 110; *Newsbaum v. Keim*, 24 N. Y. 325; *Plummer v. Douglas*, 14 Iowa 69; 81 Am. Dec. 456; *Mavity v. Eastridge*, 67 Ind. 211; *Gardner v. Bunn* (Ill. 1888), 21 N. E. Rep. 614; *Coolbaugh v. Roemer*, 30 Minn. 424; *Lee v. Figg*, 37 Cal. 328; 99 Am. Dec. 271; *Arnold v. McCorkle*, 6 Baxt. (Tenn.) 301. See preceding note.

2. *Hinds v. Hopkins*, 28 Ill. 344; *Hamley v. Allaston*, 3 Moore C. P. 606; *Juliet v. Harper*, 1 Chit. 617, and note.

In *Alldritt v. First Nat. Bank*, 22 Ill. App. 24, it was held that a judgment entered by confession in vacation, upon a power of attorney which was more than a year and a day old, will not be set aside merely for want of an affidavit showing that the defendant was alive, and the debt or some part thereof unpaid, but some equitable ground of relief must also be shown. See also *Rising v. Brainard*, 36 Ill. 79.

In *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 499, *Bronson, J.*, said: "Within a year and a day from the date of the warrant of attorney, judgment may be entered without obtaining any order for that purpose, but after that period has elapsed there must be an order. Within ten years from the date of the warrant the order may be made either by the court or a judge at chambers. After ten years it can only be made by the court; and after twenty years it will not be made unless notice has been given of the motion. I am inclined to the opinion that there should be notice after ten years; but that point need not now be considered. Whenever an order is necessary—and it is necessary after

the lapse of a year and a day—there must be an affidavit proving the due execution of the warrant of attorney, that the debt or some part of it is still due and that the parties are alive. (*Lushington v. Waller*, 1 H. Bl. 94; *Anonymous*, 6 Mod. 212; *Oades v. Woodward*, 7 Mod. 93; 3 Salk. 322, pl. 10; ——— *v. Hobson*, 1 Chit. Rep. 314, and note; 1 Tidd's Pr. 599, and 492 note (Phila. ed. of 1828); *Graham's Pr. 774*.)" See also *Elliott v. Ives*, 44 Mich. 190.

3. Judgment cannot be entered on a warrant of attorney more than twenty years old, without an affidavit stating facts that rebut the presumption of payment. *Hulke v. Pickering*, 2 B. & C. 555; 9 E. C. L. 177.

So, after the lapse of eighteen years, the court refused to permit a judgment to be entered upon a bond and warrant of attorney on the usual affidavit, the presumption being that the bond was paid. *Clark v. Hopkins*, 7 Johns. (N. Y.) 556.

By rule of court in *Pennsylvania*, if a warrant of attorney to enter judgment be more than ten years old and less than twenty, a motion must be made to the court or a judge thereof, for leave to enter judgment, which motion must be founded upon an affidavit alleging that the money is unpaid and the debtor living, but if the warrant be more than twenty years old, there must be a rule to show cause, which must be served on the debtor, if he is to be found within the state. *Troub. & Hal. Pa. Prac.*, § 440.

A judgment entered on a bond and warrant more than ten years old, without affidavit and motion as required by this rule, will be allowed to stand on filing the affidavit *nunc pro tunc*, but an execution issued thereon will be set aside upon the petition of a subsequent execution creditor. *Woods v. Woods*, 126 Pa. St. 396.

A judgment against the maker of a note, by confession under a warrant of attorney in the note expressly waiving

warrant of attorney, it is *functus officio*, and no other judgment can be entered on it.¹ The warrant of attorney is merely collateral security, but when judgment is entered up the debt is merged.²

11. Relieving Against the Judgment.—The question as to how far the defendant may be relieved in an appellate court from the effects of the judgment, is one involved in some difficulty, as in some cases it has been held that the confession is in itself a release of errors of law as well as of fact;³ in others, and perhaps with more reason, that the defendant may take advantage of substantial errors in the entering of judgment.⁴ In cases demanding relief, the judgment may, in the lower court, be stricken off or opened, and the defendant let in to a defense, or an issue may be awarded to try the facts, the courts of law having power to grant equitable relief in such cases.⁵ Fraud is one of the special grounds

errors of procedure, will not be set aside because such judgment was obtained more than six years after the date of the power or maturity of the note, there being no presumption that the power has been revoked. *Cross v. Moffat*, 11 Colo. 210. And see *Morris v. Hannick* (Pa.), 31 Leg. Int. 230.

But in *Kempner v. Laney* (Pa.), 37 Leg. Int. 126, it was held that an unsealed warrant of attorney, to confess judgment attached to an unsealed note, does not prevent the Statute of Limitations from applying; and judgment by confession, upon a judgment note not under seal, will be opened on motion, where the note at the time of the entry of judgment was *prima facie* barred by the Statute of Limitations. *Loraw v. Nissley* (Pa.), 9 Lanc. L. Rev. 177.

Judgment cannot be entered on an old warrant of attorney without an affidavit of the attesting witness, or an affidavit verifying his handwriting. *Jones v. Knight*, 1 Chit. 743; *Appleton v. Bond*, 1 Chit. 744.

1. *Martin v. Rex*, 6 S. & R. (Pa.) 296; *Manufacturers, etc., Bank v. Cowden*, 3 Hill (N. Y.) 461.

2. *Norris v. Aylett*, 2 Campb. 329; *Bell v. Banks*, 3 M. & G. 258; 42 E. C. L. 141; *Mohawk Bank v. Van Horne*, 7 Wend. (N. Y.) 117; *Byles on Bills* (8th ed.), § 239.

"The taking of a *cognovit* or warrant of attorney or judge's order from the acceptor, though payable by installments, will not discharge the indorsers, provided the last installment be not postponed beyond the period when, in the ordinary course of the action, judgment and execution might have been had. *Jay v. Warren*, 1 C. & P. 532; 11 E.

C. L. 460." *Byles on Bills* (8th ed.), § 254. And see *Mohawk Bank v. Van Horne*, 7 Wend. (N. Y.) 117.

3. *Garner v. Burleson*, 26 Tex. 348; *Bonta v. Clay*, 1 Litt. (Ky.) 27; *Wilson v. Collins*, 9 Ala. 127; *Hearn v. State*, 62 Ala. 218; *Mandeville v. Holey*, 1 Pet. (U. S.) 136; *Rush v. Halcyon Steamboat Co.*, 67 N. Car. 47; *Jeffries v. Morgan*, 1 Ark. 169.

4. *Montgomery v. Barnett*, 8 Tex. 143; *Battelle v. Bridgeman*, *Morr.* (Iowa) 363; *Edgar v. Greer*, 7 Iowa 136; *Hopkins v. Howard*, 12 Tex. 7; *Portage Canal, etc., Co. v. Crittenden*, 17 Ohio 436; *McCabe v. Sumner*, 40 Wis. 386.

5. *McAllister's Appeal*, 59 Pa. St. 204; *Earnest v. Hoskins*, 100 Pa. St. 551; *Walker v. Ensign*, 1 Ill. App. 113; *Stein v. Good*, 115 Ill. 93; *McCabe v. Sumner*, 40 Wis. 386; *Adam v. Arnold*, 86 Ill. 185.

One who is not prejudiced by the judgment cannot impeach or avoid it. *Miller v. Earle*, 24 N. Y. 110; *Freeman on Judgments* (4th ed.), § 557.

A judgment by confession upon a note given as the result of a settlement between the parties, should not be opened for defense, except upon evidence of such weight and clearness as would warrant a chancellor in decreeing the instrument void or reforming it for fraud or mistake. *English's Appeal*, 119 Pa. St. 533; 4 Am. St. Rep. 656.

The refusal of the court to open a void judgment on insufficient evidence, does not give it the character of *res adjudicata*. *Quinn's Appeal*, 86 Pa. St. 447.

In an application to open a judgment

on which relief will be granted ;¹ so where there is a substantial

entered by confession in favor of the assignee of a bond, if it appear that the assignee advanced money to the obligee upon the security of the bond, it is no ground for relief that it was given by the defendant without consideration, but for the purpose of enabling the obligee to raise money upon it. *Weigley v. Conrade*, 132 Pa. St. 147.

In *Kellogg v. Krauser*, 14 S. & R. (Pa.) 143; 16 Am. Dec. 480, it was held that in a feigned issue to try the validity of a judgment assigned to the plaintiff, entered by warrant of attorney upon a bond, it is not error to charge the jury that if the person, who at the time was the proprietor of the bond, after having entered judgment upon it, had agreed not to enter judgment, and declared to the obligor that no judgment had been entered, the effect of such agreement and declaration would be to render the judgment null and void, and it would be a fraud to proceed on it under such circumstances, provided the assignee had notice of such agreement before the assignment; and it is not necessary, in order to be affected by the agreement, that the assignee should have notice on record or even in writing, provided it is full and could leave the party in no reasonable doubt. *Tilghman, C. J.*, said: "I hope it is not now a matter of doubt whether a court of common pleas can entertain a motion to strike out or open a judgment entered on a warrant of attorney, or to order a feigned issue for the purpose of ascertaining necessary facts. If it has not this power, miserable indeed is our condition. It is the first time I have heard it questioned. It is and has been, for the last half century at least, an undisputed and constant practice. Great frauds are often committed under color of these bonds and warrants, and necessity requires that they should be investigated in a summary way. In some of the states they are absolutely prohibited, on experience of the abuse made of them; and they could be nowhere tolerated without the exercise of a liberal discretion by the courts in inquiring into them. Feigned issues should be encouraged because without them the court must draw the trial of all facts to itself."

Where the purchaser of a machine gives his notes with power of attorney

to confess judgment, which is done before there is a breach of warranty in the contract of sale, the judgment should be opened and the purchaser allowed to plead the breach of warranty. *Heist v. Kingman*, 36 Ill. App. 489.

That in a case of doubt the defendant will be let into a defense on the merits, the judgment standing meanwhile as security for the plaintiff, see cases cited in *JUDGMENTS*, vol. 12, p. 1497.

It is not imperative that judgment should be set aside and the defendant let into a defense at the term in which judgment was entered, if no laches be shown. *Heeney v. Alcock*, 9 Ill. App. 431.

The defendant ought not to be required, as a condition to opening and letting him plead, to bring into court the sum supposed to be due; the judgment may be allowed to stand as security. *Page v. Wallace*, 87 Ill. 84.

Affidavits filed in support of a motion to open a judgment entered by confession, are to be construed most strongly against the party making the motion. *Chicago Fire-Proofing Co. v. Park Nat. Bank*, 145 Ill. 481.

In *Roenigk's Appeal* (Pa. 1886), 3 Atl. Rep. 99, the court said: "That the opening of a judgment entered on a warrant of attorney is a matter of sound discretion, is well recognized by numerous adjudged cases. Whether the court below had exercised sound discretion must be determined by an examination of the whole evidence. That is not furnished us in the present case. So far as the evidence is presented, it shows a clear preponderance against the averment of the appellant. The burden of proof rests upon him to establish a defense. We are unable to see any difference in principle in regard to the exercise of a sound discretion, whether the averment be a denial of the execution of the note on which the judgment was entered, or whether it be a denial of any consideration, or whether it aver a failure of consideration, or a fraudulent use of the obligation."

1. Where the statement is insufficient, that fact throws upon the plaintiff, in a proceeding to set aside the judgment, the burden of proving that it is not tainted by fraud, and that sufficient facts to authorize the judgment existed, though they were not set forth.

failure to comply with the statute;¹ otherwise, in the case of a mere irregularity.² But when, as is often done, a release of errors

Cordier v. Schloss, 18 Cal. 576; *Pond v. Davenport*, 44 Cal. 481.

Where, in an action to set aside a judgment, on the ground that it was confessed in fraud of creditors, there is no evidence that the creditor to whom the judgment was confessed was party to any fraud, the judgment must stand. *Unangst v. Goodyear, etc., Mfg. Co.*, 141 Pa. St. 127.

Where a judgment is confessed, and execution levied for such an amount that subsequent judgment creditors find nothing to levy on, a combination between the parties having been proved, fraud will be established, and all facts tending to prove such combination should be laid before the jury. *Nusbaum v. Louchheim* (Pa. 1885), 1 Atl. Rep. 391. And see *Kohn v. Meyer*, 19 S. Car. 190; *Chappel v. Chappel*, 12 N. Y. 215; 64 Am. Dec. 496; *Ex p. Carull*, 17 S. Car. 446.

Though the statement is defective, the judgment may be valid between the parties, so as to authorize the creditor to impeach a fraudulent transfer by the debtor. *Neusbaum v. Keim*, 24 N. Y. 325.

A petition to open a judgment entered on a note because the note was falsely represented to the defendant to be for \$400, while it was in fact for \$4,000, which is the amount of the judgment, is equivalent to a bill to reform the note for fraud in its creation, and the relief prayed for will not be granted on the unsupported oath of defendant, which is directly contradicted by other testimony. *Rhine v. Swartley* (Pa. 1889), 16 Atl. Rep. 846.

Defendant cannot be relieved though judgment was without consideration, if it were confessed with intent to defraud creditors. *Shallcross v. Deats*, 43 N. J. L. 177.

But the fact that the debtor has other creditors does not render fraudulent a judgment by confession on a just debt. *Kitchen v. McCloskey*, 150 Pa. St. 376. And see *Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430; *Frothingham v. Hodenpyl*, 135 N. Y. 630.

The execution of judgment notes by insolvents to a creditor is void, where they attempt to evade the assignment law. *Hener v. Schaffner*, 30 Ill. App. 337.

An order setting aside as fraudulent, judgments confessed upon notes and warrants of attorney, will be sustained by the appellate court, when there is such a chain of facts and circumstances welded by the evidence as to leave no reasonable doubt that the debtor was preparing the way to make an assignment for the benefit of creditors when he gave the notes and warrants. *Hide, etc., Nat. Bank v. Rehm*, 27 Ill. App. 172; 126 Ill. 461.

A judgment confessed to defraud creditors is voidable by them in whatever way it may be used to their prejudice. *Bunn v. Ahl*, 29 Pa. St. 387. But they cannot attack such a judgment on the ground that the defendant in it was overreached, or taken advantage of by the plaintiff with regard to its consideration. *Dougherty's Estate*, 9 W. & S. (Pa.) 189; 42 Am. Dec. 326.

As to setting aside a judgment for usury, see *Bell v. Fergus*, 55 Ark. 536.

That a judgment can be attacked for fraud only by an independent action, and not by a motion in the cause, see *Sharp v. Danville, etc., R. Co.*, 106 N. Car. 308; 19 Am. St. Rep. 533; *Uzzle v. Vinson* (N. Car. 1892), 16 S. E. Rep. 6.

The fact that an insolvent, who has confessed judgment in favor of one creditor, expected that such creditor would lend him enough money to effect a compromise with his other creditors, does not render the judgment fraudulent, where there is no evidence that the judgment creditor agreed to make such loan, or that he had any other object than to secure himself. *Young v. Clapp*, 147 Ill. 176.

1. *Stein v. Good*, 115 Ill. 93; *Thompson v. Hintgen*, 11 Wis. 112. And see *supra*, this title, *Compliance with the Statute*.

The remedy of a defendant, for irregularity in entering judgment under a statute, should be sought in the court where the judgment was rendered. *Sipes v. Whitney*, 30 Ohio St. 69; *Gardner v. Bunn*, 132 Ill. 403.

Only a party thereto can be heard in such a motion. *Uzzle v. Vinson*, 111 N. Car. 138.

2. In *Adam v. Arnold*, 86 Ill. 185, it was held no ground for setting aside the judgment that the note sealed and

is incorporated in the warrant of attorney, this will waive all irregularities.¹ But where some condition is inserted or appended that is not complied with, the judgment will be set aside.² As the record imports verity, it will not be amended or changed on motion of the defendant, on affidavit or a showing by parol that the judgment was not entered in the manner or at the time it purported to be.³

12. Effect of the Confessed Judgment.—A judgment by confession, until set aside or reversed, has all the qualities and effects of a judgment on a verdict. It concludes and estops the parties thereto and their privies.⁴ The effect of the judgment in other

payable at a particular place, was described in the declaration as unsealed and payable generally.

Where a judgment at law by confession, on a warrant of attorney, appears regular and formal according to the record, equity will not interfere with, or impeach it, on the ground of any alleged irregularity or informality in entering it up, but will consider the rights acquired under such judgment as valid in law; especially where several years have elapsed since the judgment, and the defendants have acquiesced in it, and in the execution and sale under it. *De Riemer v. De Cantillon*, 4 Johns. Ch. (N. Y.) 85.

1. *Groll v. Gegenheimer*, 147 Pa. St. 162; *Black on Judgments*, § 77.

2. If to a money bond, with a warrant of attorney to confess judgment thereon, an agreement or condition is appended, under seal, that it is subject to the conditions of another agreement between the parties, judgment by confession if entered will be set aside; the court not being able to inquire if the conditions of the agreement have been complied with, and the only remedy for the obligee being by action on his bond. *Harwood v. Hildreth*, 24 N. J. L. 51.

A sealed agreement that, on payment by a given day of a less sum than the real debt mentioned in the condition of a bond and warrant of attorney to confess judgment, the bond shall be void, does not operate as a defeasance or discharge; especially if such payment be not made at the day. *Inman v. Griswold*, 1 Cow. (N. Y.) 199.

Where a judgment is confessed upon terms which are duly entered, it is in effect a conditional judgment, and the court will take notice of the terms and enforce them. *Wood v. Bagley*, 12 Ired. (N. Car.) 83.

A judgment entered upon a warrant of attorney to confess judgment, upon a breach of any of the conditions of a lease, will be stricken off where the defendant has had no opportunity to be heard on the question of breach of condition. *Secor v. Shippey*, 7 Pa. Co. Ct. Rep. 555.

In a judgment note containing a waiver of the \$300 exemption allowed by law, the waiver stands upon no higher plane than the rest of the note, and one who has signed such a note can defend an action on it only on the ground that his signature to it had been obtained by fraud or through some mistake. *Adams v. Bachert*, 83 Pa. St. 524.

"When an agreement in restraint or enlargement of the right of execution takes place between the parties, it should be made part of the condition of the bond or of the warrant, or the subject of a separate instrument under seal; for parol evidence to contradict or to construe the bond differently from the plain import of the condition or indorsement cannot be admitted." *Troub. & Hal. Pa. Prac.*, § 442, citing *Shoemaker v. Shirtliffe*, 1 Dall. (U. S.) 133; *Stanton v. White*, 32 Pa. St. 358; *Plankinson v. Cave*, 2 Yeates (Pa.) 370. But see *Greenawalt v. Kohne*, 85 Pa. St. 369; *Baillie v. Kessler*, 6 W. N. C. (Pa.) 527.

3. *Hansen v. Schlesinger*, 125 Ill. 230; *Roche v. Beldam*, 119 Ill. 320.

But strangers to such a judgment are not concluded by its date or recitals. They may, upon a complaint setting forth specific averments of fraud, introduce oral as well as documentary and record evidence. *Schuster v. Rader*, 13 Colo. 329.

4. In *Bell v. Fergus*, 55 Ark. 536, the court said: "But it is contended that this principle is not applicable to the

states has been considered already, in a previous section of this article.¹

II. TO BRING OR DEFEND AN ACTION.—Although the practice of filing regularly a warrant of attorney, authorizing an attorney to represent a party in bringing or defending a particular writ, has gone into disuse, yet such a warrant, or some similar power, must be produced when demand is made, on sufficient affidavit or proof that the appearance of the attorney is unauthorized;² in which

defense of usury, which renders void all securities affected by it. Many cases are cited to support this contention. In those cases, the judgments were confessed upon warrants of attorney or judgment notes, which formed a part of the contracts upon which the judgments were confessed, and by reason thereof were tainted with usury in the contracts. *Brown v. Toell*, 5 Rand. (Va.) 543; 16 Am. Dec. 759; *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122; 9 Am. Dec. 283; *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 258; *Gilbert v. Eden*, 2 Johns. Cas. (N. Y.) 280; *Starr v. Schuyler*, 3 Johns. (N. Y.) 139; *Hewett v. Fitch*, 3 Johns. (N. Y.) 250; *Fleming v. Jencks*, 22 Ill. 475; *Page v. Wallace*, 87 Ill. 84; *Hindle v. O'Brien*, 1 Taunt. 413; *Roberts v. Goff*, 4 B. & Ald. 92; 6 E. C. L. 403. In those cases, the defendants had no opportunity to plead—no day in court. The same reason existed for setting aside the judgment as there was for setting aside the contracts. The judgments were mere devices to evade the penalty of usury. But in this case, there was no agreement to confess judgment at the time the loan, contract, note, or assignment thereof, was made, or at the time the mortgage was executed. Appellants agreed many years afterward to confess the judgment or decree in question. This agreement formed no part of a usurious contract. In this case a complaint was filed, appellants entered their appearance, and by their consent the judgment or decree was rendered. They had an opportunity to set up their defenses; had their day in court and knew their defenses if they had any. Under these circumstances there is no valid reason why they should not be as much precluded from impeaching the judgment for usury as for payment or any good cause. They had the right to waive any defense of usury that they may have had, and did so by a confession of judgment, and cannot now retract

it. We can see no other or additional reason why a judgment by confession, in conformity with the law, should be set aside for usury, than there would be if there had been a judgment rendered in an adversary suit and upon a regular hearing or trial by the court; and there is none. The principle, whether it be of merger or estoppel, that makes judgments conclusive as to any defense that might have been set up in the action in which they were rendered, makes them conclusive as to usury. . . . If it does not, then there can logically be no end to litigation in which the defense of usury may be interposed, until that defense is established by a judgment of the court." See also *Chicago Fire-Proofing Co. v. Park Nat. Bank*, 145 Ill. 481; *Secrist v. Zimmerman*, 55 Pa. St. 446; *Braddee v. Brownfield*, 4 Watts (Pa.) 474; *Twogood v. Pence*, 22 Iowa 544; *Davidson v. Alexander*, 84 N. Car. 621; *Goff v. Dabbs*, 4 Baxt. (Tenn.) 300; *Apperson v. Gogin*, 3 Ill. App. 48; *Wood v. Bagley*, 12 Ired. (N. Car.) 83; *Sheldon v. Stryker*, 34 Barb. (N. Y.) 116; *Dean v. Thatcher*, 32 N. J. L. 470; *Maraist v. Caillier*, 30 La. Ann. 1087; *Shufelt v. Shufelt*, 9 Paige (N. Y.) 137; 37 Am. Dec. 381.

1. See *supra*, this title, *Jurisdiction*.

2. *Weeks on Attorneys*, §§ 185, 193; *Standefer v. Dowlin*, Hempst. (U. S.) 209.

That an attorney need not, in the first instance, produce a warrant, see *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224; 33 Am. Dec. 656; *Bridgton v. Bennett*, 23 Me. 420; *Henck v. Todhunter*, 7 Har. & J. (Md.) 275; 16 Am. Dec. 300; *Field v. Proprietors*, etc., 1 Cush. (Mass.) 11; *Farmers*, etc., *Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457; *Hardin v. Ho-yo-po-nubby*, 27 Miss. 567; *O'Flynn v. Eagle*, 7 Mich. 306; *Silkman v. Boiger*, 4 E. D. Smith (N. Y.) 236.

If the supposed client denies the

retainer, the court may require the attorney to produce the evidence of it. *Clark v. Willett*, 35 Cal. 534.

But a mere motion by the opposing party is not sufficient. *Hellman v. McWhennie*, 3 Rich. (S. Car.) 364. See *King of Spain v. Oliver*, 2 Wash. (U. S.) 429.

The proper course on failure to file the warrant is to stay proceedings, not to quash the writ. *Meyer v. Littell*, 2 Pa. St. 177. See *Keith v. Wilson*, 6 Mo. 435; 35 Am. Dec. 443.

In *M'Alexander v. Wright*, 3 T. B. Mon. (Ky.) 191, it is said: "The right to be employed and appear is one thing; this is proved by the license, and the law under which it was granted. The fact of being actually employed is another matter, and is proved by the warrant of attorney. In *England*, from which our jurisprudence is derived, attorneys must have a general license and an admission in court; yet the warrant of attorney could not be dispensed with in cases where it was properly demanded. . . . This warrant of attorney originally must be given in court—or rather a party in open court must appoint his attorney, and in process of time it was done by writing *en pais*, and even a warrant by parol has there been held good. To regulate these warrants, statutes were enacted, some of which were in force in this country, and have continued so since our separation, and are retained in our code, 1 Dig. L. K. 125, 126. It has been urged that those laws are obsolete, and the long disuse of the practice of warrants of attorney both in *Virginia* and this state, and indeed in other states of the Union, has been urged as a reason why these statutes or the provisions of the common law are not in force in this country, or are become obsolete. We admit that such warrants have been seldom used for a great length of time, and our adjudged cases are silent on the subject. This silence is loud testimony in favor of the integrity of the profession, for when the abuses are considered which might arise without, and which are intended to be restrained by warrants of attorney, the necessity of them must have been superseded more by the correct practice of the profession than by any other cause. Attorneys and counsel might often use the securities of others which fall into their hands, and use their names in actions, without their consent, for fraudulent pur-

poses; and especially the judgments of others, of which any person may obtain copies who pays for them at the clerk's offices, might often be put in suit, and money coerced by them without leave of their owners. These and similar practices have not been followed by practitioners, and hence warrants of attorney have been seldom demanded. But the possibility that such practices may grow up shows the wisdom of the law in restraining them by warrants of attorney, and we do not feel ourselves at liberty to dispense with them. We cannot say that either the provisions of the common law or these statutes are not in force, for we find no repeal. Nor can we say that they are obsolete, while the reason for their existence remains."

In *Lynch v. Com.*, 16 S. & R. (Pa.) 368; 16 Am. Dec. 582, it is said: "A power of attorney is never given or filed unless demanded by the other party, which does not happen in one case of fifty thousand, and then if procured after demand it is sufficient." And see *Ex p. Gillespie*, 3 Yerg. (Tenn.) 325.

But the warrant or authority need not be given unless due reasons are set forth for the request. *M'Alexander v. Wright*, 3 T. B. Mon. (Ky.) 189; *Savery v. Savery*, 8 Iowa 217.

An affidavit stating only the affiant's belief in the grounds of his motion is not sufficient. *Valle v. Picton*, 91 Mo. 207.

In *State v. Houston*, 3 Harr. (Del.) 20, it is said: "In our practice, therefore, the court would expect some ground to be laid by affidavit or otherwise, before they would, at the instance of the defendants, require the plaintiff's attorney to produce a written warrant or other proof of his authority. Doubtless, where fraud was suggested, and especially if a minor was concerned and in danger of being injured by an unauthorized proceeding before us, we would, for the protection of either guardian, ward or defendant, inquire into the attorney's authority; and would, if the case required it, apply other remedy than by merely striking off the suit."

So, in *McKiernan v. Patrick*, 4 How. (Miss.) 335, the court said: "Our practice does not require the warrant of attorney known in the English practice, and at one time required here. But when it becomes necessary for the ends of justice, where it is

case the burden of proof is on the party attacking the authority, the presumption always being that an attorney who regularly appears has the right so to appear.¹ (See also *ATTORNEY AND CLIENT*, vol. 1, p. 42.)

shown to the court that injury or oppression is happening, or is likely to happen, the court will interpose and require an attorney to show his authority for appearing as the attorney of a party, and grant relief where injury is done by fraud, accident or mistake, in the appearance of an attorney not authorized to do what he has done in that character."

In *Day v. Adams*, 63 N. Car. 254, it was held that letters written by the client to third persons, in which no particular suit was specified, which expressed gratification that a certain person had been employed in some controversy between the plaintiff and the present defendant, did not supply the want of the power of attorney required by statute to be filed.

But an affidavit by the plaintiff's agent, as to facts constituting authority, was held sufficient in *Hughes v. Osborn*, 42 Ind. 450.

A party has, of course, the right to impugn the authority of one who claims to be his attorney. *Handley v. Stator*, Litt. Sel. Cas. (Ky.) 186; *Legere v. Richard*, 10 La. Ann. 669.

Where the warrant is necessary, a *scire facias* cannot be issued without a new warrant. *Gonnigal v. Smith*, 6 Johns. (N. Y.) 106.

A rule on the plaintiff's attorney to file his warrant should be moved for before the plea is pleaded. *Sheetz v. Whitaker*, 7 W. N. C. (Pa.) 570; *Mercier v. Mercier*, 2 Dall. (Pa.) 142. Therefore, it is too late after the cause is at issue. *Campbell v. Galbreath*, 5 Watts (Pa.) 423; *Rowland v. Gardner*, 60 N. Car. 53. And see *Reece v. Reece*, 66 N. Car. 377. That the rule is of course, on the attorney to file his warrant, see *Dunn v. Stone Co.*, 11 W. N. C. (Pa.) 95. *Contra*, *Com. v. Serfass*, 3 Del. Co. Rep. (Pa.) 418; 5 Pa. Co. Ct. Rep. 139.

The warrant need not be under seal nor attested by witnesses, *Grubb v. Serrill*, 1 Del. Co. Rep. (Pa.) 141; but should be executed in accordance with the law of the forum. 1 *Clark* (Pa.) 482.

As to a warrant filed by a wife alone, see *Stoner v. Becker*, 15 W. N. C. (Pa.) 519.

A writ of error does not lie to the refusal of the court to admit an attorney for lack of proper authority. *Ex p. Gillespie*, 3 Yerg. (Tenn.) 325.

1. *Norberg v. Heineman*, 59 Mich. 210; *Schlitz v. Meyer*, 61 Wis. 418; *Valle v. Picton*, 91 Mo. 207.

In *Valle v. Picton*, 91 Mo. 207, the court, by Norton, C. J., said: "It also appears that defendant filed a motion to dismiss the cause, on the ground that the suit was instituted without the authority of plaintiff. This motion was accompanied by the affidavit of defendant, stating that 'he had good reason to believe, and does believe, and does so aver, that the cause has been begun by H. A. Clover, without the knowledge, sanction, or authority of plaintiff, and against her wishes, and he does believe and aver that if advised thereof she would not sanction the same.' The motion was overruled on the day it was filed. It was held, and, we think, properly, by the court of appeals in *Valle v. Picton*, 16 Mo. App. 178, that no error was committed in this, because the affidavit, which only stated the belief of the affiant, did not tend to overcome the presumption arising from the professional obligation of the attorney, and might be summarily disposed of and that such affidavit did not fall within the principle of the case of *Keith v. Wilson*, 6 Mo. 439, because it stated no specific facts, from which the court itself might be induced to doubt the attorney's authority to appear for the party. In the case above referred to there was a complete showing of such facts."

This presumption can be overcome only by clear evidence. *Wheeler v. Cox*, 56 Iowa 36; *Esley v. People*, 23 Kan. 510.

If an attorney appear and judgment be entered against his client, the court will not set it aside, though the attorney had no warrant, if he be solvent, and able to respond in damages for his officiousness. *Governor v. Lassiter*, 83 N. Car. 38. See *Magnolia, etc., Fruit Cannery v. Guerne* (Cal. 1892), 31 Pac. Rep. 363.

As to the effect of appearance and the rights involved in retainer, see *ATTORNEY AND CLIENT*, vol. 1, p. 952.

WARRANTS.—(See also ARREST (IN CIVIL CASES), vol. 1, p. 719; ARREST (IN CRIMINAL CASES), vol. 1, p. 730; CRIMINAL PROCEDURE, vol. 4, p. 729; ESCAPE, vol. 6, p. 853*d*; FALSE IMPRISONMENT, vol. 7, p. 661; JUSTICE OF THE PEACE, vol. 12, p. 391; MALICIOUS PROSECUTION, vol. 14, p. 16; UNITED STATES COMMISSIONERS, vol. 27, p. 546.)

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I. DEFINITION.—The term warrant, in its most comprehensive sense, means a writ or precept from competent authority, in pursuance of law, directing the doing of an act, and addressed to an officer or person competent to do the act, and affording him protection from damage if he does it.¹

II. KINDS OF WARRANTS—1. **Warrant of Arrest**—a. **DEFINITION.**—A warrant of arrest is a writ or precept issued by a magistrate, justice, or other competent authority, addressed to a sheriff, constable, or other officer, commanding him to arrest the body of the person therein named, and bring him before the magistrate or court to answer, or to be examined, touching some offense which he is charged with having committed.²

1. *People v. Wood*, 71 N. Y. 371. A general name for various judicial writings authorizing officers of the courts to make arrests, searches, or seizures, or do other like acts in aid of the administration of justice. Abbott's L. Dict.

2. Black's L. Dict. The statutes in some of the states define the term. In the *Alabama Code*, ch. 3, art. 1, § 4259, a warrant of arrest is defined to be "an order in writing issued and signed by a magistrate, stating the substance of the complaint,

b. HOW OBTAINED—THE COMPLAINT.—The party who knows or suspects that a public offense has been committed, goes before a justice of the peace, or other officer competent to issue warrants of arrest, together with such witnesses as he may produce, and lays before him his information and that of his companions, setting forth the grounds on which the application for a warrant is based.¹

By the federal constitution, the warrant may not issue, except upon "probable cause supported by oath or affirmation." Similar provisions are found in the constitutions or statutes of the several states.²

directed to a proper officer, and commanding him to arrest the defendant."

And according to *New York Code Crim. Proc.*, ch. II, § 151, "a warrant of arrest is an order in writing in the name of the people, signed by a magistrate, commanding the arrest of the defendant."

1. The local statutes designate the officers who may issue warrants of arrest. Ordinarily the power is conferred upon justices of the peace, corporation officers clothed by law with the powers of a justice of the peace, and the judges of certain courts.

In *Illinois*, a warrant for the arrest of persons found gambling may be granted by a judge of a circuit court. *People v. Copely*, 4 *Crim. Law Mag. & Rep.* 187.

In *Massachusetts*, a justice, or special justice, of a district court, may receive complaints and issue warrants when the court is not in session; and it is to be presumed that the justice acted within the authority given him, and that the court was not in session. *Com. v. Lynn*, 154 *Mass.* 405; *Com. v. Brusie*, 145 *Mass.* 117; *Hyde v. Malley*, 121 *Mass.* 388.

In *Alabama*, a warrant issued by a notary public as *ex officio* a justice of the peace, after the expiration of his term of office, has no legal validity, and does not authorize an arrest by an officer into whose hands it is placed, unless facts are shown which are sufficient to uphold the acts of the notary as an officer *de facto*. *Cary v. State*, 76 *Ala.* 78.

A warrant for an offense within the jurisdiction of a justice of the peace, under the *North Carolina Act of 1868-1869*, ch. 178, sub-ch. 4, § 6, may be issued by a justice who does not reside in the township where the offense was committed, but it must be returned before, and tried by, a justice who does re-

side in such township. *State v. Hawes*, 65 *N. Car.* 301.

In *Connecticut*, a justice's warrant for the arrest of a criminal upon the complaint of a grand juror, must be signed and issued by the justice to whom the complaint is addressed. *Perry v. Johnson*, 37 *Conn.* 32.

The charter of the city of New Haven provided that "process should be deemed to be issued by the city court when signed and issued by the judge, clerk, or city attorney." It was held that the attorney's signature to a warrant for the arrest of the defendant was the act of the court, and that the case was not affected by the fact that he had, as attorney, signed and issued the complaint. *State v. Dibble*, 59 *Conn.* 168.

In *Vermont*, when a proceeding in court is in progress, which at a certain stage requires, in regular furtherance thereof, that a warrant should issue, the clerk may issue the same without any order of court to that end; so, when the court receives the presentment of a grand jury and causes the same to be filed and it becomes a record, it carries with it all the authority which is required from the court to the clerk, taken in connection with the statute (*Rev. Laws of Vermont*, § 819), to issue warrants, in term time or vacation, for the arrest of the person indicted. *In re Durant*, 69 *Vt.* 176.

Examination of Witnesses—Publicity.—When a magistrate entertains an information or application for a warrant, he does not hold a court within *New York Code Civ. Proc.*, § 5, providing that "the sittings of every court in this state shall be public, and every citizen shall freely attend the same," and may, therefore, examine the witnesses on such application privately. *People v. Cornell*, 27 *N. Y. Supp.* 859.

2. *U. S. Const.*, Amend. IV. See

Blythe v. Tompkins, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; *Paine v. Barnes*, 5 Barb. (N. Y.) 465; *Vannatta v. State*, 31 Ind. 210; *Haskins v. Ralston*, 69 Mich. 63; *Turner v. People*, 33 Mich. 363; *People v. Staples* (Cal. 1891), 27 Pac. Rep. 523; *Com. v. Farrell*, 8 Gray (Mass.) 463.

In *Indiana*, the complaint may be sworn to before a notary public. *Hunter v. State*, 102 Ind. 428.

An affidavit made solely upon information derived from others, whose names are not given, by a person who swears that he has reason to believe, and does believe, that a certain person, naming him, has committed an offense, describing it, does not fulfill the requirement of the constitution of the *United States*. The magistrate, before issuing a warrant, should have before him the oath of the real accuser to the facts on which the charge is based and on which the belief or suspicion of guilt is founded. In the Matter of a Rule of Court, 3 Woods (U. S.) 502; *U. S. v. Tureand*, 20 Fed. Rep. 621. In the former case, Bradley, J., said: "After examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and that no warrants shall issue but upon probable cause supported by oath or affirmation, describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment of the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt

is founded. The magistrate can then judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant. It is possible that by exercising this degree of caution, some guilty persons may escape public prosecution, but it is better that some guilty ones should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge, and this was undoubtedly the beneficent reason upon which the constitutional provision referred to was founded. In view of these considerations, and to correct the evil alluded to, we have prepared and now make the following general order, for the guidance of the commissioners of this court in the manner of issuing warrants of arrest against persons charged with crime, to-wit: No warrant shall be issued, by any commissioner of this court, for the seizure or arrest of any person charged with a crime or offense against the laws of the *United States*, upon mere belief or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion."

Where a magistrate signs warrants in blank, and delivers them to a police officer to be filled up with the names of persons to be apprehended as occasion may require, and the officer fills up one of them for the arrest of an individual without a charge under oath being first made, the warrant will be a nullity, as not issuing in the ordinary course of justice from a court or magistrate. *Rafferty v. People*, 69 Ill. 111; 72 Ill. 37; 18 Am. Rep. 601.

And in *Sarah Way's Case*, 41 Mich. 299, printed forms of complaints, filled out by inserting names and dates, and containing general allegations only, sworn to as a matter of form by a policeman, were disapproved by the court, as failing to meet the constitutional requirement of probable cause to support a warrant.

The complaint must set up the facts constituting the offense on the knowledge of the person making the complaint, and if he does not know them, other witnesses must be examined who do know them. And no person can be arrested on the mere belief of the per-

son making the complaint. The liberty of the citizen is not held upon so slender a tenure as that. *People v. Heffron*, 53 Mich. 527; *Ex p. Dimmig*, 74 Cal. 164.

An affidavit made upon information merely, is entitled to but little weight in any legal proceeding. *People v. Smith*, 1 Cal. 9.

Before a warrant can lawfully issue for the arrest of the offender, the magistrate must have some evidence of his guilt. The facts and circumstances stated on information and belief only, without giving any sufficient grounds on which to base the belief, are insufficient. The magistrate must have evidence of probable cause, both as to the commission of the offense and the guilt of the offender. *Blodgett v. Race*, 18 Hun (N. Y.) 132; *Comfort v. Fulton*, 39 Barb. (N. Y.) 56; *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; *Wilson v. Robinson*, 6 How. Pr. (N. Y. Supreme Ct.) 110.

In *New York*, the complaint need not be an oath, but the examination of the complainant must be. *Matter of Boswell*, 34 How. Pr. (N. Y. Ct. of Sessions) 347.

In *Kansas*, complaint or information charging the defendant with a misdemeanor, and verified on nothing but hearsay and belief, is not sufficient to authorize a warrant. *State v. Gleason*, 32 Kan. 245. In this case it was said: "If a warrant, in the first instance, may issue upon mere hearsay or belief, then all the guards of the common law and of the bill of rights of our constitution, to protect the liberty and property of the citizen against arbitrary power, are swept away. There is no necessity for going so far, and the constitution warrants no such conclusion." See also *Atchinson v. Bartholow*, 4 Kan. 124; *State v. Montgomery*, 8 Kan. 351; *Thompson v. Higginbottom*, 18 Kan. 44; *Harrison v. Beard*, 30 Kan. 533; *In re Donnelly*, 30 Kan. 191; *In re Lewis*, 31 Kan. 71; *State v. Babbitt*, 32 Kan. 254; *State v. Brooks*, 33 Kan. 710; *State v. Bjorkland*, 34 Kan. 377; *In re Gilson*, 34 Kan. 643; *State v. Longton*, 35 Kan. 376.

"It is the magistrate's duty, before issuing a warrant, to require evidence on oath amounting to a direct charge, or creating a strong suspicion of guilt." *Per Ruffin, C. J., in Welch v. Scott*, 5 Ired. (N. Car.) 72. See also *State v. Mann*, 5 Ired. (N. Car.) 45.

A warrant issued upon common

rumor and report of the accused's guilt, though it recites that there was danger of his escaping before witnesses could be summoned to enable the judge to issue it upon oath, is illegal. *Conner v. Com.*, 3 Binn. (Pa.) 38.

In *Housh v. People*, 75 Ill. 487, the affidavit stated that the affiant at, etc., and on, etc., "had a saddle and sheep skin stolen from his barn in said place, and that he verily believes they are now in possession of a man, name unknown, a large size man, riding a sorrel mare with a light mane and tail, and young colt running after, when last seen, who stayed last night at Edmund Russel's, in Persifer township, this county." Upon this affidavit, a warrant was issued by virtue of which a man answering to the description therein given was arrested. The affidavit was held to be insufficient to confer jurisdiction upon the justice to issue a warrant for the arrest of the party described, as it failed to show that such person was guilty of any crime, and that affiant had just and reasonable ground to suspect, or did, in fact, suspect, he was guilty, and the warrant issued thereon was illegal and void.

Under section 6 of the Bill of Rights of *Illinois*, declaring that "no warrant shall issue without probable cause, supported by affidavit," no warrant may issue upon an information without affidavit, and the affidavit should be such that if false, perjury can be assigned upon it. *Myers v. People*, 67 Ill. 503.

In *Alabama*, an affidavit by a married woman that "she is afraid her husband will beat, wound, maim, or kill her, or do her some bodily hurt," is not sufficient, under sections 3340, 3341, of the code of that state, to authorize the arrest of the husband. And if the warrant appears on its face to be predicated on such affidavit, it is void and affords no protection to the officer executing it. *Noles v. State*, 24 Ala. 672.

A complaint stating that the complainant is "credibly informed" that an offense has been committed, does not satisfy a statutory requirement that the complainant must declare upon oath that he has "good reason to believe" that an offense has been committed. *State v. Dale*, 3 Wis. 759.

In *Donahoe v. Shed*, 8 Met. (Mass.) 326, a justice of a police court made a certificate on a complaint that it was sworn to before him on the second day

And the statutes require the magistrate to reduce the complaint to writing, and cause the same to be subscribed by the complainant.¹

of May, 1843, and issued a warrant, which was on the same paper, dated April second, 1843, commanding the officer to arrest the party "mentioned in the above complaint." The officer arrested the party, and was subsequently sued by him in an action of trespass for the arrest. The plaintiff insisted that the warrant was not issued upon a complaint made on oath, as the warrant was dated April second, and the certificate of the oath was dated May second. But the court held that as it appeared on the face of the warrant that it issued after the complaint was made, and as it was a warrant in due legal form, it furnished a justification of the arrest.

In *Massachusetts*, while a complaint and information on oath that the complainant has probable cause to suspect that the accused has committed the offense charged, is not a complaint made with such reasonable and sufficient certainty as to be the ground of a conviction and sentence, yet it seems that such a complaint is sufficient for the purpose of causing the party to be arrested and examined before an inferior tribunal, and committed or bailed to answer to an indictment or other proper form of charge in another court. *Com. v. Phillips*, 16 Pick. (Mass.) 211.

And in *Maine*, it is held that if a positive charge, verified by the complainant's oath, according to the best of his knowledge and belief, is made in the complaint before a magistrate, it will authorize him to issue a warrant. *State v. Hobbs*, 39 Me. 212.

In *Pratt v. Bogardus*, 49 Barb. (N. Y.) 89, the affidavit, upon which the application for a warrant was made, stated in substance, that the defendant did designedly, and by false pretenses, obtain from the complainant one sulky, of the value of \$30, by falsely stating and representing to him that his own sulky was hard to ride in and that he desired complainant's sulky to go to Albany in, and would return it the next week, but that on the contrary he shipped it from Albany to Fort Plains, with intent to cheat and defraud the complainant. It was held that this was colorable evidence, sufficient to call upon the justice to exercise his judgment in determining the propriety of issuing process;

and that having acted in good faith he should be protected.

An affidavit made before a notary public that affiant bought liquor of the defendant "at his saloon on one Sunday in the month of May, 1888," is insufficient under *New York Code Crim. Proc.*, §§ 145, 146, 147, 148, to authorize a warrant. So, also, is an affidavit that the defendant, on a certain day "and on divers Sundays since that date, has sold and given away intoxicating liquors," which was not prepared by a magistrate, and under which there was no examination. *People v. Nowak*, 24 N. Y. St. Rep. 274.

Under *New York Code Crim. Proc.*, § 149, a deposition upon an information of the commission of a crime, must set forth the facts tending to establish the crime, and not merely the conclusions of the witnesses. *Matter of Rothaker*, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 122. And this deposition may be upon information and belief, when the facts and circumstances on which the information and belief are founded are given, and they are such as tend to sustain the charge. *People v. McIntosh*, 5 N. Y. Crim. Rep. 38.

In *Territory v. Cutinola*, 4 N. Mex. 160, it was held that an information filed by the district attorney *ex officio*, will authorize the issuance of a warrant both at common law and under the constitution, and the oath of office of the district attorney is a sufficient compliance with the fourth amendment to the Constitution of the *United States*, providing that no warrant shall issue but upon probable cause supported by oath or affirmation; and if he files the information as district attorney, it is not necessary for him to state in the body of the information that he files it on his oath of office. See also *State v. Sickie*, *Brayt*. (Vt.) 132.

When perjury is charged to have been committed, in the trial of a criminal proceeding which was commenced by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was granted without complaint or affidavit. *State v. Peters*, 107 N. Car. 876; *State v. Alexander*, 4 Hawkes (N. Car.) 182; *Reg. v. Hughes*, 14 Cox C. C. 284.

1. In *Com. v. Barhight*, 9 Gray

It has been said that all process for the arrest of a party is not included in the word "warrant," as used in the constitutions. A *capias*, or writ of arrest in a civil action, is not a warrant in that sense, and it issued at common law, as a matter of course, without oath. A warrant, within the meaning of these constitutional provisions, is an authority for the arrest of a person upon a criminal charge, with a view to his commitment and trial thereon. The arrest of a person upon a charge of insanity, for the purpose of his commitment or confinement in an insane asylum, is, strictly speaking, an arrest neither in a civil nor a criminal proceeding, but is one *sui generis*; at the same time, it partakes more of the character of the latter than of the former, and ought not to be allowed otherwise than upon information on oath.¹

It seems that in the absence of statutory direction, the complaint need be neither in writing nor under oath.²

(Mass.) 113, it is held that a complaint for larceny signed by the complainant below the description of the goods stolen, and above the charge of larceny, is not "subscribed by the complainant," as required by *Massachusetts Rev. Stats.*, ch. 135, § 2. In this case, Shaw, C. J., said: "The magistrate is required to reduce the complaint to writing and 'cause the same to be subscribed by the complainant.' It is not certain that the complaint was reduced to writing before it was sworn to. It cannot be ascertained that this signature was made for the purpose of authenticating the whole complaint. . . . Such looseness and carelessness in instituting criminal proceedings are not to be encouraged."

In *New York*, the law does not require the information to be reduced to writing previously to issuing the warrant. *Matter of Boswell*, 34 How. Pr. (N. Y. Ct. of Sessions) 342; *Payne v. Barnes*, 5 Barb. (N. Y.) 465. And the failure of the magistrate to reduce the complaint of the prosecutor to writing before issuing the warrant, will not constitute the prosecutor a trespasser. *Sleight v. Ogle*, 4 E. D. Smith (N. Y.) 445.

The omission of a complainant, or his witness, to sign the deposition, as required by the *New York Code of Crim. Proc.*, tit. 3, ch. 2, § 148, is an irregularity which will be held to be waived, unless the defendant has interposed the objection at the first available opportunity. *People v. Winness*, 3 N. Y. Crim. Rep. 89.

1. *Sprigg v. Stump*, 7 Sawy. (U. S.) 289.

2. *State v. Killett*, 2 Bailey (S. Car.) 289.

In Chitty's *Crim. Law* (5th Am. ed.), p. 34, the author, in referring to the evidence on which a warrant may be granted, observes that a magistrate ought, unless he commits upon view of the offense, to examine upon oath the party requiring the warrant, as well to ascertain that a felony or other crime has been actually committed, as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. And he also holds it to be the duty of the magistrate to take all charges, of whatsoever nature, kind, or complexion they may be, in writing. That this is the safer course, will appear from the following considerations: "It will insure greater system and accuracy in the subsequent proceedings, enabling the justice, in case the complainant or any of the witnesses are prosecuted for their doings in the matter, to show distinctly what they testify to; and, further, if the justice himself is prosecuted, it will facilitate his defense by enabling him to exhibit at once an information on oath authorizing the warrant and giving him jurisdiction." 1 Archbold *Cr. Pr. & Pl.* (8th ed.), p. 103, notes.

In *State v. J. H.*, 1 Tyler (Vt.) 444, it was held that a warrant to arrest a person charged with crime upon the complaint of a private informer, cannot legally issue without the oath of the complainant.

The magistrate's certificate has been held to be the only proper evidence of the oath.¹

Where the complaint charges the accused in positive terms with the commission of a crime, the addition of the words that "the affiant verily believes the defendant guilty of the facts charged," will not render the complaint invalid as not being sworn to positively.²

The omission from the warrant of the pronoun "me" after the word "before," in stating before whom the complaint was made, does not vitiate the warrant.³

It is not quite clear, upon the authorities, whether a person rendered incompetent generally, as a witness on account of the conviction of an infamous offense, can prefer a valid complaint.⁴

In one instance, where neither a complaint in writing nor on oath was deemed indispensable, a party arrested under a warrant founded on the affidavit of one legally incompetent as a witness, was enlarged on his own recognizance, but the court refused to quash the prosecution.⁵

An accomplice may legally be a complainant, but as to how far the justice should act on his unsupported testimony, no rule can be laid down; he must be guided by circumstances.⁶

Criminal warrants may be both issued and executed on the Sabbath.⁷

It has been said that a justice of the peace may properly take

1. *State v. J. H.*, 1 Tyler (Vt.) 444.

Where a complaint duly charging an offense is presented in writing to a magistrate, and he administers the oath to the complainant, and certifies it in the usual form, this is conclusive evidence of a compliance with *Massachusetts* Rev. Stat., ch. 135, § 2; *Com. v. Farrell*, 8 Gray (Mass.) 463.

2. *Brown v. State*, 16 Neb. 658.

3. *Johnson v. State*, 73 Ala. 21. See this case for the form of warrant which complies substantially with the *Alabama* Code of 1876, §§ 4451, 4452.

4. 1 Bishop's Cr. Proc. (3d ed.), § 232; *Rex v. Moore*, *Cas. Temp.*, Hardw. 176; *Walker v. Kearney*, 2 Str. 1148; *Skip v. Harwood*, Willes' Rep. 291. See *Taulman v. State*, 37 Ind. 353, where it was held that in a prosecution under the *Indiana* act, Feb. 23, 1859, for carrying concealed weapons, the wife of the defendant cannot be a witness against him; and, therefore, a wife cannot make an affidavit against her husband on which to found such a prosecution.

5. *State v. Killett*, 2 Bailey (S. Car.) 289.

6. In *Rex v. Steward*, 2 B. & Ad. 12;

22 E. C. L. 16, criminal information was granted on the sole testimony (uncontradicted) of a *particeps criminis*. In *Rex v. Peach*, 1 Burr. 548, it was refused. But these cases are clearly distinguishable. In the former, the offense was against public policy, as bribery in the election of an alderman, who, by virtue of that office, would be a justice of the peace. The matter involved in the second case was private fraud, and all of the parties stood in the same relation to each other in respect to the offense complained of. This distinction was deemed all important by Lord Tenterden, C. J., who delivered the opinion in the former case.

7. *Pearce v. Atwood*, 13 Mass. 334; *Keith v. Tuttle*, 28 Me. 326; *State v. Douglas*, 69 Ind. 544. See also *DAY*, vol. 5, p. 81; *SUNDAY*, vol. 24, p. 578.

The exception, in 29 Car. 2, ch. 7, § 6, that process may be executed on the Lord's day, in cases of treason, felony, or breach of the peace, extends to all indictable offenses, and is not restricted to treason and felony, nor to such misdemeanors as involve an actual breach of the peace. *Rawlins v. Ellis*, 16 M. & W. 172; 16 L. J. Exch. 5; 10 Jur. 1039.

the advice of the prosecuting attorney before issuing a warrant, and refuse it even when the accuser can make a *prima facie* showing of a technical offense, if, in the opinion of the prosecuting attorney, the case would fail on full hearing, or the element of criminal intent is so far wanting that the cause of justice would not be advanced by the prosecution.¹

c. FORM AND REQUISITES — (1) *Description of Offender.*—Certainty of description of the accused in a warrant of arrest has been deemed so essential to the liberty of the citizen that the federal constitution, as well as that of each of the states, denounces general warrants as grievous and oppressive, and not to be granted; uncertain warrants are also reprobated as being incompatible with the necessary security of the people.²

These provisions were inserted in the constitutions on account of a well-known controversy concerning the legality of general warrants in *England*, shortly before the revolutionary war, not so much to introduce new principles, as to guard private rights already recognized by the common law.³

The warrant must specify the name of the accused, if known, and if unknown, it must supply *data* from which his identity can be inferred with certainty; such as his occupation, personal appearance and peculiarities, his place of residence or labor, his recent history, etc.⁴

1. *Beecher v. Anderson*, 45 Mich. 543.

2. U. S. Const., Amend. IV. See also the constitutions of the several states.

3. A practice had obtained in the office of the Secretary of State ever since the Restoration, founded on certain clauses in the acts for regulating the press, of issuing general warrants for the apprehension of the authors, printers, or publishers of such obscene or seditious libels as were particularly mentioned in the warrant, without naming any one in particular. When those acts expired in 1694, the same practice was continued in every reign and under every administration, except the last four years of Queen Ann, down to the year 1763. In this year the validity of such warrants was disputed in the famous case of *Money v. Leach*, 3 Burr. 1742, and the whole court of king's bench were of opinion that the warrant under which the defendant in error was arrested was illegal and void, on two grounds: First, that Lord Halifax, then Secretary of State, who issued the warrant, was not competent to do so; and, secondly, for its uncertainty, it having required the apprehension of the authors, printers and publishers of (what was called) a seditious libel, contained in a paper styled *The North Briton* No. 45, without

naming any person whatever as author, printer, or publisher of the said paper. After this case, the issuing of such general warrants was declared illegal by a vote of the House of Commons. See 4 Bl. Com. 292, note k.

4. A warrant to arrest "—— Hood" (Christian name omitted) "of B., in the parish of F., by whatsoever name he may be called or known, the son of Samuel Hood," was adjudged invalid, because the Christian name was omitted and no reason assigned therefor, and also because it failed to point out with particularity the person intended. *Rex v. Hood*, 1 M. C. C. 281.

In *Wells v. Jackson*, 3 Munf. (Va.) 458, the persons to be arrested were described only by their surnames, the counties of their residence, their professions, or trades, without their Christian names. The question of the sufficiency of the description was not properly before the court, but the judges expressed themselves upon the point, thinking their views might be useful to the parties. In the opinion of three of the judges, the description was sufficient. But Judge Roane, in a very able and exhaustive opinion, decided against the warrant, in which opinion Judge Fleming concurred.

In *Prell v. McDonald*, 7 Kan. 426,

A warrant to arrest all persons suspected of a particular crime, without either naming or describing any particular person, is illegal and void.¹

A warrant ordering the arrest of the "associates" of persons named, without further description or means of identification of the associates, is illegal and void as to them.²

At common law, the arrest of a person by a wrong name cannot be justified, although he was the person intended, unless the officer can establish that he was known as well by the one name as the other.³

it was held that the omission from the warrant of the Christian name of the party, and who is not otherwise described therein, is fatal to the validity of the warrant, and the officer is not justified in making an arrest thereunder.

In *Com. v. Crotty*, 10 Allen (Mass.) 403; 87 Am. Dec. 669, a warrant to arrest "John Doe or Richard Roe, whose other or true name is unknown," without further description, was held to be void; and it was further held that an attempt to arrest any one on such a warrant might be lawfully resisted, and third persons might lawfully aid him in such resistance, using no more force than is necessary to prevent the arrest.

In *Harwood v. Siphers*, 70 Me. 464, a warrant describing the accused as "a person whose name is unknown, but whose person is well known, of Vassalboro, in the county of Kennebec," was held to be defective.

In *Holly v. Mix*, 3 Wend. (N. Y.) 350; 20 Am. Dec. 703, it was held that a warrant against John Doe, does not authorize the arrest of any one but John Doe; but where it was altered by inserting the real name of the party, it was a justification of all subsequent regular acts of all concerned in its execution.

The following description has been said to be sufficient: "The body of a man whose name is unknown, but whose person is well known, and who is employed as a driver of cattle and wears a badge number 573." 1 Chitty's *Crim. Law*. (5th Am. ed.) 39; 1 Hale 527.

Criminal process, defective for uncertainty in the description of the defendant, is not aided by *North Carolina* act of 1794, which provides that warrants shall not be set aside for want of form. The act, in its terms, applies to civil process only, and, furthermore, the description of the defendant is a matter

of substance and not of form. *Mead v. Young*, 2 Dev. & B. (N. Car.) 521.

In *People v. Gosch*, 82 Mich. 22, the defendants, Amiel Gosch and Charles Brearley, were named in the warrant as "Amel" Gosch and Charles "Brailley," respectively, and it was contended that the error was fatal. But the court said that "the claim is scarcely worthy of notice; the names are *idem sonans*."

1. The law knows of no such process as one to arrest all suspected persons and bring them before a court for trial. It is an idea not to be endured for a moment. It would open the door for the gratification of the most malignant passions, if such process issued by a magistrate should screen him from damages. *Grimon v. Raymond*, 1 Conn. 40; 6 Am. Dec. 200.

2. *Wells v. Jackson*, 3 Munf. (Va.) 458.

A warrant reciting that A, B, "and company" had committed an offense, and commanding an officer to seize "said company," has been held not to justify the arrest of any one; for the mandatory part does not direct the apprehension of A B by name, or by any description, and it is not helped by the recital; for the words "said company" refer only to the company with A B and not to A B himself. *Mead v. Young*, 2 Dev. & B. (N. Car.) 521; *Haskins v. Young*, 2 Dev. & B. (N. Car.) 529; 31 Am. Dec. 426.

3. *Mead v. Haws*, 7 Cow. (N. Y.) 332. In this case a warrant issued against "John Doe, the person carrying off the cannon," intended for Levi Mead, who was, when it issued, in the act of carrying off a cannon. Mead was arrested on the warrant, and it was held that he might maintain trespass against the persons concerned in the arrest. A similar result was reached in *Gurnsey v. Lovell*, 9 Wend. (N. Y.) 319, where

But the rule is otherwise when the wrong person is arrested by reason of his own misrepresentations or misstatements.¹

Now by statute in some of the states, if the name of the defendant is unknown to the magistrate, he may be designated in the warrant by any name.²

It is a nice question whether a warrant containing a mandate

Daniel W. Lovell was arrested under a warrant against "John Doe or Richard Roe." And also, in *Melvin v. Fisher*, 8 N. H. 406, where the plaintiff, George Melvin, was arrested under a warrant against George Melvin.

In *Scott v. Ely*, 4 Wend. (N. Y.) 555, Evelina Scott was arrested by virtue of a warrant against Emeline Scott, and she was allowed to maintain an action for false imprisonment against the actors; and this notwithstanding it was made to appear that she was in fact the person intended. This case was decided on the strength of *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 456, from which it was, in the opinion of the court, not distinguishable. In this case, process was issued from a court of equity to attach Samuel S. Griswold for contempt, and was served upon Daniel S. Griswold, the person really in contempt, and against whom the order was made. So soon as the officer discovered the mistake in the attachment, the prisoner was discharged. He thereupon brought trespass for false imprisonment against the officer, and the latter was held liable.

In *Miller v. Foley*, 28 Barb. (N. Y.) 630, the warrant of a justice of the peace recited a complaint against "John R. Miller" for a felony, and commanded the officer to arrest "the said William Miller," and it was held that the officer could not, under this, justify the arrest of John R. Miller, although it was proved that he was the person intended.

In an action for false imprisonment by Richard Hoyer, against an officer for arresting him under a magistrate's warrant against John Hoyer, it was held that the officer was not justified, although Richard Hoyer was charged with felony before the magistrate, and was the person against whom the warrant was intended to issue. *Hoyer v. Bush*, 1 M. & G. 775; 39 E. C. L. 649.

A warrant ordering the arrest of "James West," without further description of the party intended, does not authorize the arrest of one whose name

is V. M. West, or Vandy West, and who has never been known as James West; and it matters not that such person was the one the commissioner had in mind when he issued the warrant. *West v. Cabell*, 153 U. S. 78.

In *Shadgett v. Clipson*, 8 East 328, Josiah Shadgett, the plaintiff, was arrested by the name of John Shadgett. The plea averred that the process was issued against Josiah by the name of John; but this was held, in an action for false imprisonment, to be no justification to the officer who made the arrest. Lord Ellenborough said: "Process ought regularly to describe the party against whom it is meant to be issued, and the arrest of one person cannot be justified under a writ sued out against another."

In *Wilkes v. Lorck*, 2 Taunt. 400, it was held that the sheriff was liable to an action for false imprisonment for arresting the defendant by a wrong Christian name.

In *McMahan v. Green*, 34 Vt. 69; 80 Am. Dec. 665, it was held that the arrest of John McMahan on a warrant against John McManus was illegal, but that the request of the officer to a private person to assist in the arrest was a full justification to the latter for rendering assistance.

1. If there is lawful ground for apprehending C D, and A B represents himself to the officer to be C D, and is arrested in consequence of such misrepresentation, he has no valid ground for complaining of the imprisonment, which resulted from his own act. But after he has given notice that he is not the person he represented himself to be, he cannot lawfully be detained for a longer time than may be reasonably necessary to ascertain which of the two statements made, is true. *Dunston v. Peterson*, 2 C. B. N. S. 495.

2. *New York Code Crim. Proc.*, § 152. In *Alabama*, if the warrant states that the name of the accused is unknown to the magistrate, no name need be inserted. *Alabama Code*, § 4259.

for the arrest of a person named, and others neither named nor described, is altogether void, or is null only so far as it is uncertain, and good as to the residue. In one instance, such a warrant was held to be valid as to the party sufficiently described, and void as to the others;¹ and in two other cases, the point was referred to, but in neither was it directly passed upon.²

Mere verbal inaccuracies, where the meaning is clear, will not vitiate the warrant; for example, to follow the names of the accused with a singular pronoun, such as "her" or "him," where the sense calls for a pronoun in the plural number, such as "their" or "them," is not fatal.³

The warrant cannot be rightfully altered after it has finally left the hands of the magistrate who issued it; and if, after it has been so issued, it is altered by another magistrate, by inserting the name of another person to be apprehended, it will be no justification to the officer who executes it for taking such other person.⁴

(2) *Description of Offense.*—In the first place, the warrant must state an offense in respect of which the magistrate has authority to issue the warrant. Then, as to the description of the offense—by the common law, it was not absolutely essential to the validity of the warrant that it set forth the charge or offense; this was rather a matter within the discretion of the magistrate. Indeed, some of the earlier authorities go to the length of maintaining that cases may arise in which it would be imprudent to let even the peace officer know the crime of which the party to be apprehended is accused.⁵ Now by statute in many, if not all, of the

1. In *Ard v. State*, 114 Ind. 542, it is held that a warrant issued by a magistrate, commanding the arrest of "Oscar Ard and five other persons, whose names are unknown," is bad as to all persons arrested thereunder save the one named, provided timely objection be taken; but a motion to quash the warrant and discharge the defendant from custody, will be unavailing if made after such parties have secured a continuance and entered into a recognizance for their future appearance.

2. In *Wells v. Jackson*, 3 Munf. (Va.) 458, Coalter, J., said: "All the persons concerned in the same offense cannot at all times be named, or fully described, although some of them may be. If, therefore, a warrant issued naming or sufficiently describing some of the persons accused, but which, as to others, is too uncertain to direct the officer, and which part it would be his duty therefore not to proceed to execute, I think he would nevertheless be bound to execute it on those sufficiently named or described, and that it would be a

justification as to them for such act of arrest." The other judges did not express an opinion upon this point.

In *Mead v. Young*, 2 Dev. & B. (N. Car.) 525, the court said that the question was not free from doubt, though it expressly declined to go into the matter further, as it was unnecessary to the decision of the case.

3. *Dickson v. State*, 62 Ga. 583.

4. *Haskins v. Young*, 2 Dev. & B. (N. Car.) 527; 31 Am. Dec. 426.

5. *State v. Rowe*, 8 Rich. (S. Car.) 17; *Floyd v. State*, 12 Ark. 43; 54 Am. Dec. 250; *Atchinson v. Spencer*, 9 Wend. (N. Y.) 62; *Boyd v. State*, 17 Ga. 194.

But it is generally said that it is advisable, especially if the warrant be for the peace or good behavior, to set forth the special cause upon which it is granted, in order that the party may be provided at once before the justice, with sufficient sureties, but that if it be for treason or felony, or other offense of a like nature, it is not necessary to state it, and that it seems to be rather

states, the offense must be designated, either by name, or so that it can be clearly inferred; but technical accuracy is not required, nor is it necessary to set forth the facts on which the charge made is predicated.¹ A statutory requirement that the warrant

discretionary than necessary to set it forth in any case. 1 Chitty's Crim. Law (5th Am. ed.), p. 41.

It is, however, laid down by Lord Hale that regularly a warrant ought to contain the cause specially, and should not be generally, to answer such matters as shall be objected against him, since in the latter case it would not appear whether it be within the jurisdiction of the justice, or whether the party would be bailable or otherwise. 2 Hale 111; 1 Hale 580.

1. Brown v. State, 63 Ala. 97; Crosby v. Hawthorn, 25 Ala. 221; Heard v. Harris, 68 Ala. 44; Rhodes v. King, 52 Ala. 272; Murphy v. State, 55 Ala. 252; Williams v. State, 88 Ala. 84; Gay v. DeWerff, 17 Ill. App. 417; People v. McLeod, 1 Hill (N. Y.) 378; 37 Am. Dec. 328; State v. Hallback (S. Car. 1894), 18 S. E. Rep. 919.

A warrant need only recite the substance of the offense charged, and to require the complainants, who are often persons of limited education, and who prefer complaints before justices of the peace, who are not lawyers, and not at all acquainted with legal niceties, to do more than to describe the offense with substantial correctness, or to give in the warrant any more information than is needed to inform the defendant of the crime with which he is charged, and that it is a crime, would be to make it practically impossible to hold shrewd criminals at all, in many places, and would be of no use to any one. Haskins v. Ralston, 69 Mich. 63. In this case, a warrant charging the defendant with uttering and publishing as true (on a given date) a false, forged, and counterfeited promissory note for the payment of money (fully describing the note), well knowing at the time that the note was false, forged, and counterfeited, sufficiently described the offense intended to be charged.

In State v. Smith, 13 Kan. 296, it was said that, "to hold that the warrant of a justice should describe the offense as accurately as the information, would, in most cases, defeat justice."

A warrant issued after indictment found, may briefly state the offense, and need not be more precise and accurate

than is sufficient to apprise the prisoner of the charge against him. People v. Mead, 92 N. Y. 415. Here a warrant issued by a district attorney, as authorized by New York Laws of 1847, ch. 338, for the arrest of the relator, stated that he stood indicted "for contempt." On *habeas corpus* issued on the petition of the relator, it was adjudged that this was a sufficient specification of the offense; that as the statement was of a contempt which had already served as a basis of an indictment, it necessarily implied a willful contempt of a character constituting a misdemeanor. See also Brady v. Davis, 9 Ga. 73.

Sufficient Description of Offense.—A warrant charging that the defendant did unlawfully and knowingly obstruct a public highway, "by then and there manufacturing a rail fence across said road," sufficiently describes the offense of obstructing a public highway. Jeffries v. McNamara, 49 Ind. 142.

In Flack v. Ankeny, 1 Ill. 187, it was held that a warrant stating in substance that A B made complaint on oath that C D had violently assaulted and beaten him, and requiring the officer to arrest him and bring him before the justice, contains everything essential to the validity of the warrant.

A warrant against a school-teacher, charging that he "did unmercifully whip" a child, "inflicting bruises on her person," sufficiently sets out a battery. It is not necessary that the *quo animo* be charged. State v. Stafford (N. Car. 1893), 18 S. E. Rep. 256.

A warrant stating that "information upon oath having been this day laid before me that the crime of malicious trespass, upon lands owned or occupied by . . . has been committed, and accusing . . . thereof," is sufficient in form under section 151, New York Code of Criminal Procedure. The circumstances of the offense need not be set out. People v. Upton (Supreme Ct.), 29 N. Y. St. Rep. 777.

In Pratt v. Bogardus, 49 Barb. (N. Y.) 89, the warrant issued by a justice of the peace, after stating the time and place, alleged that the defendant, "designedly and by false pretenses, did obtain from" the complainant "one sulky

recite "the substance of the accusation," is satisfied by making the warrant on the same paper with the complaint, wherein the offense is adequately described, and definitely referring to it.¹

of the value of \$30, the property of —, with intent to cheat and defraud" the complainant. It was held that this was a valid warrant upon a complaint for obtaining property by false pretenses, although the pretenses used were not set out therein. Such a statement would not have constituted a specification of the accusation, but would have been simply a recital of the evidence by which the accusation was to be sustained, and therefore need not be set out at large in the warrant.

In *People v. Kahler*, 93 Mich. 625, the warrant, in describing the offense, alleged that the respondent "did then and there unlawfully sell, furnish, etc., a large quantity of, to wit, spirituous and intoxicating liquors." It was insisted that the material fact to be proved was the sale of spirituous and intoxicating liquors to a minor, and that the warrant was bad because of the use of the *videlicet* preceding the word "spirituous." The court said that this was a pure technicality; that the offense need not be stated as in an indictment, and that it sufficed if the warrant informed the accused of the nature of the accusation, and recited the substance of the offense and described it with such certainty as to show that it was within the jurisdiction of the officer to take bail.

In *State v. Oliver*, 2 Houst. (Del.) 585, where the warrant of the justice, issued for arrest for breach of the peace, was exceedingly defective in form, containing no complaint, no affidavit, and no charge, it was nevertheless held good authority for the arrest.

Where a criminal statute is descriptive of the offense which is declared to be a crime, a complaint filed before a justice of the peace, the charging part of which is in the language of the statute, is sufficient. *State v. Lauver*, 26 Neb. 577.

Insufficient Description of Offense. —

A warrant charging merely that the defendant "did refuse to work the public road after being legally warned by P., supervisor, against the peace and dignity of the state," indicates in terms entirely too general and indefinite the particular offense intended to be charged, and fails to specify, as it should have

done, its constituent elements, and is, therefore, insufficient. *State v. Baker*, 106 N. Car. 758.

A warrant reciting that A B did oppose C D, a constable, in the execution of a civil process, "by concealing and keeping concealed the property of one James Frost," does not properly describe the offense of resisting or obstructing process, nor indeed does it describe any offense known to the law, and is, therefore, a nullity, and the party causing it to be issued, as well as the officer executing it, are liable in trespass to the party arrested. *Crumpton v. Newman*, 12 Ala. 199; 46 Am. Dec. 251.

A warrant of a justice alleging that the defendant "has property in his hands in a fraudulent condition," does not charge an offense known to the law, and the officer who executed it as well as the person who caused it to be issued, is liable in trespass to the party arrested. *Duckworth v. Johnston*, 7 Ala. 578. See also *Lueck v. Heisler*, 87 Wis. 644.

A warrant for a felony, based upon an affidavit, stating that "A B entered the inclosure of C D and carried off her grain," is no justification to the officer who issued it, nor to the officer who executed it, as the affidavit contains no words importing a felony. *Moore v. Watts*, 1 Ill. 42.

Plea in Abatement.—In *Kansas*, it is held that a plea in abatement should not be sustained because of an indefinite description of the offense in the warrant, when it appears that the warrant and testimony taken in the preliminary examination together show that the defendant could and did know the nature and character of the offense with which he was charged. *State v. Tennon*, 39 Kan. 726.

1. *Com. v. Dean*, 9 Gray (Mass.) 283. In this case, Shaw, C. J., in delivering the opinion of the court, said: "The statute requires that the warrant shall recite the substance of the accusation. Although this, upon a strict and literal construction, would require the insertion of the substance of the complaint in the body of the warrant, still it is a rule, almost, if not quite, universal, that where a paper is annexed, and

The preamble of the warrant is a part thereof, and when it sets forth the offense in apt words, the warrant in this respect is in due form.¹ A warrant of a justice ordering the arrest of a person charged with larceny, which recites a distinct charge of larceny against the accused, is not invalidated by the omission of an allegation as to the value of the property stolen.² A warrant charging the defendant with forgery, and uttering forged paper, is not objectionable as charging two offenses, as both are comprehended within the crime of forgery at common law.³ These principles in regard to the description of the offense apply only to cases where the magistrate simply causes the apprehension of offenders, but does not exercise final jurisdiction. In cases determinable before him, the warrant is the indictment, and must set out the facts constituting the offense with such certainty that the accused may be enabled to judge whether they constitute an indictable offense or not, and to determine the species of offense with which he is charged.⁴

Under many of the statutes the warrant must state as nearly as practicable the time and place of the commission of the offense.⁵

(3) *Direction and Authority.*—The direction is a material and essential part of the warrant. Indeed, it enters into and forms a part of the very definition of the term. By the common law, the warrant may be addressed to the sheriff, bailiff, or constable, or to an indifferent person by name, who is not an officer; but the most usual and regular course is to direct it to the constable of the precinct wherein it is to be executed, for constables are, by the common law, the proper and known officers of justices of the peace; and it is most advisable to do so, because no other constable, and, *a fortiori*, no private person, can be compelled

definitely referred to, it is to be treated as recited in, and a part of, the process or instrument in which it is recited." See also *Donahoe v. Shed*, 8 Met. (Mass.) 326; *State v. Davis*, 111 N. Car. 729.

1. *Harshaw v. Crow*, 11 Ired. (N. Car.) 240.

2. *Payne v. Barnes*, 5 Barb. (N. Y.) 465.

Petit Larceny—Omission of Name of Owner of Goods.—In *Ohio*, the failure to insert in an affidavit filed before a justice of the peace, charging the offense of petit larceny, the name of the owner of the property alleged to have been stolen is no ground for reversing sentence. *Montgomery v. State*, 7 Ohio St. 107.

Under *Georgia Code*, §§ 4715, 4716, where the offense charged is simple larceny, no further description of it, either in the affidavit or the warrant,

is requisite than the naming of it in these terms. The property stolen need not be mentioned nor described, nor its value stated, nor the owner named; neither is it requisite to disclose whether the larceny amounts to a felony or only to a misdemeanor. If, however, these particulars are set forth, they will not vitiate the warrant. *Dickson v. State*, 62 Ga. 583.

3. *In re Adutt*, 55 Fed. Rep. 376.

4. *State v. Jones*, 88 N. Car. 671; *State v. Bryson*, 84 N. Car. 780. See also *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 473.

5. See the various statutes. In *Price v. Graham*, 3 Jones (N. Car.) 545, a warrant issued in one of the counties of *North Carolina*, charging a person with having committed murder "somewhere between this place and the State of Texas," was held void for uncertainty.

to serve the warrant, whereas the constable of the proper precinct may be indicted if he fails to obey it.¹

1. *Rex v. Kendall*, 1 Ld. Raym. 66; 1 Chitty's Cr. Law 38; 2 Hawk., ch. 13, § 27; 4 Bl. Com. 29. See also *Meek v. Pierce*, 19 Wis. 300; *Russell v. Hubbard*, 6 Barb. (N. Y.) 654.

In *Connecticut*, a warrant issued by a justice of the peace, on the complaint of an executor or administrator, against the person having in his possession, and refusing to deliver up, effects belonging to the testator's or intestate's estate, may be directed for service to an indifferent person. *Kelsey v. Parmelee*, 15 Conn. 261. Here *Williams, C. J.*, said: "At common law, it cannot be doubted that a justice of the peace had a right to direct his warrant to any particular private person by name, who could always justify the execution thereof in an action of false imprisonment. So it was adjudged by Lord Chief Justice Hale, in *Rex v. Kendall*, 1 Ld. Raym. 66; and it has been ever since recognized as law by all writers and judges, so far as we know, upon this subject, though it is said by some writers that it is better to direct to a known officer, as he is bound to execute."

In *Abbott v. Booth*, 51 Barb. (N. Y.) 546, *Johnson, J.*, for the court, said: "At common law the warrant might be directed to some indifferent person who is not an officer; and I am of opinion this may still be done. But a magistrate should, I think, never resort to such a practice if an officer can be conveniently found to perform the service, inasmuch as a common person cannot be compelled to make service, or be punished in case of refusal."

In *Flack v. Ankeny*, 1 Ill. 187, it was held that at common law, a justice may authorize any person he pleases to be his officer; and under the *Illinois* act of March 22, 1819, a magistrate may appoint a constable in a criminal case, where there is a probability that the criminal will escape.

In *Com. v. Keeper of the Prison*, 1 Ashm. (Pa.) 183, *King, Pres.*, said: "The question discussed and to be decided is, whether a justice of the peace has the legal right to authorize a citizen to execute a criminal warrant of arrest, or whether on all occasions his process must be directed to, and executed by, a constable. Having no statutory provisions on the subject of arrest in crim-

inal cases, we are left at liberty to determine this question by the rules and doctrines of the common law. The authorities from the Year Books, down to the most recent and approved text writers, flow in one uniform course, and all agree that a justice of the peace in a criminal case may authorize any person whom he pleases to be his officer. All, however, consider that it is better to direct his process to the constable of the place where it is to be executed, and this because no other constable, and, *a fortiori*, no private person, can be compelled to execute it. Strong as this position stands on authority, it derives equal sanctity from its practical usefulness and propriety. If it is true that none but a constable can execute a criminal warrant, then is any acting justice of the peace at the mercy of these officers, for by a willful failure to attend his office they can proscribe him from the business of his district and transfer it to magistrates whose pliancy may render them convenient to the officers. But this is a small evil to that the public would suffer, if the criminal arrests could only be made by a number so limited. The accidental or intentional absence of the constable of a township would be the means of giving comparative impunity to crime. The common law, wisely considering that the prevention and punishment of crime are the objects for which all ministers of justice are created, rejects the idea that the public justice is to be delayed, and perhaps evaded, until a selected agent is to be found to carry the edicts of the magistracy into execution."

But in an early *Massachusetts* case, it was held that a warrant addressed to the proper officer, and to an individual by name who was not an officer, was erroneous and conferred no authority upon the individual to make the arrest. At the same time, doubt was expressed whether it might not be lawfully done when no officer was at hand to perform the service, and that fact was expressed in the warrant. *Com. v. Foster*, 1 Mass. 488.

According to Chitty, if an act of Parliament directs that a justice shall grant a warrant and does not state to whom it is to be directed, it must be directed to the constable and not to the

The statutes of most of the states provide that the warrant must be directed to, and executed by, a "peace officer." If the warrant is issued by a justice of the supreme court, or of a superior court, or of certain other designated courts, it may be directed generally to any peace officer in the state; if granted by any other magistrate than those named, it may be directed generally to any peace officer of the county of its issuance. Under these provisions, peace officers are usually a sheriff of a county, or his under sheriff or deputy, or a constable, marshal, police constable, or policeman of a city, town, or village.¹

sheriff, unless power to do so is conferred by the act. 1 Chitty's Crim. Law, p. 38.

1. See *New York* Code Crim. Proc., §§ 153-156; *California* Penal Code, §§ 816-819; *Nevada* Gen. Stat. 3993-3996. See also *infra*, this title, *Backing or Indorsing Warrant*.

The charter of the village of M. provided for the election of a police justice and declared that he should possess the same powers and authority in all criminal proceedings as justices of the peace in the several towns of the state. *New York* Code Crim. Proc., §§ 146, 147, declare that "a police justice is a magistrate having power to issue a warrant for the arrest of a person charged with a crime." Under sections 155, 156, a warrant issued "by any other magistrate" than a justice of the supreme court and the judges of certain other courts, "may be directed generally to any peace officer in the county in which it is issued and may be executed in that county." It was held that a warrant issued by the police justice of the said village for the arrest of a person charged with committing a crime therein, might be executed anywhere within the county beyond the limits of the village. *Orleans County v. Winchester*, 18 N. Y. Supp. 668; 63 Hun (N. Y.) 636.

In *Massachusetts*, warrants and other processes, issued for the apprehension of persons charged with offenses, may be directed to and served by any officer authorized to serve criminal process in any county. *Massachusetts* Pub. Stats., ch. 247.

In *Texas*, as a justice of the peace may not order a warrant of arrest executed beyond the limits of his county, and a warrant issued by him must be addressed to some suitable officer of his county, if the name of the county is omitted, the warrant is illegal. *Toliver*

v. State (Tex. Crim. App. 1893), 24 S. W. 286.

In *Noles v. State*, 24 Ala. 672, it was held that under section 712 of the code of that state, a justice of the peace may appoint a special constable in cases of emergency, and he must himself judge of such emergency.

In *Indiana*, if the warrant is directed to a special constable it must be addressed to him specially by name. *Dietrichs v. Shaw*, 43 Ind. 175; *State v. Wenzel*, 77 Ind. 428. In *Ziegler v. Powell*, 54 Ind. 173, the justice made and signed an entry of record that "a warrant issued" to A, "special constable;" but the warrant itself was directed to the said A as "deputy constable." A, in making return of his doings under the warrant, signed himself as A, "special constable." The erroneous designation in the warrant was held not to vitiate the appointment.

In *Wells v. Jackson*, 3 Munf. (Va.) 458, it was held that where a magistrate designated an officer to execute a warrant, issued to arrest a defendant and bring him before the court to give sureties for the peace, if such officer's name was erased and some other person's name, who was not a sworn officer, was inserted by the prosecutor, an arrest made by the person so substituted was illegal and void, and was not a justification in case he was sued for assault and battery and false imprisonment, but might be given in evidence in mitigation of damages.

By section 4259 of the *Alabama* Code of 1886, the warrant "must be directed 'to any lawful officer of the state,' but if executed by any lawful officer having authority to execute it, it is valid, without regard to its direction." A warrant directed "to any lawful officer of the state," as provided by this section, does not require the addition

A criminal warrant should contain a command or a requirement in the nature thereof, to the person to whom the warrant is directed to make the arrest. A mere authority in the nature of a license or permission to make the arrest would not be a warrant, either under the statutes or at common law.¹

In *England*, the warrant runs either in the name of the king or of the magistrate who issues it, the latter being the more usual form.² In this country, it is made in the name of "The Commonwealth," "The People," or "The State," according to the requirement of the law of the particular state.³

(4) *Seal—Signature—Date.*—It is a disputed question whether at common law a seal is essential to the validity of a warrant of arrest issued by a justice of the peace. But the better opinion in *England*, and, perhaps, in this country, also, is that this formality, in the absence of an express statutory provision, is not necessary, and that the warrant is regular and valid in this respect if simply signed by the magistrate, with his name of office.⁴ In some of

of the words "of *Alabama*." Even if the omission of these rendered the warrant defective, this would not be any ground for quashing the complaint. *Wilson v. State* (Ala. 1893), 13 So. Rep. 427.

1. *Abbott v. Booth*, 51 Barb. (N. Y.) 546.

2. 1 Chitty's Crim. Law 39.

3. See the statutes of the various states.

In *Illinois*, an order of court not running in "the name of the people of the State of *Illinois*," and directing the officer to arrest the party named therein upon default in the payment of a certain amount decreed against him, does not authorize the arrest upon default, as the constitution of the state provides that "all process, writs, and other proceedings shall run in the name of the people of the State of *Illinois*." *Leighton v. Hall*, 31 Ill. 108; 83 Am. Dec. 205. See also *Sidwell v. Schumacher*, 99 Ill. 437.

In *Missouri*, the warrant should run in the name of "the State of *Missouri*." *Hickman v. Griffin*, 6 Mo. 37; 34 Am. Dec. 124; *Miller v. Brown*, 3 Mo. 127; 23 Am. Dec. 693.

4. It is said, in 2 Hawk. P. C., b. 6, that the warrant ought to be under the hand and seal of the justice who issues it. *Citing* 1 Hale 577; 2 Hale 111; *Dalt. C.* 117; 3 Inst. 76; 14 Hen. 8, fol. 16a.

In 4 Bl. Com. 290, the author says the "warrant ought to be under the hand and seal of the justice," but with-

out citing any authority for the proposition.

The only adjudged case referred to in the above works is that reported in the Year Books (14 Hen. 8, fol. 16a), but this case does not decide that a warrant at common law must be sealed. Thus, in *Padfield v. Cabell*, reported in Buller's N. P. Cas. 83, and more fully reported in Willes' Rep. 411, Chief Justice Willes, said: "A warrant does not *ex vi termini* imply an instrument under seal. It signifies no more than an authority. All the books in which it is said that a warrant must be under seal, are founded on a case in the Year Books, where it is said that 'a justice of the peace is a judge of record and hath a seal of office.'" And in note c., p. 212, to the American edition of Willes' Rep., it is said: "This point, respecting the necessity of a warrant being under seal, did not arise in the case of 14 Hen. 8, fol. 16a, where the defendant justified in an action for false imprisonment, under a warrant granted by a justice of the peace after the arrest, without showing in his plea when or where the warrant was granted. The passage here relied upon was merely a *dictum* of Chief Justice Burdenell, who put it by way of illustration in considering in what cases an officer would be justified in executing a warrant, though a justice would not be in granting it."

In *Padfield v. Cabell*, Willes' Rep. 411; Buller's N. P. Cas. 83, the precise question arose whether a warrant must

be under seal when the statute does not in terms require it, and the question was decided in the negative. This case occurred after all the works above mentioned were written, with the exception of Blackstone.

In 1 Chitty's Crim. Law (5th Am.ed.) 38, it is stated: "It is generally laid down that the warrant ought to be under the hand and seal of the justice who makes it, but it seems sufficient if it be in writing and signed by him, unless a seal is expressly required by a particular act of Parliament." And Petersdorf (Abr., vol. 15, tit. "Warrant," 358, note) reiterates the rule as thus laid down. See also Burns, J., "Warrant" IV; Dick, J., "Warrant" III.

In Sharswood's edition of Blackstone's Commentaries, vol. 4, p. 290, note 6, in commenting on the text which says that the warrant ought to be under the hand and seal of the magistrate, the editor observes: "It seems sufficient if it be in writing and signed by him, unless a seal is expressly required by a particular act of Parliament." So Barber's Crim. Law 457, and Pomeroy's Arch. Crim. Pr. & Pl., vol. 1, p. 206, notes, hold that a seal is unnecessary.

In *State v. Vaughn*, Harp. (S. Car.) 313, Huger, J., delivering the opinion of the court, said: "Formerly seals appear to have been regarded with more respect than they are at present. When the art of writing was confined to a few, seals were used to designate persons, but now that writing has become common, a person is identified by the handwriting, and seals are seldom used but to give character to instruments. There appears to be no reason why the official act of a magistrate should be under seal, as it derives its character from the law which prescribes it. Should a statute prescribe a seal, it must be followed; but where no such requisite is prescribed, it is unnecessary."

Millett v. Baker, 42 Barb. (N. Y.) 215, and *Genin v. Tompkins*, 12 Barb. (N. Y.) 286, hold a seal to be unnecessary. The former of these cases reviews and explains *Beekman v. Traver*, 20 Wend. (N. Y.) 68; *People v. Holcomb*, 3 Park. Cr. Rep. (N. Y.) 656; *Smith v. Randall*, 3 Hill (N. Y.) 495.

In *Ex p. Smith*, 5 Cow. (N. Y.) 273, which was a *habeas corpus* to discharge a prisoner from arrest on a warrant issued against him by a justice of the peace for an alleged crime, the warrant was not under seal. Several objections

were made to the arrest, but the question as to a seal was not taken, and the court refused to discharge the prisoner; showing, it would seem, that neither the counsel nor the court supposed a seal to be necessary.

In *Aylesbury v. Harvey*, 3 Lev. 204, the defendant seized a cup under a warrant issued by a justice of the peace, on a conviction under the excise law, to levy twenty shillings; and in answer to an objection taken to the plea that the warrant was not pleaded with a proferat, the court said: "The statute does not require that the warrant be under hand and seal, but only in writing, and no writing is to be so pleaded except it be a deed."

In the very recent case of *Starr, v. U. S.*, 153 U. S. 614, the court, by Mr. Justice Fuller, after reviewing the early authorities, decided that a warrant of arrest without a seal, issued by a United States commissioner having no seal of office, and not being required by any act of Congress or statute of the state to be under seal, is not void for want of a seal.

The following cases hold a seal to be unnecessary. Though these are not cases of warrants of arrest, yet they have a bearing upon the question, and are usually cited to the point now under discussion: *Davis v. Clements*, 2 N. H. 390; *Thompson v. Fellows*, 21 N. H. 430 (both warrants of distress under the highway act); *Coleman v. Anderson*, 10 Mass. 105 (warrant of the selectmen to call a town meeting); *Bradford v. Randall*, 5 Pick. (Mass.) 496, per Morton, J. (warrant for the collection of taxes); *Gano v. Hall*, 42 N. Y. 67 (warrant of commitment).

In *State v. McNally*, 34 Me. 210; 56 Am. Dec. 650, the observation of Chief Justice Willes, above mentioned, was quoted approvingly. The point decided, however, was that a wafer adopted by the justice as his seal, is a sufficient seal.

In the following cases, a seal was held to be necessary: *Tackett v. State*, 3 Yerg. (Tenn.) 392; 24 Am. Dec. 582; *Bell v. Farnsworth*, 11 Humph. (Tenn.) 609; *State v. Caswell*, T. U. P. Charl. (Ga.) 280; *State v. Curtis*, 1 Hayw. (N. Car.) 471; *Welch v. Scott*, 5 Ired. (N. Car.) 72; *State v. Worley*, 11 Ired. (N. Car.) 242; *State v. Drake*, 36 Me. 366; 58 Am. Dec. 757. In this last case, *Shepley, C. J.*, said: "There can be little doubt that the common law required that warrants issued for the

the states, the statutes prescribing the form of the warrant expressly provide that there must be a seal,¹ in others, that there need not be,² while in still others, they are silent upon the point.³

arrest or imprisonment of a person by magistrates, should be under seal. The practice appears to have conformed to it in *England* and in this country. No case has been presented or noticed in which a warrant issued without a seal for such a purpose has been decided to be valid. To require a seal in such cases may not be important, only as matter of form. It gives the instrument a higher grade of character, arrests the attention in the hurry of business, allowing a pause for reflection. The cases deciding that a warrant may be valid without a seal, do not appear to have been those authorizing an arrest or imprisonment of a person. They might have been correctly decided, as they were, without asserting the doctrine that a warrant *ex vi termini* did not imply an instrument under seal. It may be correct that the word in common parlance signifies no more than an authority. It will not follow that by usage in the enactment of laws for the punishment of offenses, and in judicial precepts, it has not acquired a more definite and limited signification. The almost unbroken line of judicial precepts denominated warrants, and having seals affixed in conformity to the requirements of the common law, would authorize the conclusion that it had. While courts have admitted, and legislatures have enacted, that a scroll, scrawl, or scratch might be regarded as a seal, it is not known that any one has determined that a seal of some description was not necessary to give validity to instruments required to be executed or issued under seal. . . . If a warrant issued without a seal, in a criminal prosecution by a magistrate, may be valid, it would seem that one might be when so issued by any court of justice, and yet all such precepts issuing from a court having a seal, must be issued under the sanction of that seal. This appears to have been admitted by the Lord Chief Justice in his opinion, in the case of *Padfield v. Cabell*, Willes' Rep. 411, when the precept issued from any court of record. Whenever it has been held that a warrant issued in a criminal prosecution might be valid without a seal, it is apparent that there has been

a straining of the law to support the proceedings. Such a course is unauthorized and far from being productive of good general results."

Mr. Bishop, commenting on the statement in the foregoing opinion, that "if a warrant issued without a seal in a criminal prosecution by a magistrate may be valid, it would seem that one might be so when issued by a court of justice, and yet all such precepts issuing from a court having a seal must be issued under the sanction of that seal," says: "I cannot but think that justices of the peace and courts of record are properly distinguishable as to the warrant, and that on this mere technical point, where nothing of legal principle is involved, it accords well with our modern ideas to hold the simpler form sufficient." 1 Bishop's Crim. Proc. (3d ed.), § 227, note 4.

The corporate seal of the town of Keokuk, *Iowa*, is not the seal of the mayor as a justice of the peace, and need not be appended to a warrant issued by him in that capacity. *Santo v. State*, 2 *Iowa* 165; 63 Am. Dec. 487.

Under *Massachusetts* Stat. 1874, ch. 293, § 5, a warrant issued by a special justice of the first district court of Bristol, under his own hand and seal, and returnable to that court, is valid, notwithstanding that by section 14 of the statute, power is given to the court to establish a seal and to issue all writs and processes. *Com. v. Walcott*, 126 *Mass.* 238.

In *Whitney v. Haven*, Quincy (Mass.) 334, decided in 1772, it was held to be unnecessary for the justice issuing the warrant to aver himself to be such in the body of the warrant.

In *Davis v. Sanders* (S. Car. 1894), 19 S. E. Rep. 138, a warrant which was not subscribed by the magistrate was held insufficient to justify an arrest, although his name was written in the body of the warrant and in the indorsement thereon.

1. See *Hutch. Code Mississippi*, p. 688, § 3.

2. See *Consol. Stat. of Nebraska*, § 5914; *Arkansas Rev. Stat.*, ch. 52, § 264; *Illinois Crim. Code*, pt. 2, div. 18, §§ 203, 210.

3. See *Massachusetts Pub. Stat.*

The question whether there be a seal or not attached to the warrant, is held to be one exclusively for the judge who tries the cause, to be determined by him upon inspection.¹ The statutes require the warrant to set forth the time and place of issuance.

d. EXECUTION.—(1) *Generally*.—The principles in regard to the execution generally of warrants of arrest, have been set out in another part of this work.² It is proposed here only to treat the question of the execution of the warrant beyond the jurisdiction of the issuing magistrate, by means of the indorsement upon the warrant of the magistrate in whose jurisdiction the accused is supposed to be.

(2) *Backing or Indorsing Warrant*.—Formerly, in *England*, in strictness, the execution of a justice's warrant of arrest was confined to the county of its issuance, and if it became necessary to pursue the accused into other counties, a fresh warrant must have been obtained in each county. But later the custom of backing or indorsing warrants, whereby the justice's jurisdiction was greatly extended, sprung up, and long obtained without the sanction of law; finally the practice was authorized by act of Parliament.³

This matter is, in the several states of the Union, regulated by varying statutes. In some, it is provided that if the defendant is in a county other than the one in which the warrant issued, the warrant may be executed therein upon the proper direction of a magistrate of that county, indorsed upon the warrant, signed by him with his name of office, and dated at the county, city, or town where it is made, to the following effect: "This warrant may be executed in the county of——"(naming the county). But this indorsement may not be made unless upon the oath of a credible witness, in writing, indorsed on, or annexed to, the warrant, proving the handwriting of the magistrate by whom it was issued. Upon this proof, the justice indorsing the warrant is expressly exempted from liability, both civilly and criminally, notwithstanding it may subsequently appear that the warrant was illegally or improperly granted.⁴

(1892), ch. 212, § 15; *Kansas* Gen. Stat. (1889), ch. 82, art. 5, § 37; *Missouri* Rev. Stat. (1889), ch. 48, § 4009; Cook's *New York* Code, Crim. Proc., tit. 3, ch. 2, § 151; *Idaho* Rev. Stat. (1887), ch. 4, § 7519.

1. *State v. Worley*, 11 Ired. (N. Car.) 242. See also *State v. Coyle*, 33 Me. 427; *State v. Isham*, 3 Hawks (N. Car.) 185.

2. See ARREST (IN CIVIL CASES), vol. 1, p. 719; ARREST (IN CRIMINAL CASES), vol. 1, p. 730. Where the authorities are collected.

3. 1 Chitty's Crim. Law 45; 4 Bl. Com. 291; 2 Hale P. C. 115. But a warrant of a judge of the court of king's

bench extended over the whole realm. See the authorities just cited.

4. *New York* Code Crim. Proc., §§ 156, 157. By Penal Code of *California*, §§ 819, 820, the indorsement may be made when the warrant is accompanied with a certificate of the clerk of the county where the warrant was issued, under the seal of the superior court thereof, as to the official character of the magistrate, as well as in the manner stated in the text.

And in *Alabama*, the statute authorizes an indorsement when the magistrate is satisfied from his own knowledge, or from the oral or written statement, or oath, of some credible person,

In others, before the warrant may be executed in another county, there must be attached to it a certificate of the clerk of the county where the warrant was issued, setting forth that the justice signing the warrant is duly commissioned and qualified as such, and that his signature is genuine.¹

In many of the states no such formality is required; the officer to whom the warrant is addressed being expressly authorized to pursue and apprehend the party charged, in any county of the state, and for that purpose may command aid, and exercise the same powers in relation to the process as in his own county.²

And indeed, in nearly all of the states, in case of warrants issued by judges of certain of the higher courts, they may be directed generally to any peace officer in the state, and may be executed by any of those officers to whom they may be delivered, without the formality of an indorsement.³

e. RETURN.—The officer must make return of the warrant, with his doings thereunder.⁴ And regularly the warrant should contain a command to that effect, but the want of a formal command will not excuse him from the obligation of making a proper

proving the handwriting of the issuing magistrate, and that the person in pursuit is an officer authorized to make the arrest in the county in which the warrant issued. *Alabama* Crim. Code (1886), § 4272.

In *Coleman v. State*, 63 Ala. 93, it was held that section 4656 of the old code of *Alabama* (§ 4271 of the code of 1886), enacting that "any lawful officer having a warrant of arrest to execute may pursue the defendant into another county," and on obtaining an indorsement upon the warrant as prescribed, "may summon persons to assist him in making the arrest and exercise the same authority as in his own county," does not mean that the execution must be begun in the latter county when the defendant is there, and followed up in the event of his fleeing into another county. Accordingly, there was no error in the instruction given—that "if the party charged committed the offense in Sumter county, and a few days afterward the warrant was issued whilst the party was in Greene county, and the officer proceeded, in a reasonable time after, . . . to Greene county to make the arrest, this would be a pursuit within the meaning of the law."

In *Alabama*, a justice of the peace has no authority to issue a warrant for the arrest of a person in his county, on an affidavit charging him with the

commission of a criminal offense in another county. *Woodall v. McMillan*, 38 Ala. 622. The same principle has been intimated in a *New York* case. See *People v. Cassels*, 5 Hill (N.Y.) 167.

1. *Sturm v. Potter*, 41 Ind. 181.

2. *Massachusetts* Pub. Stat. 1882, ch. 212, § 20; *Illinois* Crim. Code, div. 7, par. 411, § 6; *New Hampshire* Pub. Stat. 1891, ch. 250, § 9; *Ohio* Rev. Stat., § 7139; *Mississippi* Code 1892, §§ 1380, 1382.

Under the former statute of *Illinois*, the officer had no authority to arrest the accused out of the county in which the warrant issued, unless he had fled therefrom. *Krug v. Ward*, 77 Ill. 603; *Kindred v. Still*, 51 Ill. 401. Now the warrant may be executed anywhere in the state, although the accused has not fled. *Ressler v. Peats*, 86 Ill. 275.

3. See *supra*, this title, *Direction and Authority*.

4. *Com. v. Boon*, 2 Gray (Mass.) 74; *Tubbs v. Tukey*, 3 Cush. (Mass.) 438; 50 Am. Dec. 744; *Slomer v. People*, 25 Ill. 58; 76 Am. Dec. 786. See also *Brock v. Stimson*, 108 Mass. 521; 11 Am. Rep. 390; *Paine v. Farr*, 118 Mass. 74.

In *Fisher v. Hamilton*, 49 Ind. 341, it was held that a warrant issued by a justice of the peace, and returned "served as commanded and the defendant is present," shows the arrest of the party.

return,¹ nor afford ground for discharging the defendant.² Merely formal defects in the wording of the command in the warrant to make return, will not vitiate the proceedings.³

1. In *Tubbs v. Tukey*, 3 Cush. (Mass.) 438; 50 Am. Dec. 744, the court, by Metcalf, J., said: "It is an established rule of law in civil suits, that when an officer justifies under *mesne* process, which is returnable, he must show that he has done all that it was his duty to do, and that he is a trespasser if he do not show that he returned the process. And though the plaintiff's counsel cited no decision, and though we have found none in which this doctrine has been applied to the case of a warrant in a criminal process, yet we are of opinion that the doctrine is applicable to such a case. The principle is essential to the safety of the citizen, and to prevent the processes of the law, and the action of its officers from being employed for purposes of oppression. It was suggested by the counsel for the defendants that, as the warrant on which the plaintiff was arrested contained no command to the officer to make a return thereof, the warrant was not a returnable process, and, therefore, that the rule which prevails in civil process, which is returnable, should not be applied in the present case. And we find, on inspecting the warrant, that it did not direct the officer to make a return. We also find the like omission in the forms of warrants set forth in *Davis' Justice*, and in several of the English books of forms. But Mr. Dane, speaking of the form of a warrant, says that, after the command to take and safely keep the person named therein, the officer is 'charged to make return of his warrant and doings.' 7 *Dane's Abr.* 250. And such, in our opinion, ought to be the command of the warrant. The omission of this command, however, does not excuse the officer for not making a return. It is said in *Burns', Dickinson's and Williams' Justice*, when treating of the subject of arrest, that a constable is not obliged to return the warrant, but only to make return of what he has done on it. The same is found in other English books; and the case of *Reg. v. Wyatt*, 2 *Ld. Raym.* 1106, is uniformly cited in support of the position. In that case, the defendant was indicted for refusing to return a warrant of distress, issued by two justices against one Nash, upon his

conviction before them of the offense of aiding and assisting in the killing of deer in a park. The indictment alleged that the warrant was delivered to the defendant, a constable, commanding him to levy a certain sum of the goods and chattels of Nash for the aforesaid offense, and to make return of the warrant to said justices or one of them; that the defendant levied the money of the goods of Nash, but illicitly, obstinately, and contemptuously refused to make return of the warrant. The defendant was found guilty by the jury, and three arguments were had on the record before the court of king's bench. Holt, C. J., held the indictment to be bad, but the other judges gave judgment against the defendant. At the close of the case, it is said that at the former arguments, 'the Chief Justice and Powell, J., held that the constable was not obliged to return the warrant itself to the justice, but might keep that for his own justification in case he should be questioned for what he had done; but only to give him an account of what he had done upon it.' It is very clear, upon examining that case, that it is no authority for the position that a constable is not obliged to return a warrant issued for the arrest of a person on a criminal charge, and his doings on the warrant. Admitting that Holt, C. J., and Powell, J., were right in their first impressions (which, however, the final judgment seems to negative), yet the process in that case was a warrant of distress in the nature of an execution in a civil suit. It was final process and not returnable *mesne* process. And it is well settled that when an officer is sued as a trespasser, for levying a *fiery facias*, he need not show a return thereof in order to justify the levy."

2. *Com. v. Boon*, 2 *Gray* (Mass.) 74. Here it was said: "And since the warrant was properly executed and duly returned, the deficiency of a formal command to the officer to do that which he actually did, and which he was legally bound to do, whether the command was or was not expressed, affords no reason why the defendant should be absolved from answering to the charge made against her."

3. In *State v. Sherman*, 16 *R. I.* 631,

At common law, the warrant might be general to bring the party before any justice of the peace of the county, or special, to bring him before the justice who granted it. If it were general, the election of the magistrate before whom the defendant should be taken lay entirely with the officer making the arrest.¹

The statutes usually provide that the officer making the arrest shall take the defendant before the issuing magistrate, or in the event of his absence or inability to act, then before the nearest or most accessible magistrate in the same county.²

a complaint was made to A, justice of the district court, etc., and thereupon a warrant was issued signed by A, as justice, etc., commanding the officer to have the defendant "before me or some other lawful authority," etc. The defendant was arrested and arraigned before the district court, and pleaded not guilty and recognized to appear. Subsequently the defendant asked the court to quash the proceeding. It was held that the warrant was formally irregular in being returnable "before me," but that "some other lawful authority" meant the district court; hence, the proceeding should not be quashed.

It is no objection to a warrant that it is made returnable to the "Pike county criminal court of said county," instead of to "the criminal court of Pike county." *Wilson v. State* (Ala. 1893), 13 So. Rep. 427.

1. 1 Chitty's Law 39; 4 Bl. Com. 291; 2 Hawk. P. C. 85. See also Com. v. Intoxicating Liquors, 130 Mass. 29.

2. See *New York* Crim. Proc., §§ 151, 158, 164; *People v. Board of Auditors* (Supreme Ct.), 17 N. Y. St. Rep. 875; *People v. Frink*, 41 Hun (N. Y.) 193; *People v. Navagh*, 4 N. Y. Crim. Rep. 289; *People v. Chapman*, 30 How. Pr. (N. Y. Supreme Ct.) 202; *People v. Clews*, 77 N. Y. 39; *California* Penal Code, §§ 814, 821, 824; *Ex p. Branigan*, 19 Cal. 133; *Ex p. Hung Sin*, 54 Cal. 102.

In *People v. Fuller*, 17 Wend. (N. Y.) 211, it was held that a person, arrested on a warrant on a charge of having violated the act to prevent the disturbance of religious meetings, may not be taken by the arresting officer before any magistrate other than the one who granted the warrant; the provisions of the statute authorizing persons arrested under a warrant to be brought before the nearest magistrate, etc., it seems, apply only to cases where the accused may be required to enter

into recognizance to appear at a court of criminal jurisdiction, or may be committed to jail. But if the accused may be brought before a different magistrate from the one who issued the warrant, the officer making the arrest should state in his return the absence of the latter magistrate.

By the provisions of *Massachusetts* Stats. 1850, ch. 314, the jurisdiction of justices of the peace, in the examination and trial of persons charged with criminal offenses, was taken away and the same was transferred to certain new officers called trial justices, leaving to justices of the peace only the authority to receive complaints and issue warrants for the arrest of alleged criminal offenders, returnable before any of the trial justices of the same county. A warrant issued by a justice of the peace, after this act took effect, directing the officer to bring the defendant "before A, or some other justice of the peace, within and for the county" (A being a trial justice as well as a justice of the peace) authorizes the officer to arrest the defendant and take him before A as a trial justice, but not before any other trial justice. And if the officer arrests the party to take him before A, not finding whom, he, without taking his prisoner before any other justice of the peace, takes him before another trial justice, the officer, but not the magistrate who issued the warrant, will be liable in trespass to the party aggrieved. *Stetson v. Packer*, 7 Cush. (Mass.) 562. See also *Com. v. Henry*, 7 Cush. (Mass.) 512.

Under *Massachusetts* Rev. Stats., ch. 135, the warrant may be issued by one justice of the peace, upon complaint made to him, and may be returned with the body of the defendant before any other justice for the same county, and the offense therein specified tried and determined by the latter. *Com. v. Wilcox*, 1 Cush. (Mass.) 503.

And if the crime be a misdemeanor, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit him to bail for his appearance before the magistrate named in the warrant, and take bail from him accordingly.¹

The warrant of a magistrate is not returnable at any particular time, and it continues in force until it is fully executed and obeyed. It does not state any precise time when the defendant is to be brought before the magistrate for examination. This is never done in any warrant whatever. Nor is it possible to do it without manifest injury to the party; for if a distant, or any period should be limited, he must remain in custody during all the time between the issuing of the warrant and the day limited for its return, whereas he is entitled to be discharged the first day, if he is innocent. All that the officer is required to do in this particular, is to bring the accused before the magistrate, without unnecessary delay; failing in this, he violates the duties of his office.²

f. WAIVER OF IRREGULARITIES IN FORM AND SERVICE OF WARRANT.—When the defendant applies for, and agrees to, a

A warrant issued by a trial justice to an officer, under *Massachusetts Statutes* of 1876, ch. 162, in which he is directed to "make due return of this warrant," does not authorize him to return it to another trial justice. *Com. v. Intoxicating Liquors*, 130 Mass. 29.

Under the *Massachusetts Statutes* of 1869, ch. 416, and of 1870, ch. 201, the district court of Central Berkshire is authorized to issue a warrant returnable before the district court of Northern Berkshire, for the apprehension of a party on a complaint charging him with the commission of a crime within the jurisdiction of the latter court. *Com. v. Walcott*, 110 Mass. 67.

The *Alabama* act of February 25, 1889, establishing a criminal court for Pike county, expressly provides for the issuing, by a justice of the peace, of a criminal warrant returnable to that court. *Walker v. State*, 89 Ala. 74.

1. See *New York Code Crim. Proc.*, § 159; *California Penal Code*, §§ 822, 824.

2. *Davis' Justice* 27; *Archbold's Cr. Pr. & Pl.* (8th ed.), p. 110, notes; *Dickenson v. Brown*, 1 Peake's Rep. 307. See also the various statutes prescribing the form of the warrant.

In *Pratt v. Hill*, 16 Barb. (N. Y.) 303, where the magistrate issued a warrant, for the arrest of a person on a criminal charge, late on Saturday night, directing that he should be committed

until the following Monday for examination, and the constable arrested the accused on the same evening and committed him to jail without first bringing him before the justice, it was held that the justice had exceeded his authority, and that he and the constable, and the latter's assistants, were liable in trespass.

Hour of Starting with Prisoner—State of Weather—Officer's Discretion in These Matters.—In *Butler v. Washburn*, 25 N. H. 260, *Eastman, J.*, for the court, said: "An officer must be the judge of the time at which he will start for the jail, and the state of weather in which he will go. He has a right to start at any hour he may choose, or his business require, and in such weather as he may find at the time; provided he does not needlessly expose the prisoner's health or do him a personal injury. It will not answer to restrict an officer in these particulars, and no specific rules can be laid down without seriously interfering with the rights and duties of an officer. To fix and limit the hours in which he may travel, or to say that he is to be governed by any particular temperature in the weather, would be alike impracticable. He must exercise his judgment in these matters, and it is a sufficient protection to the prisoner, to hold the officer liable for any needless exposure or unnecessary personal injury."

continuance of the cause, over the subject-matter of which the magistrate has jurisdiction, and enters into a recognizance for his appearance at a subsequent time, he thereby waives all defects in the warrant, or the service thereof, as he is then held by force of the recognizance and not by virtue of the warrant.¹

It is not competent for the defendant, on the trial of an appeal, to object to an irregularity in the form of the warrant, it not appearing from the records or papers that he took the objection before the magistrate.²

And it seems that, although the objection was taken before the magistrate, yet it is waived by not renewing it at the first opportunity in the appellate court.³

It has been held that the omission to sign the return on a warrant will not affect the jurisdiction of a justice, where it appears that the accused was arrested and brought before him by an officer by virtue of a lawful warrant, and made no motion to dismiss on account of the defective return until the adjourned day, nearly a week after his arraignment.⁴

2. Bench Warrant.—A bench warrant is a process issued by the court itself, or "from the bench," for the attachment or arrest of a person, either in case of contempt or after indictment found, or to bring in a witness who does not obey the subpoena. It is so

1. *Ard v. State*, 114 Ind. 542; *State v. Sherman*, 16 R. I. 631; *Junction City v. Keeffe*, 40 Kan. 275. See also *State v. Blackman*, 32 Kan. 615; *State v. Bjorkland*, 34 Kan. 377.

Where a criminal warrant is issued upon an information charging the defendant for selling intoxicating liquors contrary to law, and the defendant, without objecting to the sufficiency of the warrant of information, or verification of the latter, enters into a recognizance for his appearance at the next term of the court and is thereby discharged from arrest, he waives any supposed defects or irregularities in the issuing of the warrant, without a sufficient verification of the information, and may not subsequently, for that reason, and upon motion, have the warrant quashed or set aside. *State v. Longton*, 35 Kan. 375.

And the same is true when the defendant, without first objecting to the sufficiency of the warrant, or of the verification of the information, files a sworn petition for a removal of the cause to the federal court, seeking to justify the sales as made by him in the original package as resident agent for non-resident owners. *State v. Tuchman*, 47 Kan. 726.

It is too late to raise an objection to

an affidavit or warrant of arrest for a criminal charge, after the examination of the prisoner has been had, and it appears that there is probable cause to suppose that he is guilty of felony, and an order of commitment has been made by the committing magistrate. It was so held upon an application to discharge a prisoner upon *habeas corpus*. *People v. Smith*, 1 Cal. 9. See also *People v. Staples*, 91 Cal. 23.

2. *Com. v. Henry*, 7 Cush. (Mass.) 512; *Com. v. Loughlin*, 15 Gray (Mass.) 569; *Com. v. Hart*, 123 Mass. 416; *Com. v. Wait*, 131 Mass. 417; *Com. v. Murphy*, 155 Mass. 284; *Com. v. Lynn*, 154 Mass. 405; *State v. Dibble*, 59 Conn. 168.

3. *Com. v. Dean*, 9 Gray (Mass.) 283.

4. *People v. Kenyon*, 93 Mich. 19.

In *Kansas*, it is not error on the part of the trial court to overrule a plea in abatement, based upon the fact that the warrant of arrest commanded the officer serving it to bring the defendant before the magistrate issuing the warrant, instead of before "some magistrate of the county," the defendant having gone before the issuing magistrate without objection, and there submitted to an examination of which he did not complain. *State v. Aldrich*, 50 Kan. 666. See also *People v. Dowd*, 44 Mich. 488.

called to distinguish it from warrants granted by justices of the peace, police magistrates, and other inferior officers.¹

The principles in regard to the subject of bench warrants have been treated somewhat in this article, as well as in former articles of this work.²

3. **Search Warrant.**—See CONSTITUTIONAL LAW, vol. 3, p. 670; SEARCHES AND SEIZURES, vol. 21, p. 955.

4. **Warrant of Commitment.**—See MITTIMUS, vol. 15, p. 692.

5. **Death Warrant.**—See SENTENCE, vol. 21, p. 1084.

6. **Warrant of Extradition.**—See EXTRADITION, vol. 7, p. 598.

7. **Press Warrant.**—In *England*, a commission from the Crown authorizing the impressment of seafaring men into the royal navy.³

There, the power to impress seamen has been a matter of dispute, and submitted to with great reluctance; but it is claimed by some authorities to be part of the common law.⁴

As this power forms no part of the common law as adopted by the American colonies, and being contrary to the spirit and genius of republican institutions, such warrants are unknown here.⁵

8. **Warrant in Bankruptcy.**—See BANKRUPTCY, vol. 2, p. 67.

9. **Tax Warrant.**—See TAXATION, vol. 25, p. 294.

10. **Municipal Warrants.**—See COUNTIES, vol. 4, p. 362; MUNICIPAL SECURITIES, vol. 15, p. 1206.

11. **Dividend or Interest Warrant.**—This is a check drawn by a joint stock company upon its bankers, directing them to pay a specified sum of money to a shareholder or his order.⁶

12. **Land Warrant.**—See PUBLIC LANDS, vol. 19, p. 305; SHIFTED LAND WARRANT, vol. 22, p. 709.

13. **Landlord's Warrant.**—This is a warrant from a landlord to a constable or other person, to levy upon the goods and chattels of his tenant, and make public sale of the same, in order to constrain the tenant to pay rent, or to observe some other condition in the contract for occupancy.⁷

14. **Warrant of Attorney.**—See WARRANT OF ATTORNEY.

15. **Warrant to Sue and Defend.**—In old English practice, a

1. Black's L. Dict.

2. See *supra*, this title, *Warrant of Arrest*; BENCH, vol. 2, p. 169; CRIMINAL PROCEDURE, vol. 4, p. 760; JUDGE, vol. 12, p. 2; SUBPÆNA, vol. 24, p. 158.

3. 1 Bl. Com. 418; 1 Russell on Crimes (9th ed.) 822.

4. Broadfoot's Case, 18 How. St. Tr. 1323; 1 Bl. Com. 418.

5. In Cooley's Const. Lim. (6th ed.), p. 363, the author observes: "The common law of *England* permits the impressment of seafaring men to man the royal navy; but this species of servitude was never recognized in the

law of *America*. A citizen may doubtless be compelled to serve his country in her wars, but the common law, as adopted by us, has never allowed arbitrary distinctions for this purpose between persons of different avocations."

In "Life and Times of Warren," p. 15, it is stated that there were cases of impressment in *America* before the Revolution, but that they were always stoutly resisted by the colonists.

6. Anderson's L. Dict.

7. Anderson's L. Dict. See DISTRESS, vol. 5, p. 706; LANDLORD AND TENANT, vol. 12, p. 658; LEASE, vol. 12, p. 974.

special warrant from the Crown authorizing a party to appoint an attorney to sue or defend for him.¹

A special authority, given by a party to his attorney, to commence a suit, or to appear and defend a suit in his behalf. These warrants are now disused, though formal entries of them upon the record were long retained in practice.²

16. Dock Warrant.—In *England*, a certificate given to the owner of goods warehoused in the docks; a warehouse receipt.³

WARRANTY.—(See also IMPLIED WARRANTY, vol. 10, p. 85; INSURANCE, vol. 11, p. 290 *et seq.*; LIFE INSURANCE, vol. 13, p. 632; MARINE INSURANCE, vol. 15, p. 362; REAL COVENANTS, vol. 19, p. 973.)

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I. GENERAL SCOPE OF THE SUBJECT.—The term warranty is used in several distinct connections; in insurance law, to indicate an undertaking on the part of the insured that certain alleged facts are as he represents them to be; in the law of real property, to indicate a covenant on the part of the grantor in the conveyance; in the law of sales of personal property, to indicate a collateral undertaking on the part of the seller as to the quality of, or title to, the subject of the sale; warranties of this last character may be either express or implied. This article is confined to a consideration of the law relating to express warranties in sales of personal property; the law of implied warranties constitutes the subject of a separate article.¹

1. See 2 Bouvier's L. Dict.; Sweet's L. Dict.; and the works of other legal lexicographers, under the title "Warranty." See Behn v. Burness, 3 B. & S. 751; 113 E. C. L. 746.

Throughout this article, the word "warranty" is used as indicating an express warranty made in a sale of personalty, unless it is otherwise specifically stated.

II. DEFINITION.—A warranty in a sale of personal property is a statement or representation made by the seller, contemporaneously with, and as a part of, the contract of sale, though collateral to the express object of it, having reference to the character or the quality of, or the title to, the goods or article sold, and by which he promises or undertakes that certain facts are, or shall be, as he represents them. The warranty is express when created by the apt and explicit statements of the seller; it is implied when the law derives it by implication or inference from the nature of the transaction, or the relative situation or circumstances of the parties.¹

It is not always essential that the representations constituting the warranty shall have been made at the time of the sale; they may be made before or after such time, but they are incorporated into, and become a part of, the contract of sale whenever made, and take effect from its date.²

1. Black's L. Dict. In *Chanter v. Hopkins*, 4 M. & W. 404, Lord Abinger defined a warranty thus: "It is an express or implied statement of something which the party undertakes shall be a part of the contract, and though part of the contract, yet collateral to the express object of it." And this is declared in the case of *Stuckey v. Bailey*, 3 F. & F. 1, to be the "best definition" yet given.

Other Definitions.—In Sweet's L. Dict., a warranty in a sale of personal property is defined to be "a collateral contract by a vendor on a sale of goods, that the goods have a certain quality or property. Warranty of title is an engagement by the vendor that he has a good title to the goods which he proposes to sell. Warranty of quality is an engagement by the vendor that the goods are of a good quality, and fit for the purpose for which they are wanted, or that they are of a particular description."

California Civil Code, § 1763, defines a warranty to be "an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future." See *Harley v. Golden State, etc., Iron Works*, 66 Cal. 238.

"It is a collateral undertaking forming part of the contract by the agreement of the parties, express or implied." Benjamin on Sales (4th Am. ed.), § 610; Bouvier's L. Dict; Rapalje & Law. L. Dict. See also *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753; approving definition given in 2 Schouler on Pers. Prop. (2d ed.), § 321.

"Warranty, which is a synonym of guaranty, is an agreement, express or implied, to be responsible for all damages, if a statement or assurance of a fact eventually proves to be false. When the assurance is that a certain debt will be paid, it is called a guaranty; when it relates to the title or quality of property sold, it is called a warranty. Although the warranty, express or implied, is a common accompaniment of the contract of sale, it is only collateral to it, and is in no sense a necessary part of it." Tiedeman on Sales, §§ 180, 186.

In *Dorr v. Fisher*, 1 Cush. (Mass.) 273, Shaw, C. J., delivering the opinion of the court, said: "A warranty is a separate, independent collateral stipulation, on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase-money in the vendor."

2. Representations made previous to the contract of sale must be shown to have been intended to be a part of the contract as made; and in order to incorporate into the contract representations made subsequently to the sale, a new consideration must be proven. See *infra*, this title, *Consideration for Warranty*; also *Subsequent Representations*. And see *Stryker v. Crane*, 33 Neb. 690, where the jury was properly instructed that a warranty "is a contract," and that, "in order to find that

The terms warranty and representation are not synonymous ; a warranty is always a representation, but the reverse is not necessarily true, the first being a more comprehensive term.¹

1. Is a Collateral Undertaking.—A warranty is not one of the essential elements of a sale, though it is a usual accompaniment ; a sale may be complete although there are no warranties, and the warranty, when it exists, is therefore a mere collateral undertaking, though it forms a part of the contract.² A representation or affirmation is not a warranty when it relates to one of the essential elements of the contract, as, for example, to the existence of the thing sold, or its identity.³ And there is some authority for the view that since a transfer of the absolute or general property in the thing sold is an essential element of every sale, an undertaking by the vendor that he has power to make such a transfer is an essential part of the contract, and is not properly a warranty.⁴

2. Is Not a Condition.—The warranty, being a collateral undertaking, is to be distinguished from a condition ; a breach of a

the seller warranted the thing sold, the agreement to warrant must enter into, and form part of, the contract of sale."

1. Thus, in an action for the price of a cow, where the defense was the breach of a warranty that the cow was a breeder, an instruction, that the jury must find for the defendant if the cow was "represented and warranted" to be a breeder, is not error, on the ground that it requires both a representation and a warranty. *Palmer v. Mt. Sterling Nat. Bank* (Ky. 1892), 18 S. W. Rep. 234.

2. See *supra*, this title, *Definition*, and authorities cited; *Reynolds v. Palmer*, 21 Fed. Rep. 439, note; *Behn v. Burness*, 3 B. & S. 751; 9 Jur. N. S. 620; *SALES*, vol. 21, p. 361.

In a suit for the price of labor or goods, the warranty of their quality is not a matter altogether collateral, but the warranty forms an essential portion of the consideration for the defendant's undertaking, and its failure is proper to be shown in reduction of the stipulated price. *Allen v. Hooker*, 25 Vt. 137.

3. Affirmations as to Essential Elements, Not a Warranty.—See *Reynolds v. Palmer*, 21 Fed. Rep. 439, note. In *Chanter v. Hopkins*, 4 M. & W. 404, it was said, by Lord Abinger: "If a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty. There is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him anything else

in their stead, it is a non-performance of it. So if a man were to order copper for sheathing ships, that is, a particular copper, prepared in a particular manner; if the seller sells him a different sort, in that case he does not comply with the contract and though this may have been considered a warranty, and may have been ranged under the class of cases relating to warranties, yet it is not properly so." See also *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305.

There are also cases which speak of an implied warranty of the existence of the thing sold, but, as seen from the reasoning of Lord Abinger, just quoted, such intimations are necessarily erroneous. See *Terry v. Bissell*, 26 Conn. 23; *Chapin v. Dobson*, 78 N. Y. 82; 34 Am. Rep. 512.

4. As to Warranty of Title.—Mr. Benjamin seems to favor this view. In his work on sales (4th Am. ed., § 612) it is said: "In regard to warranty of title, inasmuch as it is an essential element of the contract of sale, that there should be a transfer of the absolute or general property in the thing sold from the seller to the buyer, it would seem naturally to follow that, by the very act of selling the chattel, the vendor undertakes to transfer the property in the thing, and thus warrants his title or ability to sell, and it is believed that such is the true rule of law." See also *IMPLIED WARRANTY*, vol. 10, p. 117; *Lincoln v. New Orleans Express Co.*, 45 La. Ann. 729.

condition avoids the whole contract, or prevents its becoming executed, while a breach of warranty properly affords ground only for an action for damages.¹ There are some cases in which a warranty has been regarded as a condition subsequent, a breach of which would authorize the vendee to treat the contract as at an end.² In other cases it has been regarded as a condition precedent to the existence of any obligations on the part of the vendee.³

In *England*, the doctrine prevails that in a sale by description, it is a condition precedent that the article delivered shall answer the description. This view is maintained by a leading text writer, but is opposed by the weight of authority in the *United States*.⁴

3. Distinguished from Fraud.—A warranty being a contract, a breach of it is to be distinguished from fraud; an action for a mere breach of warranty is, therefore, *ex contractu*, while if it is founded

1. See *CONDITION*, vol. 3, p. 422; *CONDITIONAL SALES*, vol. 3, p. 427. Compare *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305.

In *Dorr v. Fisher*, 1 Cush. (Mass.) 274, the court, by Shaw, C. J., after defining a warranty as being a collateral undertaking, said: "It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase-money in the vendor. And notwithstanding such warranty, or a breach of it, the vendee may hold the goods, and have a remedy in an action for damages."

Is Not a Contract of Indemnity.—A warranty is a promise of soundness of quality, and not of indemnity against loss on a resale; and the vendor is liable immediately on a breach thereof, although the vendee may never have suffered actual loss. *Muller v. Eno*, 14 N. Y. 597.

2. Treated as a Condition Subsequent.—In *Dorr v. Fisher*, 1 Cush. (Mass.) 274, already cited, the court, by Shaw, C. J., further said: "But, to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract, and recover back the amount of his purchase-money as in case of fraud." See also *Boardman v. Spooner*, 13 Allen (Mass.) 361; 90 Am. Dec. 196; *Bryant v. Isburgh*, 13 Gray (Mass.) 607; 74 Am. Dec. 655. Compare *infra*, this title, *Rescission*.

In another case, it appeared that the defendant bought of the plaintiffs, at a certain price, "413 bales of wool, to

arrive *ex Stige*, or any vessel they may be transhipped in (and subject to the wool not being sold in *New York*). The wool to be guaranteed about similar to samples in the brokers' possession, and if any dispute arises, it shall be decided by the selling brokers, whose decision shall be final." The wool turned out not about similar to the sample, and the brokers, after protest from the defendant, awarded that the defendant should take it at a certain abatement. It was held, that, as the contract was for the sale of specific goods, the guaranty was not a condition, but only a warranty, that the brokers had the power to award as they had, and the defendant was bound to take the wool accordingly. *Héyworth v. Hutchinson*, L. R., 2 Q. B. 447.

3. Treated as a Condition Precedent.—Thus, in *Safety Fund Nat. Bank v. Westlake*, 21 Mo. App. 565, where a machine sold was warranted to do certain work, the warranty was considered to be a condition precedent to the attaching of any liabilities to the purchaser, even though he had already given his note for the price. See also *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305; *Case Threshing Mach. Co. v. Smith*, 16 Oregon 382.

A stipulation in a contract of sale that the article shall pass inspection, is nothing more than a warranty of the soundness of the article, and does not change the sale into an executory contract. *Gibson v. Stevens*, 8 How. (U. S.) 384.

4. Sales by Description.—*Benjamin on Sales* (4th Am. ed.), § 600; *Hogins v. Plympton*, 11 Pick. (Mass.) 99. See *infra*, this title, *Sales by Description*.

on fraud it may be either *ex contractu* or *ex delicto*.¹ In an action for fraud, a willful intent to deceive must be proven,² while in an action for a breach of warranty no such proof is necessary, since the action is based on the contract.³ These questions, however, relate more immediately to the form and character of the vendee's remedy, and are discussed under that head.⁴

III. EXPRESS AND IMPLIED WARRANTIES.⁵—A warranty is express

1. Distinguished from Fraud.—See Tiedeman on Sales, § 180; Wallace v. Wren, 32 Ill. 146. The meaning is that if there is a willful misrepresentation the vendee may have an action in tort for the fraud, or he may waive the fraud, and proceed as for a breach of warranty, if the representations will amount to a warranty. See Shippen v. Bowen, 122 U. S. 575; Hillman v. Wilcox, 30 Me. 170; Vail v. Strong, 10 Vt. 457; Hughes v. Funston, 23 Iowa 259; Burge v. Stroberg, 42 Ga. 89; Bedford v. Megibben (Ky. 1890), 13 S. W. Rep. 1082; 1 Chitty's Plead. (16th Am. ed.), 114; Williamson v. Allison, 2 East 446.

The purchaser of a patent right may rely upon the representations of the seller as to what is covered by the patent, and if there is no patent for a part of that which the vendor exhibits to the vendee as an invention, there is fraud. Rose v. Hurley, 39 Ind. 78. And, as a rule, if a party selling anything of value willfully misrepresents its true character, and thereby defrauds the purchaser, he is responsible for damages caused by the fraud. Sherman v. Johnson, 56 Barb. (N. Y.) 60.

If there is a warranty, any fraud at the time of the sale will avoid the sale, though it may not amount to a breach of warranty. Stewart v. Coesvelt, 1 C. & P. 23; 11 E. C. L. 305. Likewise, the vendee may recover on a fraudulent representation, though such representation was not sufficient to constitute a warranty. Pinney v. Andrus, 41 Vt. 631; Oregon Imp. Co. v. Roach (Super. Ct.), 6 N. Y. Supp. 502.

The distinction is set out in Rose v. Hurley, 39 Ind. 81, in the opinion of the court, by Downey, J.: "The same transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests upon contract, while fraud or fraudulent representations have no element of contract in them, but are essentially a tort. When judges or law writers speak of a fraudulent warranty, the language is neither accurate nor perspicuous. If there is a breach of warranty, it cannot be said

that the warranty was fraudulent, with any more propriety than any other contract can be said to have been fraudulent, because there has been a breach of it. On the other hand, to speak of a false representation as a contract or warranty, or as tending to prove either, is a perversion of language and of correct ideas."

Representations in the sale of personality, which are sufficient to constitute a warranty, are not deprived of their effect, as such, by the fact that they are falsely and fraudulently made. Carter v. Abbott, 33 Iowa 180; Burge v. Stroberg, 42 Ga. 89.

2. See FRAUD, vol. 8, p. 654.

In an action for a breach of warranty in the sale of a horse, it would be improper to instruct the jury what would constitute fraud in such sale. In such an action, the jury has nothing to do with the question of fraud. Wallace v. Wren, 32 Ill. 146.

3. Fraud Need Not Be Alleged or Proven.—And the fraud need not be proven though it is alleged. Shippen v. Bowen, 122 U. S. 575; Schuchardt v. Allens, 1 Wall. (U. S.) 359; Trice v. Cockran, 8 Gratt. (Va.) 442; 56 Am. Dec. 151; Burge v. Stroberg, 42 Ga. 89; Tyre v. Causey, 4 Harr. (Del.) 425; Hyatt v. Boyle, 5 Gill & J. (Md.) 110; 25 Am. Dec. 276; Osgood v. Lewis, 2 Har. & G. (Md.) 495; Adler v. Robert Portner Brewing Co., 65 Md. 27; 18 Am. Dec. 317; Wren v. Wardlaw, Minor (Ala.) 363; Ross v. Mather, 47 Barb. (N. Y.) 582.

4. See *infra*, this title, *Remedies for a Breach of Warranty*.

5. Implied Warranty as to Sufficiency of Buildings for Particular Purposes.—While foreign to the scope of this article, it does not seem improper to advert to the rule as to implied warranties as to the safety of public buildings. The rule is laid down clearly, in Francis v. Cockrell, L. R., 5 Q. B. 501; 39 L. J. Q. B. 291, that a man who erects, or causes to be erected, a building for holding public exhibitions, and admits persons upon the payment

when created by the apt and explicit statements of the seller; it is implied when the law derives it by implication or inference from the nature of the transaction, or the relative situation or circumstances of the parties.¹ An express warranty will exclude any implied warranty, even when it relates to one quality, and the other is sought to be implied with respect to an entirely different quality;² though an express warranty as to quality

of money, to a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose, and it is immaterial whether the money is to be appropriated to his own use or not. See also *Searle v. Laverick*, L. R., 9 Q. B. 43; 22 W. R. 367; 43 L. J. Q. B. 43.

The same principle is held as to the undertaking of railway carriers as to the sufficiency of their vehicles. They warrant their carriages to be well built, but they do not insure their safety from latent defects. *Redhead v. Midland R. Co.*, 9 B. & S. 519; L. R., 4 Q. B. 379; 20 L. T. N. S. 628. See also, in this connection, *Thorne v. London, L. R.*, 1 App. Cas. 120; 24 W. R. 932, *affirming* L. R., 10 Exch. 112; L. R., 9 Exch. 163; 22 W. R. 656; IMPLIED WARRANTY, vol. 10, pp. 143-151.

1. Black's L. Dict.; *Tiedeman on Sales*, § 182; *Borrekins v. Bevan*, 3 Rawle (Pa.) 23; 23 Am. Dec. 85. See also IMPLIED WARRANTY, vol. 10, p. 85 *et seq.*

2. **Express Warranty as Excluding Implied Warranty.**—*Mullain v. Thomas*, 43 Conn. 252; *Jackson v. Langston*, 61 Ga. 392; *Johnson v. Latimer*, 71 Ga. 470; *Ramming v. Caldwell*, 43 Ill. App. 175; *Shepherd v. Gilroy*, 46 Iowa 193; *McGraw v. Fletcher*, 35 Mich. 104; *Cosgrove v. Bennett*, 32 Minn. 371; *Dyer v. Britton*, 53 Miss. 270. In *International Pav. Co. v. Smith*, 17 Mo. App. 264, an express warranty of quality excluded the implication that the article was warranted to be fit for the intended purposes. *Deming v. Foster*, 42 N. H. 165; *Lanier v. Auld*, 1 Murph. (N. Car.) 138; 3 Am. Dec. 680; *Baldwin v. Van Deusen*, 37 N. Y. 488; *DeWitt v. Berry*, 134 U. S. 306.

Co-existence of Express and Implied Warranty.—An express and implied warranty may exist under the same contract, if the express warranty does not relate to obligations covered by the implied. *Bucy v. Pitts Agricultural Works* (Iowa, 1893), 56 N. W. Rep. 541.

An express warranty will not be extended by implication. *Dickson v. Zizinia*, 10 C. B. 602; 70 E. C. L. 600. In this case it was said, by Maule, J.: "Nor will a court, by inference, insert in a contract implied provisions with respect to a subject which the contract has expressly provided for. If a man sell a horse, and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, this would be no breach of the warranty; the maxim '*expressum facit cessare tacitum*' applies to such cases." *Broom's Leg. Maxims* (8th ed.), p. 657. See also *Howell v. Cowles*, 6 Gratt. (Va.) 393. But when, in a suit to recover for a breach of warranty in the sale of goods, a portion of the counts in the declaration are upon an express warranty, and the others upon an implied warranty, instructions for the defendant which wholly ignore all reference to an implied warranty are rightfully refused. *Thorne v. McVeagh*, 75 Ill. 81.

Compare, as to the rule of the text, *Merriam v. Field*, 24 Wis. 640; *Boothby v. Seales*, 27 Wis. 626; *Bucy v. Pitts Agricultural Works* (Iowa, 1893), 56 N. W. Rep. 541. A bill of sale affirming the chattels sold to be sound, and expressly warranting the title, will not be considered as expressly warranting the soundness. *Smith v. Miller*, 2 Bibb (Ky.) 616.

When a contract is for merchantable goods, and the sale is by seller's sample, which represents to the buyer a merchantable article, and discloses no defect, and the goods are accepted as according with the same, there is still an implied warranty of their being merchantable in respect to all such matters as cannot be judged by the sample, the same as there would be if the bulk had been inspected, and defects could not thereby be ascertained. *Mody v. Gregson*, 38 L. J. Exch. 12; L. R., 4 Exch. 49; 17 W. R. 126; 19 L. T. N. S. 458.

does not preclude an implied warranty as to title, and *vice versa*.¹

Where a general warranty is relied on, it is not necessary, in pleading, to state whether it is an express or an implied one.²

IV. WARRANTY OF TITLE.—The general doctrine now is that in every sale of personal property, particularly where the seller has all the evidences of title in himself, there is an implied warranty of title.³ As a consequence, instances of express warranty of title are not frequent; an express warranty of title excludes any implied warranty on the same subject, and therefore cannot add to the security afforded to the vendee, but may afford less than he would have had by virtue of the warranty which the law implies. The same rules of construction apply in this connection, as in the case of other warranties.⁴

V. CONSIDERATION FOR WARRANTY.—A warranty, like other contracts, is not valid unless supported by a consideration. Where it is made at the time of the sale, it is a part of the whole contract, and the price paid for the subject of the sale constitutes the consideration for it.⁵ It is not essential, however, in such a case, that the representation or warranty should be made at the exact time of the sale; if it is made at any time before the completion

1. Implied Warranty of Title Not Excluded by Express Warranty of Quality.—In *Wells v. Spears*, 1 McCord (S. Car.) 421, an express warranty of title does not exclude an implied warranty of quality. So in *Hughes v. Banks*, 1 McCord (S. Car.) 537. See *Wood v. Ashe*, 3 Strobb. (S. Car.) 64; *Houston v. Gilbert*, 3 Brev. (S. Car.) 63; 5 Am. Dec. 542; *Merriam v. Field*, 24 Wis. 640. Compare *Wren v. Wardlaw*, Minor (Ala.) 363; *Barnes v. Blair*, 16 Ala. 71.

But an express declaration by the vendor that he warrants nothing but the title, will preclude any implied warranty of quality. *Boinest v. Leig-nez*, 2 Rich. (S. Car.) 464.

And although a person may maintain an action on an implied warranty of soundness, where there is an express warranty of title only, yet he must produce the deed as evidence of the sale, and be able to show that there is no express covenant contrary to the implied warranty on which his action is brought. *Allen v. Potter*, 2 McCord (S. Car.) 323.

2. *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163.

3. See IMPLIED WARRANTY, vol. 10, pp. 117, 124; *Benjamin on Sales* (4th Am. ed.), § 627 *et seq.*; *Tiedeman on Sales*, § 185.

4. See *Burgess v. Wilkinson*, 13 R. I. 646, where affirmation of ownership was considered as a warranty. So, also, in *Medina v. Stoughton*, 1 Salk. 210. See *Adamson v. Jarvis*, 4 Bing. 66; 13 E. C. L. 343; *Sims v. Marryat*, 17 Q. B. 281; 79 E. C. L. 280, a case of warranty of title to copyright; *Long v. Anderson*, 62 Ind. 537; *Cheatham v. Wilber*, 1 Dakota 335; *Jamison v. Harbert* (Iowa, 1893), 54 N. W. Rep. 75, a case of warranty by one partner of a partnership's title to certain shares of stock.

A warranty, in a sale by the defendant, to save the plaintiff harmless from any claims and demands "that may arise or be brought against said boat," only includes such as the plaintiff was liable for at the time of the sale. *Moran v. Prather*, 23 Wall. (U. S.) 492. See also *McHugh v. Brown*, 33 Mich. 2.

5. *Tiedeman on Sales*, § 181; *Wightman v. Carlisle*, 14 Vt. 296, a case of warranty on an exchange. In an action for a breach of warranty, an allegation in the complaint that the plaintiff exchanged certain property with the defendant for a horse, "which the defendant expressly warranted," etc., shows sufficiently that the warranty was made at the time, and in consideration of the exchange. *Curtis v. Moore*, 15 Wis. 134.

of the contract, and so as to form a part of the whole transaction, the price of the thing sold will afford a consideration.¹ But a warranty made after the sale is invalid, unless it has some new consideration to support it; the consideration already given, *i. e.*, the price, is exhausted by the transfer of the property in the thing sold, and there is nothing to support the subsequent warranty, unless a new consideration is given.² Where a written guaranty of quality is given a day or two after the sale, in pursuance of an oral promise made at the time of the sale, the consideration of the contract of sale will extend to this written guaranty, and support it.³

But there is nothing in the rules of law just stated, which prevents parties, who have discovered that their contract has not been correctly expressed in the written instrument, from correcting the writing by mutual consent, so as to make it conform to the actual agreement, thus doing that which might be compelled in equity by a bill to reform the contract.⁴

1. Thus, in *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584, it was held that although a warranty should generally be made at the time of the sale, yet, if, when the parties first are in treaty respecting the sale, the owner offers to warrant the article, the warranty will be binding, although the sale does not take place until some days afterward. See also *Lysney v. Selby*, Ld. Raym. 1120; and *infra*, this title, *Antecedent Representations*; *McGaughey v. Richardson*, 148 Mass. 608.

The seller of an article, who has inserted a warranty of the same in a receipted bill thereof, cannot, in an action against him on the warranty, give evidence of a prior bargain for a sale of the thing at the same price without warranty, for the purpose of showing that the warranty was without consideration. *Davis v. Ball*, 6 Cush. (Mass.) 505; 53 Am. Dec. 53.

2. **Subsequent Warranty Requires a New Consideration.**—*Benjamin on Sales* (4th Am. ed.), § 611; *DaLee v. Blackburn*, 11 Kan. 190; *Brewster v. Countryman*, 12 Wend. (N. Y.) 446; *Roscorla v. Thomas*, 3 Q. B. 234; 43 E. C. L. 713; *Bloss v. Kittridge*, 5 Vt. 28; *Burdit v. Burdit*, 2 A. K. Marsh. (Ky.) 143; *Towell v. Gatewood*, 3 Ill. 22; *Summers v. Vaughan*, 35 Ind. 323; 9 Am. Rep. 741; *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *Morehose v. Comstock*, 42 Wis. 626; *Burton v. Young*, 5 Harr. (Del.) 233.

As to what will amount to a sufficient consideration to support such a war-

ranty, see *Congar v. Chamberlain*, 14 Wis. 258; *infra*, this title, *Subsequent Representations*. In *Porter v. Pool*, 62 Ga. 238, it appeared that one A sold a water wheel to B and C with warranty. Afterward B informed A of a defect, and of his purpose to buy C's interest, in case A would repair the wheel and renew the warranty to B; this A did, in consideration of B's order for certain castings. It was held that B's order was a good consideration for the new contract; and that, for A's breach thereof, B could recover the difference between the wheel sold and such a wheel as was warranted.

Under the rule that a consideration is presumed conclusively in the case of contracts under seal, it is held that a warranty under seal, though given after the sale, cannot be impeached for want of consideration. *Wilson v. Ferguson*, 1 Cheves (S. Car.) 190.

Warranty May Be Transferred.—A warranty of a machine sold may, by agreement of the parties, be transferred to another machine substituted for the first, and the original consideration will be sufficient to support it. *Sandwich Mfg. Co. v. Kelly*, 26 Ill. App. 394.

3. *Collette v. Weed*, 68 Wis. 428.

4. **An Apparent Exception to the General Rule.**—Therefore, in *Spalding v. Conant*, 146 Mass. 292, it was held that a warranty of the soundness of a horse, written into a bill of sale by the vendor several days after the horse had been sold, paid for and delivered, ac-

VI. WARRANTY OF FUTURE SOUNDNESS.—It is laid down by an early authority that a warranty can apply only to matters existing at the time the sale or warranty is made, and cannot extend to embrace future events.¹ But this cannot be considered now as the correct doctrine, for while it is true that warranties are ordinarily confined to the state of affairs existing at the time of the sale, and are construed so, unless it clearly appears that the parties understood and intended otherwise,² yet there is no doubt that a future event may be warranted, and the warranty construed so as to embrace future conditions, if its terms plainly show that such was the intention of the parties.³ Thus, the vendor may warrant the quality of the article sold for a specified period; in such cases, the warranty will be held to extend to defects occurring within the time specified, but not afterward.⁴

cording to the oral statements made by him at the sale, is binding on him without any new consideration having been paid.

1. Early Doctrine.—In 3 Bl. Com. (3d. ed.) p. 165, it is said that "the warranty can only reach to things in being at the time of the warranty made, and not to things in future; as that a horse is sound at the buying of him, not that he will be sound two years hence."

2. Warranty Not Ordinarily Extended to Future Events.—Thus a warranty, in a sale of young fruit trees, that they were really harvest apple trees and would produce early harvest apples, was a present warranty that the trees were what they were represented to be, and not a future warranty, to become effective after the lapse of years. *Gregory v. Underhill*, 6 Lea (Tenn.) 207.

So, in an action for a breach of an ordinary warranty of soundness, the rule is that there can be no recovery unless the plaintiff can show that the disease existed at the time of the sale. *Stamm v. Kuhlmann*, 1 Mo. App. 296; *Miller v. McDonald*, 13 Wis. 674; *Smith v. Swarthout*, 15 Wis. 550; *Shaw v. Gibson*, 3 How. (Miss.) 32; *Bowmar v. Clemmer*, 50 Ind. 10; *Merrick v. Bradley*, 19 Md. 50. And see *Walton v. Cottingham*, 30 Tex. 772, a case where the warranty was held to refer to the condition of an article at the date of the contract.

In *Osborne v. Nicholson*, 13 Wall. (U. S.) 654, a slave sold was warranted to be a "slave for life." It was held that this related to his condition at the time of the sale, and that the warranty

was not broken by the subsequent abolition of slavery by the state constitution. *Haskill v. Sevier*, 25 Ark. 153; *Patrick v. Swinney*, 5 Bush (Ky.) 421; *Blewitt v. Evans*, 42 Miss. 804; *Whitworth v. Carter*, 43 Miss. 61; *Mayfield v. Barnard*, 43 Miss. 270. Compare *Algier v. Black*, 32 Tex. 168; *Ketchum v. Dew*, 7 Coldw. (Tenn.) 532.

3. Eden v. Parkison, 2 Dougl. 735, where Lord Mansfield, commenting upon the passage cited from Blackstone, said: "There is no doubt but you may warrant a future event." See also *Richardson v. Mason*, 53 Barb. (N. Y.) 601, a case of warranty in the sale of cows that they were all "coming in" during the following spring.

4. Warranty Confined to Specified Period of Time.—See *Blodget v. Detroit Safe Co.*, 76 Mich. 538. In *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111; 44 Am. Rep. 509, it was said that the words "every piano warranted for five years," contained in a contract of sale of pianos by the manufacturer, constitutes a warranty that each piano sold has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale; but they do not warrant the style or grade of the instrument.

A usage of trade, among tobacco dealers in a certain locality, in all sales of a particular brand, of warranting the article to remain sound and merchantable for the space of four months after the sale, is not unreasonable, and when once established becomes an essential part of a contract of sale of that article. *Fatman v. Thompson*, 2 Disney (Ohio) 482.

If the warranty is not to be performed within a year from the time it is made, it comes within the provision of the Statute of Frauds requiring such contracts to be in writing.¹

VII. WARRANTY IN EXECUTORY CONTRACTS OF SALE.—While warranties usually exist only in executed contracts of sale, they are not confined necessarily to them. Thus, in an executory contract for the sale of goods to be manufactured, an express agreement that they shall correspond in quality to certain other goods, is a warranty of quality for a breach of which the vendee may recover damages without returning the goods.² Ordinarily, however, in contracts for the sale of goods "to arrive," it is presumed that the parties intended that the arrival of the goods, of the quality and in the quantity prescribed by the contract, should constitute a condition precedent to the existence of any obligations on the part of either party, so that if the goods fail to arrive, the contract is avoided *in toto*.³ But this rule is merely a presumption, and if it

1. *Nicholls v. Nordheimer*, 22 U. C. C. P. 48.

2. *Brigg v. Hilton*, 11 Daly (N. Y.) 335; 99 N. Y. 517; 52 Am. Rep. 63; *Parks v. Morris Axe, etc., Co.*, 54 N. Y. 586. In *Kent v. Friedman*, 101 N. Y. 616, the court, by Learned, J., observed: "There can be no difference between an executory contract to sell and deliver goods of such and such a quality, and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter." See *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753.

The doctrine was stated clearly, in the opinion of the court, by Bartholomew, J., in *Halley v. Folsom*, 1 N. Dak. 326: "It is true that there can be no effective warranty—no warranty that will serve as the basis of an action—without a completed sale. If the purchaser reject the property because not of the specified quality, he may have an action on the contract for failure to deliver, but he can have no action upon the warranty. There can be no breach of warranty if the title never vests in the purchaser. The case of *Osborn v. Gantz*, 60 N. Y. 540, was a case where the purchaser refused to accept the goods. In executory contracts for the sale of personal property, the acceptance of the property by the vendee, with full opportunities for inspection, and where he is not induced to refrain from inspection through any fraud or artifice of the vendor, is generally regarded as an

admission that the property corresponds with the terms of the contract of sale. *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305; *Dutchess Co. v. Harding*, 49 N. Y. 321. But this rule does not cover latent defects, or defects not readily discernible on inspection. It is entirely competent, however, for the vendor, in an executory contract of sale, to make an absolute warranty of the quality of the goods. It is purely a question of intent. If he intend to extend the warranty beyond the delivery, and make himself responsible for any damages that may result in case the goods are not as represented, and if the other party so understands it, he is bound. In this respect the law is the same whether the contract of sale be executory or *in presenti*."

Where the contract is to deliver wool "in good order," the phrase "in good order" constitutes a warranty, although the contract is executory. *Polhemus v. Heiman*, 45 Cal. 573; 50 Cal. 438. Compare *Osborn v. Gantz*, 60 N. Y. 540, where the rule is laid down that a warranty is an incident of completed sales, and has no place as a contract having present vitality and force in an executory agreement of sale.

3. **Sales of Goods "to Arrive."**—*Tiedeman on Sales*, § 214; *Hawes v. Lawrence*, 4 N. Y. 345, affirming 3 Sandf. (N. Y.) 193; *Shields v. Pettie*, 2 Sandf. (N. Y.) 262; affirmed 4 N. Y. 122, where it was held that the vendee might, therefore, refuse to accept. And in *Rogers v. Woodruff*, 23 Ohio St. 636; 13 Am. Rep. 276, where the words

plainly appears that the vendor intended his undertaking as warranty, or that such was the understanding of the parties, the vendor will be held liable on the warranty if the goods fail to arrive in proper quantity or of proper quality, and the vendee's acceptance of them as delivered will not constitute a bar to his action.¹ The exact form of the contract is ordinarily immaterial but where the sale is of certain goods "now on passage, and expected to arrive" at a fixed date, there is a warranty that the goods are on passage, and the vendee may have an action for breach of it, if it appears that they never were on passage.³

VIII. WHAT CONSTITUTES A WARRANTY—1. The General Rule.—No particular form of words is necessary to create a warranty; the word "warrant" need not occur specifically, though it is generally used. It is the subject-matter of the statement, and the circumstances under which it was made, rather than its form which are to be considered.⁴ Any distinct assertion or affirmation

"to arrive" are words of description, are conditional, and do not import a warranty. *Boyd v. Siffkin*, 2 Campb. 326; *Johnson v. MacDonald*, 9 M. & W. 600; 1 Parsons on Contracts (7th ed.) 552; *CONDITIONAL SALES*, vol. 3, p. 432.

"The conclusion to which we must come, after a careful examination of the cases, is . . . that if the article contracted for does not arrive, either from the vessel being lost or other cause by accident, and without any fraud or fault of the vendor, the contract is at an end. The contract . . . is merely an agreement for the sale and delivery of the articles named, at a future period when they shall arrive. It is in the nature of a condition, not a warranty." *Neldon v. Smith*, 36 N. J. L. 154.

1. In *Dike v. Reitlinger*, 23 Hun (N. Y.) 241, the vendor agreed to sell a certain amount of hair "to arrive from Europe. . . . Hair to be equal to sample." When it was tendered, the vendee refused to accept it on the ground that it was not of the proper quality. It was held that the stipulation of the contract was not a substantive part of the agreement, and did not render it conditional upon the arrival of goods of the proper quality, but was an express warranty, for a breach of which the vendee might recover damages. *Citing Simond v. Braddon*, 2 C. B. N. S. 324; 89 E. C. L. 324. For a very similar case, see *Heyworth v. Hutchinson*, L. R., 2 Q. B. 447, set out and approved in *Chapin v. Dobson*, 78 N. Y. 83; 34 Am. Rep.

512, where the vendee was not allowed to reject the article when delivered but was limited to his remedy by an action for damages. See also *Higgins v. Weld*, 14 Gray (Mass.) 165.

2. It is immaterial whether the words "to arrive" or "on arrival," or words of similar import, are used; the exact form of the contract is ordinarily immaterial. *Tiedeman on Sales*, § 21; *Johnson v. MacDonald*, 9 M. & W. 600.

3. *Gorissen v. Perrin*, 2 C. B. 1 S. 681; 89 E. C. L. 681.

4. **No Particular Form of Words Necessary to Create Warranty—Word "Warrant" Need Not Be Used.**—*Tabor Peters*, 74 Ala. 90; 49 Am. Rep. 80; *Buckman v. Haney*, 11 Ark. 339; *Teahune v. Dever*, 36 Ga. 648; *Wheeler Reed*, 36 Ill. 81; *Reed v. Hastings*, Ill. 266; *Thorne v. McVeagh*, 75 Ill. 81; *Robinson v. Harvey*, 82 Ill. 5; *Hughes v. Funston*, 23 Iowa 257; *Callahan v. Brown*, 31 Iowa 333; *Henshaw v. Roins*, 9 Met. (Mass.) 83; 43 Am. Dec. 367; *Ottis v. Alderson*, 10 Sme & M. (Miss.) 480; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; 34 Am. Dec. 108; *Carter v. Black*, 46 Mo. 384; *Roberts v. Ackerman*, 22 Barb. (N. Y.) 13; *Warren v. Philadelphia Coal Co.*, Pa. St. 437; *Weimer v. Clement*, Pa. St. 147; 78 Am. Dec. 411.

In *Neave v. Arntz*, 56 Wis. 176, the court, by Cassoday, J., said: "Undoubtedly, any assertion or affirmation, made by the seller to the purchaser during the negotiations to effect the sale, respecting the quality of the article or the efficiency of the machine sold, w

as to the quality of the thing to be sold, made by the owner during the negotiations for the sale, which it reasonably may be supposed was intended to induce the sale, and which was relied on by the purchaser, will be regarded as implying or constituting a warranty. If the affirmation was made in good faith, it is still a warranty; and if made with a knowledge of its falsity, it is none the less a warranty though it is also a fraud.¹

be regarded as a warranty, if relied upon by the purchaser in making the purchase. *Smith v. Justice*, 13 Wis. 600; *Hahn v. Doolittle*, 18 Wis. 197; 86 Am. Dec. 757; *Giffert v. West*, 33 Wis. 621; *Elkins v. Kenyon*, 34 Wis. 93."

No precise form of expression is necessary to create a warranty. If the vendor, at the time of the sale, affirms a fact as to the essential qualities of his goods in clear and definite language, and the purchaser buys on the faith of such affirmation, there is an express warranty; and the same rule applies where the contract of sale is executory. *Polhemus v. Heiman*, 45 Cal. 573.

No particular words are necessary to constitute a warranty. A representation or any positive affirmation as to the state, quality, condition, or fitness of the things sold, which may be supposed reasonably to have entered into the consideration of the sale, showing an intention to warrant, and which was understood so, and relied upon by the purchaser, will amount to a warranty. Whether what passed between the parties amounted to a warranty, or was merely a recommendation or expression of opinion, is a matter for the determination of the jury, unless the language used has a technical or fixed meaning. *Murray v. Smith*, 4 Daly (N. Y.) 277; *Morrill v. Wallace*, 9 N. H. 111. See also *Dunham v. Barnes*, 9 Allen (Mass.) 352.

1. 1 *Parsons on Contracts* (7th ed.) 579, 580; *McLennan v. Ohmen*, 75 Cal. 558; *Drew v. Edmunds*, 60 Vt. 401; 6 Am. St. Rep. 122; *Herron v. Dibblell*, 87 Va. 289; *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595; *McKinnon v. McIntosh*, 98 N. Car. 89; *Shippen v. Bowen*, 122 U. S. 581, quoting *Osgood v. Lewis*, 2 Har. & G. (Md.) 518; 18 Am. Dec. 317; *Henshaw v. Robins*, 9 Met. (Mass.) 83; 43 Am. Dec. 367; *Otto v. Alderson*, 10 Smed. & M. (Miss.) 476; *Naylor v. McSwegan* (C. Pl.), 21 N. Y. Supp. 930; *Maxted v. Fowler*, 94 Mich. 106. In *Mason v. Chappell*, 15 Gratt. (Va.)

582, the court said: "It is enough if the words used import an engagement on the part of the vendor that the article is what he represents it to be. Any distinct affirmation of quality made by the vendor, at the time of the sale, not as an expression of opinion or belief, but as an assurance to the purchaser of the truth of the fact affirmed, and an inducement to him to make the purchase, is, if accordingly received and relied on, and acted upon by the purchaser, an express warranty." *Herron v. Dibblell*, 87 Va. 289. See also *Crenshaw v. Slye*, 52 Md. 146; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753.

In *Hobart v. Young*, 63 Vt. 363, an important question was whether the words "sound and kind," in a bill of sale constituted a warranty. *Rowell, J.*, speaking for the court, said: "The law of warranty has undergone much change since *Chandelor v. Lopas*, Cro. Jac. 4, decided by the exchequer chamber in 1803. It was held that an affirmation that the thing sold was a bezoar-stone was no warranty; for, it was said, every one in selling his wares, will affirm that they are good, or that the horse he sells is sound; yet if he does not warrant them to be so, it is no cause of action. But latterly, courts have manifested a strong disposition to construe liberally, in favor of the purchaser, what the seller affirms about the kind and quality of his goods, and have been disposed to treat such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. *Stone v. Denny*, 4 Met. (Mass.) 155; *Hawkins v. Pemberton*, 51 N. Y. 198. And now any affirmation as to the kind or quality of the thing sold, not uttered as matter of commendation, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon

A distinction is to be made between positive affirmations of a material fact, which always constitute a warranty when relied on by the vendee, and mere words of praise and commendation uttered by the vendor, in order to induce the purchaser to buy. Such words of mere praise are presumed to have been understood by the vendee as such, and impose no liability on the vendor, either as a contract or a fraud.¹ There must be a distinct affirmation as to the quality or condition of the thing sold, not asserted

by the purchaser, is deemed to be an express warranty."

"If any word or affirmation is used in such a manner as to show that the party expects or desires the other party to rely upon the assertion as a matter of fact, instead of taking it as an expression of the judgment or opinion of the vendor, it amounts to a warranty." *Austin v. Nickerson*, 21 Wis. 549; *Tenney v. Cowles*, 67 Wis. 596.

A representation or positive and unequivocal affirmation by a vendor, as to the state and quality of the thing sold, on the faith of which the buyer makes the purchase and pays the consideration, is a warranty. *Carter v. Black*, 46 Mo. 384. Thus, an affirmation that a horse is not lame, accompanied by the declaration of the owner that he would not be afraid to warrant him, is sufficient to establish a warranty. *Cook v. Moseley*, 13 Wend. (N. Y.) 277. So also an affirmation in a bill of sale, or a verbal statement at the time of the sale, that a jack is a good and sure foal-getter, is a warranty. *Lamme v. Gregg*, 1 Metc. (Ky.) 444; 71 Am. Dec. 489. See also *Stevens v. Bradley* (Iowa, 1893), 56 N. W. Rep. 429, where the declaration of the vendor that the hogs for sale were "as thrifty a lot as I ever owned," was construed to be a warranty.

In a parol agreement for the sale of a certain amount of sound corn, to be delivered, the seller stated that he had just purchased the corn from a third person as sound corn, and would sell it as such. It was held that this was nothing more than a mere representation, and not a warranty. The purchaser could have refused acceptance, or returned the goods, and thus protected himself. *Lawton v. Keil*, 61 Barb. (N. Y.) 558.

A covenant that a vessel to be constructed "shall be of the best material, and the workmanship shall be first class," made by one party and relied on by the other, amounts to a war-

ranty. *Potomac Steamboat, etc., Co. v. Harlan*, 66 Md. 42. So of a representation that a machine "will do as good work as any in the market," when relied upon by the purchaser. *Aultman v. Weber*, 28 Ill. App. 91.

Declaration that Animal Is "All Right."—A declaration, made during the sale of certain horses, that they are "all right," amounts to a warranty of their soundness. *McClintock v. Emick*, 87 Ky. 160 (leading case). And representations by the vendor of sheep, that "they are all sound and right, and free from any disease," made to induce a sale of them, amount to a warranty, if a party is induced thereby to become a purchaser. *Marsh v. Webber*, 13 Minn. 109; *Works v. Crosswell* (Me. 1887), 10 Atl. Rep. 494; *Powell v. Chittick* (Iowa, 1893), 56 N. W. Rep. 652; *Stevens v. Bradley* (Iowa, 1893), 56 N. W. Rep. 429.

1. Mere Words of Praise or Commendation.—*Baum v. Stevens*, 2 Ired. (N. Car.) 411; *O'Neal v. Bacon*, 1 Houst. (Del.) 215.

The rule in this connection is well stated, in *Tabor v. Peters*, 74 Ala. 90; 49 Am. Rep. 804, that to constitute a warranty, there must be the affirmation of some fact as distinguished from the mere expression of an opinion. Words of praise or commendation, such as are ordinarily used by the vendor of wares or chattels, however extravagant, impose no liability, either in the nature of a contract, or as a fraud; but a false statement, deliberately made, though in the form of an opinion, as to the quality, quantity, or condition of the thing sold, may amount to a warranty, if so intended and understood by the parties; and what would be a mere matter of opinion when spoken by a non-specialist, may be a matter of fact when spoken by a specialist. See also *Beals v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *Byrne v. Jansen*, 50 Cal. 624; *Robinson v. Harvey*, 82 Ill. 58; *Duffany v. Ferguson*, 66 N. Y. 482; *Leonard v.*

as a mere matter of opinion or belief, made by the seller during the transaction, for the purpose of assuring the vendee of the truth of the fact affirmed, and of inducing him to make the purchase, and this affirmation must be so received and relied upon by the vendee.¹

2. Intention to Warrant.—The rule is laid down in an early case, that an affirmation made at the time of the sale, in regard to the character or quality of the subject of the sale, is a warranty, provided it appears in evidence to have been intended as such.² And in

Peeples, 30 Ga. 61; Leggat v. Sands, etc., Brew. Co., 60 Ill. 158; Wharton on Contracts, § 259.

To constitute a warranty, there must have been a distinct assertion or affirmation as to quality, made during the negotiation, and which it may be supposed was intended to, and did, cause the sale. No warranty will be implied from remarks of praise or commendation merely, since the purchaser has no right to rely thereon. *Tewkesbury v. Bennett*, 31 Iowa 83; *McGrew v. Forsythe*, 31 Iowa 179; *Harris v. Brain*, 33 Ill. App. 510.

Even where the word "warrant" is used, a warranty is not created necessarily. Thus, in *Starnes v. Erwin*, 10 Ired. (N. Car.) 226, it was said that the word "warrant" was one whose meaning the jury must decide, and determine whether it was used merely in high commendation of the article sold, or as incurring a legal liability if the article should not prove to be as represented.

1. Must Be a Distinct Affirmation.—*Hawkins v. Berry*, 10 Ill. 36; *Ender v. Scott*, 11 Ill. 35; *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595; *Crenshaw v. Slye*, 52 Md. 140.

In an action for the price of certain hogs sold, the defendant set up a breach of the warranty by the vendor that the hogs were free from disease. It was held that the jury was properly instructed that the warranty by the vendor "is a contract," and that "in order to find that the seller warranted the thing sold, the agreement must enter into and form a part of the contract of sale." And, further, "that defendant must have had reasonable grounds to suppose that plaintiff intended to warrant the hogs free from disease." *Stryker v. Crane*, 33 Neb. 690.

An answer by the vendor, given in reply to a question as to the soundness of a horse, that "he thought he was sound," does not amount to a warranty. *Lynds v. Davis*, 30 Mo. 406.

2. Intention to Warrant Must Appear.—*Palsey v. Freeman*, 3 T. R. 57; 2 Smith's L. Cas. (8th ed.), p. 66. See also *Hillman v. Wilcox*, 30 Me. 170; *Potomac Steamboat Co. v. Harlan, etc., Co.*, 66 Md. 42. In *Tabor v. Peters*, 74 Ala. 96; 49 Am. Rep. 804, the rule stated in the text was quoted and approved; *Tyre v. Causey*, 4 Harr. (Del.) 425; *Drew v. Edmunds*, 60 Vt. 408; 6 Am. St. Rep. 122; *McGrew v. Forsythe*, 31 Iowa 179; *Figge v. Hill*, 61 Iowa 430; *Maxwell v. Lee*, 34 Minn. 511; *Weimer v. Clement*, 37 Pa. St. 147; 78 Am. Dec. 411; *Richardson v. Grandy*, 49 Vt. 22; *Horton v. Green*, 66 N. Car. 596; *Henson v. King*, 3 Jones (N. Car.) 419; *Keeley v. Turbeville*, 11 Lea (Tenn.) 339; *Smithers v. Bircher*, 2 Mo. App. 499; *Randall v. Thornton*, 43 Me. 226; 69 Am. Dec. 56; *Richardson v. Brown*, 1 Bing. 344. An affirmation by the seller of the quality or condition of the thing sold, not made as a matter of opinion or belief, but as an assurance of facts, and an inducement to the purchaser, if so relied upon by the purchaser, is an express warranty. *Shippey v. Bowen*, 122 U. S. 596.

The existence of the vendor's intention to warrant is insisted on, particularly by the earlier cases. See *Ender v. Scott*, 11 Ill. 35; *McFarland v. Newman*, 9 Watts (Pa.) 55; 34 Am. Dec. 497; *Beeman v. Buck*, 3 Vt. 53; 21 Am. Dec. 123.

A simple affirmation of the soundness of property sold, will not, in legal effect, constitute a contract of warranty, unless it was so intended, and was so understood by the parties at the time; and what was intended by an affirmation is a question of fact, to be submitted to a jury. *Foster v. Cadwell*, 18 Vt. 176; *Bacon v. Brown*, 3 Bibb (Ky.) 35. And where the property, at the time of the sale, is exposed to the buyer's inspection, the intention to warrant must be clearly shown. *House v. Fort*, 4 Blackf. (Ind.) 294; *Jones v.*

determining whether it was intended as such, the decisive test is whether the vendor assumes to assert a fact of which the vendee is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the vendee may be expected to have an opinion and to exercise his own judgment. In the former case there is a warranty, in the latter there is not.¹

It is not always necessary, however, that the vendee should be able to show an intention to warrant on the part of the vendor, in order to constitute the representations of the latter a warranty; where the vendor makes a positive affirmation as to a material fact, and the vendee, relying upon the truth of it, makes a purchase which probably he would not have made otherwise, it is presumed conclusively that the vendor intended his statements as a warranty, whether he actually intended them as such or not.² He

Quick, 28 Ind. 135. See *infra*, this title, *Where Buyer Has Opportunity to Inspect*.

It is necessary that such expressions be used as will show the intention of the vendor to bind himself to make good the quality of the articles as described or represented, and not a mere statement or expression of opinion as to quality. *Carondelet Iron Works v. Moore*, 78 Ill. 65.

In *Stryker v. Crane*, 33 Neb. 690, the court held that it was proper to instruct the jury that, in order for a representation to constitute a warranty, the vendee must have had reasonable grounds to suppose that the vendor intended to warrant.

1. Criterion as to Intention to Warrant.—*Benjamin on Sales* (6th Am. ed.) 625; *Tabor v. Peters*, 74 Ala. 90; 49 Am. Rep. 804; *Hawkins v. Pemberton*, 51 N. Y. 199; 10 Am. Rep. 595; *Halliday v. Briggs*, 15 Neb. 221 (quoting the language of the text); *Linn v. Gunn*, 56 Mich. 447; *Drew v. Edmunds*, 60 Vt. 408; 6 Am. St. Rep. 122; *Reed v. Hastings*, 61 Ill. 266; *Crenshaw v. Slye*, 52 Md. 146; *Konner v. Harding*, 85 Ill. 264; 28 Am. Rep. 615; *Beals v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *Foggart v. Blackweller*, 4 Ired. (N. Car.) 238. See also, in this connection, *Ulmer v. Ryan*, 137 Pa. St. 309.

But there is a distinction as to the legal effect of expressions when used in reference to a matter of fact, and when used to express an opinion. When the representation is positive and relates to a matter of fact, it constitutes a warranty, but where it relates to that which is a matter of opinion or fancy,

it does not amount to a warranty unless there are other declarations which leave no doubt of the intention to warrant. *Reed v. Hastings*, 61 Ill. 266; *White v. Stelloh*, 74 Wis. 435; *Tenney v. Cowles*, 67 Wis. 594.

2. *Hobart v. Young*, 63 Vt. 363; *Smith v. Justice*, 13 Wis. 600; *Austin v. Nickerson*, 21 Wis. 549; *Warren v. Van Pelt*, 4 E. D. Smith (N. Y.) 202. See also *Dawson v. Chisholm* (Supreme Ct.), 1 N. Y. Supp. 171, a case of the sale of a yacht.

Misrepresentations as to the character and condition of the articles sold, made to influence the bargain, and having that effect, are equivalent to warranties, whether made innocently or fraudulently, and whether inserted in the written contract of sale or not. *Waterbury v. Russell*, 8 Baxt. (Tenn.) 159.

No mere expression of opinion will constitute a warranty. But where the vendor, at the time of the sale, affirms a fact as to the quality of his goods, on the faith of which affirmation the vendee purchases, this will amount to a warranty. *Bryant v. Crosby*, 40 Me. 9; *Sweet v. Bradley*, 24 Barb. (N. Y.) 549.

Whenever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has not seen, but which he buys on the representation of the seller, relying on its truth, then the representation in effect amounts to a warranty, and the seller is bound to make good the representation. *Smith v. Richards*, 13 Pet. (U. S.) 26.

Where a purchaser orders a certain machine by letter, stating that it is to do specific work, and the seller answers,

cannot be allowed to induce a purchase by his misrepresentations, and then escape liability by alleging an absence of intention to warrant.¹

The general tendency of the later authorities is to construe liberally, in favor of the vendee, language used by the vendor in making affirmations in regard to his goods, and to treat such affirmations as warranties wherever the language used will authorize the reasonable inference that they were understood so.² So that any positive statement of a material fact, made with the intention of influencing the buyer, and relied upon by him, will constitute a warranty, whether as such intended or not; the intention is presumed conclusively from the efforts made to induce a sale by these statements.³ Even where the seller accompanies his representations with words of caution, advising the buyer not to take the

accepting the order, and stating "You may rely on having a first-rate machine, which will do your work in a satisfactory manner," these last words are not mere words of commendation, but are to be construed as part of the contract, and constituting a warranty. *Whitehead, etc., Mach. Co. v. Ryder*, 139 Mass. 366. See also *English v. Spokane Commission Co.*, 57 Fed. Rep. 451.

At an auction sale of A's interest in certain real property, the landlord of the premises was present, and publicly announced that he had a lien for one thousand dollars, due him on the store and its contents, which was part of the property. A made a counter-statement that the landlord's lien was for five hundred dollars only, "that he was A, and everybody knew who he was," and that he was responsible. It was held that A's statement was a warranty that only five hundred dollars was due on the premises, and that the purchaser at the sale could maintain an action against A for the excess above the sum of five hundred dollars, for which the landlord enforced payment. *Thurber v. Hughes*, 47 N. Y. Super. Ct. 159.

1. *Hobart v. Young*, 63 Vt. 363.

2. **Liberal Construction of Affirmations in Favor of Vendee.**—*Hobart v. Young*, 63 Vt. 363; *Stone v. Denny*, 4 Met. (Mass.) 151; *McClintock v. Emick*, 87 Ky. 166; *Hawkins v. Pemberton*, 51 N. Y. 199; 10 Am. Rep. 595; *Sparling v. Marks*, 86 Ill. 125; *Emrick v. Meriman*, 23 Ill. App. 24.

Where an owner of a certain lot of hogs, who was a man of long experience in such matters, informed the bidders at an auction sale that the hogs were "as thrifty a lot as I have ever

owned," his words constitute a warranty of soundness. *Stevens v. Bradley* (Iowa, 1893), 56 N. W. Rep. 429; *Powell v. Chittick* (Iowa, 1893), 56 N. W. Rep. 652.

3. **Intention to Warrant Conclusively Presumed—When.**—*Tiedeman on Sales*, § 193; *Drew v. Edmunds*, 60 Vt. 401; 6 Am. St. Rep. 122; *Naylor v. McSwegan* (C. Pl.), 21 N. Y. Supp. 930. And in such cases the declaration on the warranty need not allege that the vendor intended to warrant. *McClintock v. Emick*, 87 Ky. 166.

A statement made in good faith at the time of the sale, by the vendor, that seed being sold is of a certain kind, such seed, with respect to their kind, not being ascertainable by inspection, will authorize a finding that a warranty of kind was intended. *Walcott v. Mount*, 38 N. J. L. 496. So, in the sale of beef, an agreement to sell beef that has not been heated before being killed amounts to a warranty. *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753.

An assertion by a vendor of cows, that "they are all coming in in good season in the spring," the vendor knowing from the vendee's statement that this is important for the purposes for which the vendee is buying them, will authorize the jury to find that there was a warranty. *Richardson v. Mason*, 53 Barb. (N. Y.) 601.

In *Hawkins v. Pemberton*, 51 N. Y. 202; 10 Am. Rep. 595, Earl, J., speaking for the court, said: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by

seller's word, but to satisfy himself before buying, he is not relieved from liability for misrepresentations made in order to induce the sale, and which actually induced it.¹

3. Expressions of Opinion.—A mere statement by the seller of his own opinion and belief, not amounting to a positive affirmation or statement of fact, upon a matter concerning which the purchaser is to exercise his own judgment, does not amount to a warranty.² One has a right to express his opinion freely as

the vendee, as a warranty. If the contract be in writing, and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so, if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it, and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not." This language is quoted with approval in *Fairbanks Canning Co. v. Metzger*, 118 N. Y. 360; *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13.

The same language is quoted with approval in *McClintock v. Emick*, 87 Ky. 166, where Holt, J., speaking for the court, further says: "The cases in our opinion, correctly hold that if one even supposes that he is not making himself liable upon a warranty, yet if he makes a positive affirmation as to the condition of the property, or utters what is equivalent to a promise as to it, instead of expressing a belief merely, then such affirmation or promise amounts to a warranty, and he is liable upon it. It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the condition of the article, or merely expressed an opinion as to it." See also *Morrill v. Wallace*, 9 N. H. 111; *Stroud v. Pierce*, 6 Allen (Mass.) 413.

1. *Hicks v. Stevens*, 121 Ill. 186. In this case the seller cautioned the buyer "not to take his word, but to satisfy himself as to the merits of the invention before buying." The court, nevertheless, held him liable for misrepresentations inducing the purchase. See also *Koerper v. Jung*, 33 Ill. App. 144, where the seller was held liable on his express warranty of title, although he had told the buyer, formerly, that he did not own the goods.

A party may be bound by express warranty of quality distinctly made at the close of a negotiation, though he may, in the course of a previous conversation, have stated the truth on the same point. *Deming v. Foster*, 42 N. H. 165.

2. *Hunter v. Stege*, 59 N. Y. Sup. Ct. 17; *White v. Stelloh*, 74 Wis. 435; *Tenney v. Cowles*, 67 Wis. 596; *Ricks v. Dillahunt*, 8 Port. (Ala.) 133; *Bond v. Clark*, 35 Vt. 577; *Crenshaw v. Slye*, 52 Md. 140; *Schoreder v. Trubee*, 35 Fed. Rep. 652; *Farrow v. Andrews*, 69 Ala. 96.

A statement by the vendor, to constitute a warranty, "must be a representation which the vendee relies on, and which is understood by the parties as an absolute assertion, and not the expression of an opinion." *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. (N. Y.) 440; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753.

Thus, in the case of *Osborne v. McCoy*, 107 N. Car. 730, a horse dealer, selling a horse for his principal, stated to the purchaser that "the horse is sound so far as I know." The court held this did not amount to a warranty, and, therefore, that the agent could not recover of his principal for any sums paid by him to the purchaser on account of an alleged breach of warranty. The court went on to say: "This was not even an affirmation of soundness, as was the case in *Horton v. Green*, 66 N. Car. 596, in which it was said, *citing* *Baum v. Stevens*, 2 Ired. (N. Car.) 411, that such an affirmation of soundness does not amount *per se* to a warranty, but may be submitted to the jury, with attendant circumstances, to say whether the affirmation was intended as a warranty."

In another case, it is said that a representation which is in the nature of an expressed opinion, does not constitute a fraud, unless it was knowingly false, made with intent to deceive, and accepted and relied on as true; and when made under these circumstances,

to the merits of any article he may have to sell, and cannot be held responsible in an action for the truth or falsity of such expressions. *Simplex commendatio*, however unwarranted, has never of itself been regarded as sufficient to vitiate a sale, or to sustain an action for misrepresentation. It is to be treated as an invitation to purchase, since every vendor is permitted to allege the good qualities of such ware or articles as he may have for sale. The exception to this general rule is where it appears from the evidence, or the words used, that it was the clear intention of the vendor that the recommendations should be a warranty.¹

Prominent among the expressions used by sellers, which are usually considered as mere matters of opinion, are representations as to the value of the property sold; these, from their nature, are opinionative merely, and the buyer has no right to rely upon them.²

it often may constitute a warranty. *Brown v. Freeman*, 79 Ala. 406.

1. *Allen v. Hart*, 72 Ill. 106; *White v. Stelloh*, 74 Wis. 435.

Words of Commendation—"Dealers' Talk."—See *Chandelor v. Lopas*, Cro. Jac. 4; *Kimball v. Bangs*, 144 Mass. 321.

Thus, in *Fauntleroy v. Wilcox*, 80 Ill. 481, in a sale of hogs, the vendor refused to warrant, but insisted on the vendees personally examining and inspecting them. It was held that his expressions of opinion, under such circumstances, could not be regarded as a warranty. The court said: "It was not to be expected of W., in making the contract, nor did the law require it, that he should underestimate the value of his property. But, on the other hand, he had the clear right to extol its superior qualities, and by any and all fair means induce the purchaser to pay him a good price therefor; and when he refused to warrant, and required the vendees to examine for themselves, they have no legal ground of complaint," though he had insisted that the hogs were of much greater value than they really were. *Bruner v. Strong*, 61 Tex. 555; *Davis v. Meeker*, 5 Johns. (N. Y.) 354. See also *LOGS AND LUMBER*, vol. 13, p. 1027. Compare *Brown v. Bigelow*, 10 Allen (Mass.) 242; *Hubert v. Young*, 63 Vt. 363.

So, the vendee's mere commendation of the article sold is not ordinarily a warranty, *e. g.*, where an auctioneer, in making a sale, remarked "Here's a nice lot of young sound sheep." *McGrew v. Forsythe*, 31 Iowa 179. Or where, in answer to the purchaser's inquiry as to whether the sheep were dis-

eased, he replies, "They appear to be healthy and are doing well." *Tewkesbury v. Bennett*, 31 Iowa 83; *Hunter v. Stuge* (Super. Ct.), 12 N. Y. Supp. 557.

The words, "approved standard quality," used in the sale of merchandise, do not create an express warranty. They are merely another expression for "a merchantable article," and constitute a mere expression of the vendor's commendation. *Cahen v. Platt*, 40 N. Y. Super. Ct. 483.

The representations by the seller of a threshing machine, that it is a very good machine and will do good work, is not a warranty. *Worth v. McConnell*, 42 Mich. 473. But an agreement by the vendor that certain wheat, to be delivered, should be "good milling wheat," constitutes a warranty as to quality. *Jack v. Des Moines, etc., R. Co.*, 53 Iowa 399.

The seller's declaration that he will sell as cheap as the same goods can be bought in a certain city, is not a warranty binding him to reduce his price to the price current in the city named, on that day. *Falkner v. Lane*, 58 Ga. 116.

2. **Seller's Representations As to Value.**—*Fauntleroy v. Wilcox*, 80 Ill. 481. Also *McComas v. Haas*, 93 Ind. 276, in which a machine was represented to be "of great value and utility." *MacDonald v. Longbottom*, 1 El. & El. 977; 102 E. C. L. 977. Compare *Maxted v. Fowler*, 94 Mich. 106.

In *Haven v. Neal*, 43 Minn. 315, the court, by *Vanderburgh, J.*, said: "While, as a rule, representations as to the value of property are to be deemed matters of opinion, and not of fact, yet, when such

4. Vendee Must Have Relied on Representations.—In order to constitute any affirmations or representations of a warranty, it must appear that the vendee relied on them in making the purchase,¹ though this alone is no criterion; there are many cases in which it is presumed conclusively that the vendee knew enough not to be misled by the vendor's statements, as, for example, where such statements consist of mere "dealer's talk," and the usual praise of their goods indulged in by vendors.² Some of the authorities lay down the rule, however, that "a representation made by the vendor at the time of the sale in respect to the quality of the thing sold, which is relied on by the vendee, amounts to a warranty."³ But such statements of the rule are more properly to be considered as intended to emphasize a particular and essential feature of a warranty, and not as being exhaustive or exclusive definitions.⁴ And though it is essential ordinarily that the representations must have been relied on by the

representations are made in connection with others, which are material as tending to establish the plaintiff's case, they should not be ruled out, but the entire statement should be received and considered together. *Hickey v. Morrell*, 102 N. Y. 463; 55 Am. Rep. 824." Following this principle, it was held, in *Maxted v. Fowler*, 94 Mich. 106, that where a vendor represents to a vendee, who knows nothing about the value of mining property, that as a matter of fact the stock of a certain company is worth a certain price, and in a short while will be worth more, but that, as it is desired to enlist his services, he may have it for less, he has a right to rely on such representations, and if, in reliance upon them, he purchases the stock, they constitute a warranty.

The value of the article sold, however, may be made the subject of a warranty. *Picard v. McCormick*, 11 Mich. 68.

1. *Rose v. Meeks* (Iowa, 1894), 59 N. W. Rep. 30; *Halliday v. Briggs*, 15 Neb. 220; *Watson v. Roode*, 30 Neb. 264; *Hawkins v. Berry*, 10 Ill. 36; *Fautleroy v. Wilcox*, 80 Ill. 477; *Tewkesbury v. Bennett*, 31 Iowa 85; *Torkelson v. Jorgenson*, 28 Minn. 383; *Lincoln v. Ragsdale*, 7 Ind. App. 354; *Herron v. Dibrell*, 87 Va. 289; *Handy v. Waldron* (R. I. 1894), 29 Atl. Rep. 143; *Samuels v. Guin*, 49 Mo. App. 8; *Richardson v. Coffman* (Iowa, 1893), 54 N. W. Rep. 356.

The representations must have been made so as to authorize the vendee to understand that the vendor intended to be bound by them, and must have

been actually relied upon by the vendee. *Torkelson v. Jorgenson*, 28 Minn. 383.

2. *Tabor v. Peters*, 74 Ala. 90; 49 Am. Rep. 804. See *Stryker v. Crane*, 33 Neb. 690, where the court held that it was proper to instruct the jury that the "buyer must have had reasonable grounds to suppose the seller intended to warrant" the animals as claimed.

3. *Hahn v. Doolittle*, 18 Wis. 197; 86 Am. Dec. 757; *Neave v. Arntz*, 56 Wis. 174.

In *Henshaw v. Robins*, 9 Met. (Mass.) 83; 43 Am. Dec. 367, upon a sale of goods, a bill of parcels was given describing the goods or designating them by a name well understood. It was held that this bill amounted to a warranty that the goods were what they were described to be.

In *Halliday v. Briggs*, 15 Neb. 222, it was held proper to instruct the jury that "to constitute a warranty there must not only be an affirmation by the seller respecting the quality of the article sold, but the affirmation must be made with a view of assuring the buyer of the truth of the fact asserted, and it must be received and relied upon by the buyer in making the purchase." See a similar instruction given in *Figge v. Hill*, 61 Iowa 432; *Carter v. Abbott*, 33 Iowa 180.

4. There must be something more than a mere expression of opinion by the vendor relied upon by the vendee. *Farrow v. Andrews*, 69 Ala. 96; *Lindsay v. Davis*, 30 Mo. 406; *supra*, this title, *Expressions of Opinion*.

At an auction of slaves, the auctioneer told persons to judge for themselves as to the soundness of the negroes; the

vendee, yet, in an action by the vendor for the price, the vendee may set up a breach of warranty in defense, if material representations made by the vendor have proved to be untrue, although the vendee had not relied wholly on such representations.¹

The fact that at the time of the sale the article sold was not accessible to the purchaser, so that he had no opportunity to examine it, may be shown as presumptive, though not conclusive, evidence that he relied on the seller's representations;² the same is true of evidence as to the superior knowledge of the seller in regard to the merits of the article, and the inability of a purchaser to acquire an accurate idea of its character from a mere inspection.³ Whether the buyer purchased relying upon the representations of the seller, or upon his own knowledge, is ordinarily a question for the jury.⁴

5. Representations Must Be Definite.—It is another requisite to a warranty that the representations which are claimed as establishing it must be of a definite character, and not vague or indeterminate, nor such as might equally well apply to every grade or quality.⁵

vendor told some persons that a certain slave was sound, but the purchaser did not hear him and appeared to have relied on his own previous knowledge of the slave. It was held that there was no warranty. *Lindsey v. Lindsey*, 34 Miss. 432.

1. *Ruff v. Jarrett*, 94 Ill. 475. In this case this is true, although the vendor made the positive affirmations with no intent to deceive.

Thus, where a party, without information, makes a purchase of which representations have been made which are material, the law will presume that he relied upon them. *Hicks v. Stevens*, 121 Ill. 186.

In an action for the price of a machine, the plaintiff requested an instruction that before defendant could defeat a recovery by setting up a breach of warranty, he must prove, first, that there were representations sufficient to constitute a warranty; second, that he, the defendant, relied on them; and third, that the article was not as warranted. It was held that the court properly modified the instruction by striking out the second clause. *Wilcox v. Carson*, 29 Ill. App. 70.

The fact that at a sale of a lot of hogs, the buyer looked at them, and that he testified at the trial that he had made up his mind to buy them if the price was low enough, does not preclude the finding that there was a warranty. *Powell v. Chittick* (Iowa, 1893), 56 N. W. Rep. 652.

2. See *Overbay v. Lighty*, 27 Ind. 27; *Hicks v. Stevens*, 121 Ill. 186.

3. Where one party possesses superior means of knowledge, and knows that the other party relies upon him for correct information, his representations must be correct; and the law implies a warranty from his representations as to the quality and fitness of the article for the purpose for which it is purchased. *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Ormsby v. Budd*, 72 Iowa 80. Thus, where the purchaser was wholly unacquainted with the use, operation, and management of patent steam boilers, and of the utility and value of the invention offered for sale, and it is doubtful whether its capabilities, usefulness, and practical value could then have been determined, even by experts, without very considerable use and long experiment, the purchaser had a right to rely on the representations of the seller entirely, in making his purchase. *Hicks v. Stevens*, 121 Ill. 186.

4. *Toner v. Zell*, 149 Pa. St. 458.

5. In an action by a vendee, upon a written agreement by the vendor, by which he undertook to ship to the vendee a certain quantity of "good fine wine," and acknowledged receipt of payment, it was held that the words of the instrument did not amount to a warranty that the wine should be of any particular quality, not only because they were too indefinite, but because the instrument in which they were

6. Where Article Is Purchased for a Particular Use.—If the vendee buys an article for a particular use, which is known to the vendor at the time, and he assures the vendee that the article is “all right,” or uses equivalent language, his assurance or representation amounts to a warranty that the article is reasonably fit for the use for which the vendee desires it; the vendee would naturally so understand it, and the vendor must be presumed to have intended it so.¹ The vendor cannot avoid the effect of such a representation, by showing that he did not intend to warrant.² But where the vendor delivers goods of the character and quality

used was not the contract of sale; and that parol evidence was admissible to show the actual terms of the sale. *Hogins v. Plympton*, 11 Pick. (Mass.) 97. See also *Bradford v. Manly*, 13 Mass. 139; 7 Am. Dec. 122; *Salem India Rubber Co. v. Adams*, 23 Pick. (Mass.) 256; *Rice v. Codman*, 1 Allen (Mass.) 380.

In the sale of a horse, and just before the payment of the purchase-money, the buyer asked the seller if the horse was sound, and the seller answered that he was. It was held that this was not a warranty; it was not sufficiently express. *Erwin v. Maxwell*, 3 Murph. (N. Car.) 241.

In the case of *Wiggin v. Butcher*, 154 Mass. 447, it appeared that a firm wrote to their agent, with regard to the condition of a lot of hams shipped to him, “that there is an occasional ham sour in the marrow,” but that the hams as a body were not sour, and this letter the agent showed to a proposed buyer of the hams. In an action to recover for a breach of warranty, it was held that the statement contained in the letter was too indefinite to constitute a warranty that less than a third of the hams were sour in the marrow.

Declarations as to the amount of wool certain sheep would yield, and the time in which the vendee could pay for them, and whether he would have wool left after paying, are mere speculations as to the future and cannot import a warranty. It would be otherwise of declarations that such sheep were young and healthy. *Bryant v. Crosby*, 40 Me. 9.

1. Article Purchased for a Particular Purpose.—Thus, where a horse is bought for use in harness, and the vendor, knowing this, assures the vendee that the horse “is all right,” there is a warranty that the horse is good in harness, and if he is not, it is no defense to an

action on the warranty that he is a good saddle horse. *Smith v. Justice*, 13 Wis. 602; *Hahn v. Doolittle*, 18 Wis. 196; 86 Am. Dec. 757. And in *Roe v. Bacheldor*, 41 Wis. 360, it was held that parol evidence of the vendor's knowledge of such intended use was admissible, though the warranty was in writing. See also, as supporting the rule of the text, *Beals v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *Wilcox v. Hall*, 53 Ga. 635; *Emrick v. Merriman*, 23 Ill. App. 24.

In *Jones v. Bright*, 3 M. & P. 155; 5 Bing. 533; 13 E. C. L. 529, the vendor, knowing exactly what the vendee desired, and for what purpose, assured him “I will supply you well.” *Shepherd v. Pybus*, 4 Scott N. R. 434; 3 M. & G. 68. Compare *Bartlett v. Hoppock*, 34 N. Y. 118.

On a sale of “Paris Green” by a druggist, the seller knowing that the buyer intended to use it for killing cotton worms, there was a warranty that it was effective for that purpose. *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280.

Representations by the vendor of a “patent screw-fork for elevating hay,” etc., that it would work in all kinds of hay, grain, straw, and other grass, and was “in all respects fit for the use” intended, amount to a warranty of its fitness. *Elkins v. Kenyon*, 34 Wis. 93; *Latham v. Shipley*, 86 Iowa 543.

A ordered a machine of B, who knew the purpose for which it was wanted, and who wrote, in accepting the order, “You may rely on having a first-rate machine which will do your work in a satisfactory manner.” It was held that these words might be construed as constituting an express warranty. *Whitehead, etc., v. Machine Co.* *Ryder*, 139 Mass. 366.

2. Smith v. Justice, 13 Wis. 600; *Austin v. Nickerson*, 21 Wis. 542.

represented, the vendee cannot defend an action for the purchase-money, on the ground that they are unsuitable for the purpose for which he desired them.¹

7. Antecedent Representations.—Since the warranty enters into and forms a part of the contract of sale, representations made some time previous to the sale, and as an inducement to the buyer to purchase, but not such as to form a part of the executed contract, do not amount to a warranty; there is no consideration to support them, and they do not enter in as a part of the mutual agreement between the parties.² It is not always essential, however, that the representations constituting a warranty shall have been exactly contemporaneous with the sale; it is sufficient if they were made during the course of the dealing which led to the consummated bargain, and were a part of the agreement finally reached.³

1. *Horner v. Parkhurst*, 71 Md. 110; *Kauffman Milling Co. v. Stuckey*, 37 S. Car. 7; *Dounce v. Dow*, 64 N. Y. 411; 57 N. Y. 16. In this last case, it appeared that the vendee, desiring a certain quality of iron, tough and soft, and fit for a particular purpose, ordered of the vendor "XX pipe iron," believing that that was the quality he wanted. The vendor, to whom these facts were all known, forwarded "XX pipe iron" as ordered, being himself under the same wrong impression as the buyer. It transpired later on that this iron was not fit for the purpose for which it was wanted. It was held that the seller could not be charged as having given a warranty, he having sent what had been ordered; that if a warranty that the iron was merchantable could be implied, the defendant, by using a large portion of the iron after an opportunity to examine and ascertain the quality, must be deemed to have accepted it, and to have waived the warranty. See also *Horner v. Parkhurst*, 71 Md. 110.

2. *Benjamin on Sales* (6th Am. ed.), § 610; *Hopkins v. Tanqueray*, 15 C. B. 130; 80 E. C. L. 129; 26 Eng. L. & Eq. 254. In this case, it appeared that the defendant, having sent his horse to Tattersall's to be sold by auction, on the day previous to the sale saw the plaintiff (with whom he was acquainted) examining the horse, and said to him, *bona fide*: "You have nothing to look for, I assure you; he is sound in every respect;" to which the plaintiff replied: "If you say so I am satisfied," and desisted from his examination. The horse was put up the next day at auction,

without a warranty, and the plaintiff bought him, being induced, as he said, by the defendant's assurance of soundness. In an action for breach of warranty, it was held that there was no evidence of a warranty to go to the jury, the representation not being made in the course of, or with reference to, the sale. The court doubted, however, whether such a sale would be valid or binding.

After an agreement for an exchange of horses had been made between the parties, and consummated by a delivery, the plaintiff returned the horse he had received, and, after rescinding the first agreement, a new bargain was made, by which the defendant sold his horse to the plaintiff for \$100. It was held that the representations and warranties made by the defendant on the first bargain did not enter into and form a part of the second, so as to constitute a defense to an action for fraud or breach of warranty. *Shull v. Ostrander*, 63 Barb. (N. Y.) 130. See also *Eldridge v. Hargraves*, 30 Neb. 638. Compare, however, *Starke v. Dicks*, 2 Ind. App. 125.

3. In the case of *Percival v. Oldacre*, 18 C. B. N. S. 398; 114 E. C. L. 398, it appeared that the owner of a horse exposed for sale at a commission stable, meeting A, who had been to see the horse, told him that the animal was a good harness horse, and had belonged to Baron Rothschild, who had sold him because he could not match him. A then went back to the stable and purchased the horse, which turned out to be a kicker. It was held that the jury was justified in finding from these facts

Where, in negotiating a sale, the vendor refers to a letter written by his agent to the vendee, and specifies that the goods shall be in accordance with the representations there made, the letter is a part of the agreement, and constitutes a warranty.¹

8. Subsequent Representations.—Representations made after the execution of the contract of sale, like those made before, do not constitute a warranty ordinarily, unless it was intended that they should, by both parties, enter into the original contract, as a part of it.² Such representations are of no force or validity, unless

that the owner's representations were a part of the contract, and that they amounted to a warranty that the horse was kind in harness.

In *Lysney v. Selby*, *Ld. Raym.* 1120, Lord Holt said: "If, upon a treaty about buying certain goods, the seller warrants them, the buyer takes time for a few days, and then gives the seller his price, though the warranty was before the sale, yet this will be well, because the warranty was the ground of the treaty; and this is *warrantizando vendidit*." See this quoted with approval in *Wilmoth v. Hurd*, 11 *Wend.* (N. Y.) 585, where it is held that if a vendor, while the parties are negotiating for the sale, offers to warrant an article, the warranty will be binding, although the sale does not take place until some days afterward.

H. showed M. a mule, and tried to sell it to him at private sale, telling her that the mule was all right and perfectly sound. No bargain, however, was made at the time, and H. said that the mule would soon be sold at auction, when M. could have a chance to buy him. In less than an hour thereafter M. bought the mule at auction, relying on the previous representations of H. It was held that H. was liable to M. for all damage sustained by her in consequence of such representation, and if the mule died of a disease that H. knew it had at, or previous to, the sale, or of a disease which was the consequence of the first disease, notwithstanding it was announced at the beginning of the auction that no warranty of the mule was made or intended. *Harris v. Mullins*, 32 *Ga.* 704; 79 *Am. Dec.* 320. See also *Crossman v. Johnston*, 63 *Vt.* 333, where representations of an administrator, as to the age and soundness of a horse, made privately to one who afterward purchased the horse of him at auction, were held to constitute an express warranty.

In *Chase v. Nichols* (Supreme Ct.), 9 *N. Y. Supp.* 878, the vendee, while negotiating for the purchase of a horse, had his attention called to a defect in the animal's hind leg, which the vendor said was natural. The sale was not concluded then, but a day or two afterward an employee of the vendor brought the horse to the vendee, and agreed that if he went lame, there should be no sale. The vendee took the horse, and it went lame from the defect. It was held that the vendor was bound by the agreement as having given the warranty.

1. Reference to a Previous Letter.—*Albany, etc., Steel Co. v. Lundberg*, 121 *U. S.* 451.

2. In *Erwin v. Maxwell*, 3 *Murph.* (N. Car.) 241, when the purchase-money for a horse was about to be paid, the vendee asked the vendor if the horse was sound, and the vendor replied in the affirmative. It was held that this reply did not constitute a warranty, as it was not sufficiently express, and was made after the sale had been consummated. But in the case of *Tuttle v. Brown*, 4 *Gray* (Mass.) 457; 64 *Am. Dec.* 80, where the purchaser of a cow said to the vendor, after the sale, "You said the cow was all right?" to which the vendor replied, "Well, she is all right," it was held that there was sufficient evidence of a warranty made at the time of the sale. And in *Smilie v. Hobbs*, 64 *N. H.* 75, where the proof was that after the sale of an article by the vendor's agent, but before payment, the vendee claimed that the agent warranted its durability, which claim the vendor neither admitted nor denied, but received the purchase-money. It was held that it was sufficient to authorize a finding that a warranty had been made. In each of these last two cases, the representations were in effect admissions by the vendor of the fact that a warranty had been given.

this intention can be shown, though they may operate as a separate and distinct undertaking, if supported by a new consideration,¹ or may render the seller liable, if they were made fraudulently.² If such representations are a part of the contract, the question whether they amount to a warranty, is to be determined by the rules applicable to the case of representations made at the time of the sale.³

The rule that, where the contract of warranty is in writing, parol evidence cannot be introduced to add to, or contradict it, does not apply where it is attempted to set up a subsequent oral representation as a warranty; the written contract may be modified or completely abrogated by a subsequent oral agreement.⁴

The rule of the text is applied in *Morehouse v. Comstock*, 42 Wis. 626. In that case the plaintiff had sold some apples, and after shipment of them to the defendant, notice thereof being sent him by mail, and the apples being accepted by him, the plaintiff sent him a bill of them, on which was written: "You will find this a very nice lot." It was held that this was no warranty, the contract being previously complete and executed. And, for the same reason, these words, printed on such bill, "all claims for damages must be made within three days after receipt of the goods," were without legal effect. See also *Brooks v. Matthews*, 78 Ga. 739.

Parol warranty of the soundness of a horse, made at the time of its sale, is not affected by a written warranty, never agreed on between the parties, delivered by the sellers to the purchasers with other papers, without any knowledge on their part until long afterwards that any such written warranty had been given. *Valerius v. Hockspiere* (Iowa, 1893), 54 N. W. Rep. 136.

1. Thus, in the case of *Congar v. Chamberlain*, 14 Wis. 258, A agreed to deliver fruit trees to B in time to enable B to deliver them at a certain point before they should be injured by freezing, but he delivered them at so late a period that B objected to receiving them. It was held that if A, for the purpose of inducing B to receive the trees, thereupon warranted that they would not be frozen within the time required for their delivery by B at the point mentioned, and also, that if frozen, they would, upon being buried in a certain manner, come out good in the spring, such a warranty would be founded upon a consideration distinct from that of the sale, i. e., B's

consent to accept, and would be binding. See also *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *supra*, this title, *Consideration for Warranty*.

In *Aultman v. Kennedy*, 33 Minn. 339, the court refused to allow a written warranty, gratuitously given after the sale, to supersede an oral and different warranty given at the time of the sale.

2. Thus, where one person sells and transfers personal property to another, by a written instrument, and no warranty is made by the vendor with regard to it, but pending the negotiations he makes statements respecting it which are not true, whereby the vendee is induced to purchase the property, which is of but little value, and where the contract of sale is allowed to remain in full force, each party retaining all he had received under, or by virtue of, it, the vendor is liable to the vendee, in an action at law for damages, only where the statements were made fraudulently, and is not liable where the statements were made in good faith. *DaLee v. Blackburn*, 11 Kan. 190.

3. See *supra*, this title, *What Constitutes a Warranty—The General Rule*.

4. **Parol Evidence of Subsequent Warranty Admissible Although Contract Is in Writing.**—1 Greenleaf on Ev. (14th ed.), §§ 303, 304; *Tiedeman on Sales*, § 196; *Courtenay v. Fuller*, 65 Me. 156; *Grandin v. U. S.*, 22 Wall. (U. S.) 496. See also, in support of the principle of the text, *Monahan v. Finn*, 13 Mo. App. 585; *Malone v. Dougherty*, 79 Pa. St. 46; *Le Fevre v. Le Fevre*, 4 S. & R. (Pa.) 241; 8 Am. Dec. 696; *Homer v. Guardian Mut. L. Ins. Co.*, 67 N. Y. 481; *Burt v. Saxton*, 1 Hun (N. Y.) 551; *Wiggin v. Goodwin*, 63 Me. 389.

A written contract warranting the

9. Where Buyer Has Opportunity to Inspect.—While the fact that the buyer has had an opportunity to examine the goods sold is not material where there is a specific warranty, it is a fact to be considered in determining whether mere words of commendation, used in the course of the sale, constitute a warranty. It seems that where abundant opportunity to examine and inspect the goods is afforded to the buyer, the maxim of *caveat emptor* applies, and he assumes all risks not covered by clear and express warranty.¹ Where, however, the seller is guilty of a fraud in concealing defects,² or makes a distinct warranty against all defects,³ this principle has no application; and it is always material to inquire whether the buyer's neglect to inspect was not due to the seller's assurances.⁴

If the buyer purchases, partly upon an examination and test of the article sold, made by himself, but mainly relying upon the representations of the seller, and these representations were made with the intent that they should be relied on, they constitute a warranty for a breach of which the buyer may claim damages, notwithstanding his opportunity of inspection.⁵

quality of logs in a certain lot sold, although executed after the consummation of a sale, is not invalid as being without consideration, where it is simply an affirmation of a parol contract previously made at the time of the sale. *Collette v. Weed*, 68 Wis. 428.

1. *Eaton v. Waldron* (Super. Ct.), 22 N. Y. Supp. 504; *Ranger v. Hearne*, 37 Tex. 30; *Eaton v. Waldron* (Supreme Ct.), 22 N. Y. Supp. 504; *Pattison v. Jenkins*, 33 Ind. 87; *Gilson v. Bingham*, 43 Vt. 410; *Pickering v. Dowson*, 4 Taunt. 779; *Bullock v. Consumer's Lumber Co.* (Cal. 1892), 31 Pac. Rep. 367.

In the case of *Osborne v. Hart*, 19 W. R. 331; 23 L. T. N. S. 321, the defendant's traveling agent agreed to sell, without sample, to the plaintiff, a pipe of superior port wine, fit to be laid down. The wine was afterward bottled by the defendant, and when delivered to the plaintiff was described in the invoice as "superior old port." The wine afterward proved to be sour, owing to there being a deficiency of spirit at the time of bottling. A verdict having been found for the plaintiff, it was held by Kelly, C. B., that the defendant did absolutely contract to sell wine fit to be laid down, and was bound to supply wine suitable for that purpose; by Martin, Pigott, and Cleasby, BB., that there was evidence for the jury that the defendant had warranted the wine to be fit to be laid down, and by Martin, B.,

as words of commendation do not amount to a warranty, the general rule of law is that the maxim *caveat emptor* applies to the sale of specific goods, whenever the buyer has an opportunity of inspecting the chattel sold.

Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods not only must answer in fact the specific description, but must be also salable, or merchantable, under that description. *Jones v. Just*, L. R., 3 Q. B. 197; 9 B. & S. 141; 16 W. R. 643; 18 L. T. N. S. 208. See also *Omaha Coal, etc., Co. v. Fay*, 37 Neb. 68.

In an action for deceit on the sale of a certain commodity, the defendant may show that before buying, the purchaser examined the stuff and said it was all right. *Bowker v. Delong*, 141 Mass. 315.

Where the warranted quality of an article sold is not such as can be determined by inspection, the buyer has the right, after inspection, to rely upon the warranty, both as to present and future deliveries. *Hodgman v. State Line, etc., R. Co.*, 45 Ill. App. 395.

2. *Ranger v. Hearne*, 37 Tex. 30.

3. *First Nat. Bank v. Grindstaff*, 45 Ind. 158.

4. *Brigg v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *First Nat. Bank v. Grindstaff*, 45 Ind. 158.

5. *Keeley v. Turbeville*, 11 Lea (Tenn.) 339; *Powell v. Chittick* (Iowa, 1893), 56 N. W. Rep. 652; *Smith v. Hale*, 158

The fact that the buyer had opportunity to, and did, inspect before purchasing, is not material where there is proof that the defect complained of was embraced within the express warranty; then the only question is whether he waived the benefit of the warranty.¹

Upon a purchase from a wholesale dealer of goods of a particular quality, to be delivered at a future time, it is the duty of the purchaser to examine the goods, and, if not of the quality purchased, to notify the seller to send them back; and this must be done within a reasonable time, considering all the circumstances. What is a reasonable time is a question for the jury. If it is the usage not to examine such goods until opened by dealers to sell to customers, and both parties deal with reference to such usage, then an examination made by the dealer when he opens the package to sell to customers will be within a reasonable time, provided the goods are offered for sale in due course of trade.²

Mass. 178. See also *Samuels v. Guin*, 49 Mo. App. 8.

The buyer of an interest in goods has a right to rely upon the seller's representations that he is the owner thereof, and he is not negligent merely because he fails to test the truth of such representations. The liability of the seller arises from his own fraud and falsehood, and is not affected by the question of diligence upon the part of the buyer. *Hale v. Philbrick*, 42 Iowa 81.

1. *Gould v. Stein*, 149 Mass. 577; 14 Am. St. Rep. 455; *Henshaw v. Robins*, 9 Met. (Mass.) 83; 43 Am. Dec. 367.

In *Lewis v. Rountree*, 78 N. Car. 323, it was held that where, after the sale of a certain number of barrels of rosin, to be delivered, the buyer goes to the place of delivery and selects the number of barrels purchased by him from a large lot, the fact that he had an opportunity to inspect the rosin before or at the time it was delivered, and did in fact select the particular barrels purchased, does not amount to a waiver of the warranty that they should be of the specific description.

2. *Vendee's Duty to Inspect Before Buying*.—*Doane v. Dunham*, 79 Ill. 131.

In respect to the merchantable quality of the goods sold, where the purchaser has an opportunity of inspecting them, the rule of law is that the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in doing so; for, in the absence of a warranty, the purchaser buys on his own responsibility. *Armstrong v. Buford*, 51 Ala. 410; *Biggs v. Perkins*, 75

N. Car. 397. Compare *Hill v. Gray*, 1 Stark. 434; 2 E. C. L. 167.

In *Gentilli v. Starace*, 133 N. Y. 140, the court, by Gray, J., said: "I think, under the circumstances of this case, where the seller was not the manufacturer, where the article sold was *in esse*, and open to inspection and examination, and where no fraud is charged nor existed, and the buyer claimed and was allowed his time to exercise his judgment, and to approve of the subject of the transaction of sale, the acceptance and retention of the goods concluded him, and there was neither warranty nor agreement by the seller which survived the transaction. The principle of this conclusion, I think, is deducible from the authorities, several of which I cite, without further reference. *Parkinson v. Lee*, 2 East 314; *Sprague v. Blake*, 20 Wend. (N. Y.) 61; *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305; *Dounce v. Dow*, 64 N. Y. 411. The contract in this case called for a delivery of that description of wine known as 'Prosperi's Chianti Wine,' which should be 'in good merchantable order,' and was to be 'approved by the buyer within three days.' That kind of wine was in fact delivered, and the merchantable order of the goods was a fact which, though warranted, was to be ascertained by the buyer for himself within the delay allowed. It was open to the buyer, if he distrusted his judgment, or if, for any reason, he wished it, to require an express warranty to cover the quality or other points about the wine. He

10. Warranty Distinguished from Descriptions.—A distinction is to be made between affirmations intended as a warranty, and those which are made merely by way of description of the article sold, or to identify it, and not for the purpose of describing its quantity or quality.¹ But words of description may amount to a warranty, where the vendee has no other means of finding out the quality of the goods, and such words are not intended or needed to identify the article; in such a case the question is one of intention, and must depend upon the circumstances.²

did not do so, and, under the terms of the contract of the parties, we should hold that as to the seller it was fully executed, and no warranty survived in favor of, and available thereafter to, the buyer."

1. Words of Description Merely.—*Behn v. Burness*, 3 B. & S. 751; 113 E. C. L. 749; *Randall v. Thornton*, 43 Me. 226; 69 Am. Dec. 56; *Whitman v. Freese*, 23 Me. 212. In *Carondelet Iron Works v. Moore*, 78 Ill. 65, where iron was described as mill iron in a bill rendered to purchaser. *Maxwell v. Lee*, 34 Minn. 511; *Ryan v. Ulmer*, 108 Pa. St. 332; 56 Am. Rep. 210. Also in *Fraley v. Bispham*, 10 Pa. St. 320, where tobacco was described as sweet scented, and *Barrett v. Hall*, 1 Aik. (Vt.) 269, which was a sale of "good stoves."

To give simple affirmations the effect of a warranty, they must be of a character to enter into the essential elements of the contract—to constitute a substantial inducement to the purchaser. Therefore, the certificate of a master carpenter as to the capacities of the ship is to be taken as a matter of description and not a warranty, unless an intention otherwise is made to appear. *Randall v. Thornton*, 43 Me. 226; *Dyer v. Lewis*, 7 Mass. 284. See also *Callender Insulating, etc., Co. v. Badger*, 30 Ill. App. 314; *affirmed* 33 Ill. App. 90.

A notable example often cited is that where a picture was described in an invoice as the painting of a particular master, and the court held that such a description did not amount to a warranty. *Power v. Barham*, 4 Ad. & El. 473; 31 E. C. L. 114; 7 C. & P. 356; 32 E. C. L. 541; *Jendwine v. Slade*, 2 Esp. 572. *Compare Bridge v. Wain*, 1 Stark. 504. The statement in the contract of sale of certain engines, which the buyer has seen and approved, that they are of a certain horse-power, does

not amount to a warranty that they are of that strength, such a statement being a mere matter of description. *Kleebe v. Bard*, 7 Wash. 41.

2. When Description Amounts to a Warranty.—*Bowes v. Shand*, L. R., 2 App. Cas. 455; *Bridge v. Wain*, 1 Stark. 504.

Thus, if wool sold in sacks be marked on the sacks and described in the invoice, by the authority of the seller, as being of a certain quality, there is a warranty by the seller that the wool is of that quality. *Richmond, etc., Mfg. Co. v. Farquar*, 8 Blackf. (Ind.) 89.

A written assignment of a note described it as "payable in one year from date, with use for value received." It was held that the words "for value received" were not merely descriptive of the note assigned, but that, *prima facie* at least, they imported a sufficient legal consideration for the assignment; that such instrument, in describing the property assigned as "a note," must be construed as an express warranty, on the part of the assignor, that it was a valid note, and that the signers were of sufficient capacity to contract when they executed it. But as to whether such a warranty would not be implied from the sale, without words indicating an express warranty, was left undecided. *Thrall v. Newell*, 19 Vt. 202; 47 Am. Dec. 682.

A firm having furnished the defendant railroad company during a year with satisfactory coal, agreed to furnish during the following year coal "of same quality and kind as furnished during the preceding year." It was held that the reference to the coal delivered during the previous year was not a mere description, but was an express warranty that the coal to be delivered should be of the same good quality. *Zabriskie v. Central Vt. R. Co.*, 59 Hun (N. Y.) 623; *affirmed* 131 N. Y.

11. Warranty Distinguished from Mere Stipulations.—The vendor may make positive affirmations as to the quality of the goods, and this may be relied upon by the vendee, and yet they may not constitute a warranty, because of conditions which are annexed. Thus, where the vendor states that he will recommend his goods as being of the best, and if they are not entirely satisfactory, the vendee may return them, such representations, however positive, do not constitute a warranty, where the contract is so worded as merely to give the vendee an option to return the goods if not satisfactory.¹

In this connection, also, belongs the distinction between statements in the contract which are a warranty, and those which are mere stipulations as to the price, or manner of payment.²

12. Descriptions in Printed Advertisements or Invoices.—Descriptions or representations made by the vendor in written or printed advertisements, are not necessarily or presumably warranties; they are more properly considered generally as being mere "dealer's talk," and the burden of proof is on the vendee, to show an intention to warrant the goods as described or represented. It is a matter of common knowledge that dealers and traders make use of extravagant language in advertisements in praising the quality of their wares, and the vendee cannot blindly rely on such representations, and insist on them as warranties, unless other facts and conditions can be proven, such as are requisite in the case of

72. So, also, there is a warranty where the vendor contracted that the coal to be furnished by him "shall be of good quality; of as good quality as" certain coal then being landed at the "mills of Haven" in the same city; and this, although it appears that there were no such mills as those mentioned. *Pearson v. Martin*, 38 Wis. 265.

If a contract, made by the vendee with a vendor of personal property, though not signed by the latter, describes the property as "in good order and condition," the description is equivalent to a warranty, and, if the vendor knew it to be untrue, will vacate the contract; but will merely afford ground for an action for damages if made in good faith. *Bryant v. Crosby*, 36 Me. 562; 58 Am. Dec. 767.

A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance or maritime law. *Norrington v. Wright*, 115 U. S. 188; *Filley v. Pope*, 115 U. S. 213.

1. Distinction Between Warranty and

a Mere Option to Return.—See *Childs v. O'Donnell*, 84 Mich. 533.

In *Gentili v. Starace*, 14 N. Y. Supp. 764; 133 N. Y. 140, an action for a breach of warranty, it appeared that the vendor sold wine to the vendee, the contract providing, "all to be delivered in merchantable order. The said goods to be approved by the buyer within three days after delivery." It was held that there was no warranty of the quality of the wine sold, further than to allow the vendee three days in which to satisfy himself that the wine was merchantable.

2. A written contract of sale of varnish and similar materials, provided that "these goods are to be exactly the same in quality as we make for" certain third parties, "and as per samples delivered;" and further on, "Turpentine copal varnish at 65 cents per gallon; turpentine japan dryer at 55 cents per gallon." It was held that these latter terms were but stipulations as to price, and imported no warranty that the goods delivered should be articles known to the trade by those names and of a certain standard quality. *DeWitt v. Berry*, 134 U. S. 306.

verbal assurances which amount to a warranty.¹ Such advertisements, however, may amount to a warranty, where, to the knowledge of the vendor, they are relied on by the vendee in making the purchase, and where they state material facts relative to the quality of the goods, or are intended as a warranty.²

1. *Richy v. Daemicke*, 86 Mich. 647; *Whitman v. Freese*, 23 Me. 212; *Gunter v. Atwell*, 19 Md. 157; *Freeman v. Baker*, 2 N. & M. 446; 5 C. & P. 475; 24 E. C. L. 414; 5 B. & Ad. 797; 27 E. C. L. 194; *Taylor v. Bullen*, 5 Exch. 779; 20 L. J. Exch. 21; *Power v. Barham*, 7 C. & P. 356; 32 E. C. L. 451; 4 Ad. & El. 473; 31 E. C. L. 114; *Jendwine v. Slade*, 2 Esp. 572; *Cranston v. Marshall*, 5 Exch. 395; 19 L. J. Exch. 340. See also *Winsor v. Lombard*, 18 Pick. (Mass.) 57; *Roberts v. Applegate*, 48 Ill. App. 176.

Thus, the fact that a vendor presented to a purchaser a printed circular, with testimonials of a meat cooler offered by him for sale, and said that his cooler was the only one in the world that would keep meat any length of time properly, is not sufficient to sustain a finding that he guaranteed the cooler to keep the meat as long as the testimonials claimed it did. *Richy v. Daemicke*, 86 Mich. 647. Compare *Latham v. Shipley*, 86 Iowa 543.

In the case of *Grieb v. Cole*, 60 Mich. 397, it appeared that the defendant gave the plaintiff an order for a mowing machine, across the back of which order was printed a blank warranty with the vendor's printed signature appended, the full benefit of which was reserved in the order, to the defendant. The blanks in the warranty were not filled up, and in a suit by the vendor, on the order, he offered this warranty and the order in evidence, to which the defendant objected on the ground that the warranty was not a valid instrument. It was held that if the warranty stood alone, its invalidity was unquestionable; but that the reference thereto in the order constituted them one instrument, and since when read together, no ambiguity or uncertainty appeared, the warranty was valid.

In *Enger v. Dawley*, 62 Vt. 164, which was an action for the price of certain carriages, the buyer set up, by way of defense, the fact that the carriages did not conform to the representations concerning them in the plaintiffs' catalogue. The defendant asked for an instruction

that if the catalogue "was used by the parties and referred to by them" in completing the sale, and the defendant relied upon them, and believed them to be true, and made the purchase relying on them, then they were, in legal effect, warranties. The court said: "This request is defective in that it ignores any intent on the part of the seller that the representations should be warranties, or knowledge that the vendee so regarded them, or that the representations formed the basis of the sale, or were intended to form a part of the contract. Without one of these elements, the representations contained in the catalogue would not be warranties. To constitute a representation a warranty, it must have been so intended and understood by the parties, both vendor and vendee, *Beeman v. Buck*, 3 Vt. 53; 21 Am. Dec. 123; *Foster v. Caldwell*, 18 Vt. 176; *Bond v. Clark*, 35 Vt. 577; *Houghton v. Carpenter*, 40 Vt. 588; *Pennock v. Stygles*, 54 Vt. 226; or, intended by the parties as a part of the contract, *Richardson v. Grandy*, 49 Vt. 22; or have formed the basis of the contract, *Beals v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *Drew v. Edmunds*, 60 Vt. 401; 6 Am. St. Rep. 122. In the making of the contract, the representations in the catalogue may have been used and referred to without forming a part of it, and without any intent on the part of Stevens, the plaintiffs' agent, that they should, and without any intent on his part that they should be warranties, and without knowledge that the defendant so understood them. In ignoring these facts the request did not embody sound law, and for this reason the defendant was not entitled to have it complied with. *Rea v. Harrington*, 58 Vt. 181; 56 Am. Rep. 561."

2. Thus, where a manufacturer offers by letter to sell pianos of his own manufacture, to a party at a distance, stating the terms of the sale, and directing attention to a circular advertising the pianos, sent by the same mail, on the front page of which was printed in conspicuous manner the words, "Every piano warranted for five years;" these

words are incorporated thereby into the offer contained in the letter, and, on acceptance of the offer and a purchase thereunder, after the receipt of the circular, they constitute a part of the contract to purchase. *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111; 44 Am. Rep. 509. See also *Power v. Barham*, 7 C. & P. 356; 32 E. C. L. 541; 4 Ad. & El. 473; 31 E. C. L. 114; 1 M. & R. 507.

In *Borrekins v. Bevan*, 3 Rawle (Pa.) 37; 23 Am. Dec. 85, the court, by Rogers, J., said: "From a critical examination of all the cases, it may safely be ruled that a sample or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty that the goods are what they are described or represented to be by the vendor." This language is quoted with approval in *Hawkins v. Pemberton*, 51 N. Y. 206; 10 Am. Rep. 595, a case where an auctioneer, in making a sale, represented a certain article to be "blue vitriol." It appeared that the article was not blue vitriol, but a different compound of similar character which could not be distinguished easily from the genuine article. It was held that the auctioneer's representation or description amounted to a warranty that the article was as described. *Jennings v. Gratz*, 3 Rawle (Pa.) 168; 23 Am. Dec. 111.

In the case of *Henshaw v. Robins*, 9 Met. (Mass.) 83; 43 Am. Dec. 367, a bill of parcels was given, upon a sale, describing the goods or designating them by a name well understood. The description in the bill was held to amount to a warranty that the goods were as described; and this, although the purchaser examined them about the time of the sale, it appearing that when the examination was made, the goods were wrapped up so as to deceive the examiner. See also *Bradford v. Manley*, 13 Mass. 144; 7 Am. Dec. 122; *Hastings v. Lovering*, 2 Pick. (Mass.) 214; 13 Am. Dec. 420; *Cramer v. Bradshaw*, 10 Johns. (N. Y.) 484.

In *Wilcox v. Henderson*, 64 Ala. 541, Stone, C. J., referring to published circulars used to advertise a certain fertilizer, said: "These (the circulars), we think, were legitimate instruments of evidence, and tend to show that the seller contracted, and held himself bound by such representations of fact as were thus, as we may presume, made part of the stipulations and inducements of the contract. To hold the

seller to a less accountability than this, would be a license to perpetrate the grossest frauds. But this rule is limited to representations of fact and not of opinion. *Sledge v. Scott*, 56 Ala. 202; *Perry v. Johnston*, 59 Ala. 648."

The vendor, a party in *Iowa*, appointed a broker in Mobile to sell hams, and this agent took the vendee's order for "choice, sugar-cured, canvassed hams." The vendee had no opportunity to examine them, but they were to be shipped from *Iowa*. The vendor shipped them and demanded and received payment for them while in transit. It was held that the facts amounted to a warranty that the hams were as described, and that the vendee had a right to recover for damages sustained in consequence of their not being as represented. *Forcheimer v. Stewart*, 65 Iowa 593.

A statement, in a bill of parcels for a certain quantity of oil, that it was "winter-pressed sperm oil," was an express warranty that the oil was winter-pressed. *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; 18 Am. Dec. 317.

Printed Circulars.—In the case of *Cranston v. Marshall*, 5 Exch. 395; 19 L. J. Exch. 340, it appeared that C., who resided in *Ireland*, having applied to emigration agents in London, in regard to a passage for himself and family on board their ships to *Australia*, received in answer a letter in which they agreed to convey him and his family for £65. This letter was written on the fly sheet of a printed circular, headed "Emigration to *Australia*," and which stated that ships "will be dispatched on the appointed days (wind and weather permitting), for which written guaranties will be given." Then followed a list of ships, in which the *Asiatic* was named as to sail from London on the 15th of August, and from Plymouth on the 25th. In another part of the circular it was stated: "Passengers from *Ireland* can readily join at Plymouth. A deposit of one-half the passage money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order." C. engaged a berth on board the ship *Asiatic*, and paid the agents a deposit, but no written guaranty was given. The *Asiatic* did not arrive at Plymouth until the 3d of September, although not prevented by wind or weather. C.'s berth was kept vacant from London to Plymouth. It was held, that the statement in the circular was not a mere

The delivery to the vendee of a printed warranty, bearing no other signature than the printed one of the company which sells, may nevertheless constitute a valid warranty, where relied on by the vendee and inducing him to make the purchase.¹ And this is true even where the paper itself contains a condition printed on the margin that the warranty shall not exist unless it is countersigned by the company's agent, and no agent has countersigned it.²

13. Representations—To Whom Made.—It is not essential to a warranty that the representations constituting it shall have been made to the buyer; if they are made to a stranger, and by him communicated to another so as to become the basis of a purchase by the latter from the party originally making the representations, they are to be regarded as having been made directly to the purchaser, and he may insist upon them as a warranty.³

Where a vendor, on selling a patent right, makes representations concerning its value to certain parties, who thereupon form themselves into a corporation, for the purpose of utilizing the right, the representations are, to all intents and purposes, made to the corporation, and it may sue for a breach of the warranty.⁴

representation, but a warranty that the *Asiatic* would sail on the days appointed, and that, as she did not, C. was justified in taking a passage on board another vessel, and was entitled to recover from the agents the amount of the deposit and the expenses he had been put to by the delay at Plymouth.

In several cases it has been said that circulars, printed and distributed for the purpose of inducing others to purchase the rights of the seller, and the statements therein, may be regarded as being of a more deliberate character than if made in conversation. *Hicks v. Stevens*, 121 Ill. 186; *Smilie v. Hobbs*, 64 N. H. 75.

Where a verbal warranty was a part of the preliminary negotiations which were afterward consummated by the execution of a written and printed order for certain machinery, which was accepted, it became a mutual binding contract on both parties. *Brown v. Russell*, 105 Ind. 46.

1. Printed Warranties—Signature of the Vendor.—*First Nat. Bank v. Erickson*, 20 Neb. 580; *Brown v. Russell*, 105 Ind. 46.

2. First Nat. Bank v. Erickson, 20 Neb. 580.

3. Crocker v. Lewis, 3 Sumn. (U. S.) 1. In this case, Story, J., went on to say: "No principle seems better founded than this, that if a party makes a representation to one person in respect to a sale, and that representation

constitutes the basis of a subsequent sale made by the party so making the representation, to the party to whom it is communicated by the third person, it is treated in the same way as if directly made by the vendor to himself. It is by no means true that representations made to third persons are to be treated as *res inter alios acta*, if those representations have been communicated to and acted upon by another person, who places entire confidence in them. In the case of *Barden v. Keverberg*, 2 M. & W. 63, the court thought that representations, made by a married woman to third persons, that she was a *feme sole*, might, if communicated to plaintiff by such third persons, entitle him to the same benefit as if made to himself." See the same principle in *Pilmore v. Hood*, 5 Bing. N. Cas. 97; 35 E. C. L. 43; 6 Scott 827; 7 Dowl. Pr. Cas. 136. And see *infra*, this title, *Parties to the Action*.

4. Representations Made to Corporations.—*Iowa Economic Heater Co. v. American Economic Heater Co.*, 32 Fed. Rep. 737. In this case Blodgett, J., said: "There can be no doubt in this case, that if these citizens of Iowa, to whom these representations were made, had at once formed themselves into a firm for the purpose of purchasing and vending the right to use these heaters, they would have had their action; and it is well known that the formation of a corporation is merely a method of

14. **Question for the Jury.**—The border line between distinct and positive affirmations on the one hand, and mere expressions of commendation on the other, is extremely shadowy, and cannot be made always to appear; the only course in such cases is to submit the matter to the jury to determine from the evidence the question of intention.¹ The decisive test as to whether representations by the vendor constitute a warranty is, whether the vendor so intended them, and whether the vendee purchased on the faith of them; these two questions are for the jury.² And in determining these questions the jury should not be confined to the

associating capital, for the purpose of transacting such business as corporations of this class are authorized to transact; hence, these statements, if false, made to such persons, are clearly statements made to the corporation itself. This corporation may be said to have had its origin in the impression which was made by the statements upon the minds of the persons who organized it. The principle is also recognized in *Mason v. Crosby*, 1 Woodb. & M. (U. S.) 342; *Smith v. Babcock*, 2 Woodb. & M. (U. S.) 246; *Crocker v. Lewis*, 3 Sumn. (U. S.) 1."

1. **Question for the Jury.**—*Hawkins v. Pemberton*, 51 N. Y. 199; 10 Am. Rep. 595; *Rogers v. Ackerman*, 22 Barb. (N. Y.) 134; *Riley v. Rea* (Supreme Ct.), 18 N. Y. Supp. 597; *Halliday v. Briggs*, 15 Neb. 219; *Patrick v. Leach*, 8 Neb. 530; *Brown v. Freeman*, 79 Ala. 406; *Terhune v. Dever*, 36 Ga. 648; *Kankanee Stone, etc., Co. v. Ugrow*, 36 Ill. App. 448; *Jones v. Quick*, 28 Ind. 125; *Figge v. Hill*, 61 Iowa 430; *Horner v. Parkhurst*, 71 Md. 110; *Lake Engine Mfg. Co. v. Hurley* (Mich. 1894), 57 N. W. Rep. 1044; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; 34 Am. Dec. 108; *Foggart v. Blackweller*, 4 Ired. (N. Car.) 238; *Toner v. Zell*, 149 Pa. St. 458; *McFarland v. Newman*, 9 Watts (Pa.) 55; 34 Am. Dec. 497; *Bigler v. Flickinger*, 55 Pa. St. 279; *Boothby v. Scales*, 27 Wis. 626. In *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, the question as to whether the vendee was imposed upon was for the jury. See also *Stevenson v. Reaves*, 24 Ala. 425; *Croly v. Pollard*, 71 Mich. 612; *Marshall v. Keefe* (Cal. 1893), 34 Pac. Rep. 89. Whether a distinct assertion or affirmation of quality, made by the owner during a negotiation for the sale of chattels, which it may be supposed was intended to cause the sale, and was operative in causing it, will constitute a war-

ranty, and the question whether the particular affirmation amounts to a warranty, is one of fact for the jury. *Hughes v. Funston*, 23 Iowa 257.

A bare representation or assertion of the quality of the thing sold, if so understood and intended by the parties, will amount to a warranty; hence, when there is evidence that such was the intention and understanding of the parties, though there was no express demand for a warranty, a charge that the "purchaser must buy on his own responsibility or ask a warranty" is properly refused, as tending to take away from the jury all consideration of evidence of a warranty voluntarily made or arising out of the circumstances of the transaction. *Claghorn v. Lingo*, 62 Ala. 230.

2. *McLennan v. Ohmen*, 75 Cal. 558. See also *Tenney v. Cowles*, 67 Wis. 596. In *McGregor v. Penn*, 9 Yerg. (Tenn.) 74, the proof was that on the sale of the horse the vendor said to the vendee, "I recommend this horse as having one good eye;" and the jury found that a warranty had been intended. The court, in affirming the judgment of the trial court, said, by Turley, J.: "Now whether this amounts to a warranty of soundness or not is for the determination of the jury, under the instruction of the court as to what it takes to constitute a warranty. We have seen that no set phrase of words is necessary; that any will do, provided it can be collected from them that a warranty was intended. Now, whether a warranty was intended by these words used by the vendor, depends upon the situation of the parties, and the manner and circumstances under which they were spoken. . . . The question was left to the jury, the proper tribunal for its determination, and we will not disturb the verdict."

In *Jones v. Quick*, 28 Ind. 125, which

words actually used, but should be allowed to take into account all the circumstances of the transaction.¹

IX. CONDITIONAL, LIMITED, AND QUALIFIED WARRANTIES.—The vendor may attach conditions to warranties given by him, provided they are not unreasonable, and such conditions may enter into and form a part of the contract, where they are printed and posted in such a manner as to be brought to the vendee's notice. Thus the vendor may warrant an animal to be sound, and stipulate that he shall not be liable on the warranty unless a complaint of the breach is made to him within a specified time.² So,

was an action for a breach of warranty, the court laid down the following rules, as being applicable to cases where the property alleged to have been warranted is exposed to the inspection of the party contracting for it: *First*, No particular form of words is necessary to make a warranty, though the word "warranty" is generally used. Any assertion of the seller in respect to the property, if intended by the seller and understood by the buyer as a warranty, must be considered as such, whether the word warranty was made use of or not. *Second*, When a warranty is relied on, the question with the jury should always be: Do the words proven fairly show that they were intended and understood by the parties, at the time of the sale or exchange, as a warranty? If they do, they must be so considered.

1. All the Circumstances to be Considered.—*McDonald Mfg. Co. v. Thomas*, 53 Iowa 558; *McClintock v. Emick*, 87 Ky. 167. Thus, although, from correspondence between the buyer and seller, a warranty cannot be inferred, the jury, in an action upon a warranty, is properly charged that it may consider evidence of previous conversations, from which such warranty may be inferred. *Driesbach v. Lewisburg Bridge Co.*, 81 Pa. St. 177.

So, also, where it appears that the negotiations connected with the sale, occupied several interviews between the parties, it is error to confine the jury to the evidence of a warranty made at the time the sale was consummated. *Way v. Martin*, 140 Pa. St. 499. In this case, the court observed: "It is entirely for the jury to say whether the sale was made on the faith of the alleged warranty; and, to determine this question, they should know all that passed between the parties in relation to the terms of the sale. This very point seems to have

been decided in *Wilmot v. Hurd*, 11 Wend. (N. Y.) 586."

2. Conditional Warranty.—Thus, in *Bywater v. Richardson*, 1 Ad. & El. 508; 28 E. C. L. 135, at the time of the sale of a horse at a repository, there was a board fixed to the walls of the repository having certain rules printed on it, one of which was that the warranty of soundness given should remain in force until twelve o'clock of the day following the sale, after which the sale should be complete and the vendor's liability be at an end, unless a notice accompanied by a surgeon's certificate of unsoundness should, in the meantime, be produced. The rules were not particularly referred to during the sale. The horse proved to be unsound, and the vendor knew it, but no complaint was made until after the lapse of the prescribed time. The unsoundness was of a character not likely to be immediately discovered, and the sale had been made under circumstances favorable to the concealment of the defect. It was held that the vendee had sufficient notice of the rules, and as they were not unreasonable, must be bound by them; recovery was therefore denied in an action on the warranty.

See also *Baglehole v. Walters*, 3 Campb. 154; *Hinchcliffe v. Barwick*, 5 Exch. Div. 177; 28 W. R. 940; *Smart v. Hyde*, 8 M. & W. 723; 1 Dowd. N. S. 60. In *Best v. Osborn*, 2 C. & P. 74; 1 R. & M. 296; 12 E. C. L. 33, the rule is laid down by Best, C. J., that if a general warranty of a horse is proved by parol (the written contract not being forthcoming), the fact that the witness who proved it saw a notice board on the seller's premises, requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the jury for them to say whether this formed any part of the original contract.

also, he may provide that the duration of the warranty shall be limited to a specific period.¹

A statement by the vendor, that an article is sound so far as he knows, is a qualified warranty, and the vendee may maintain an action thereon if he can show that there was an unsoundness of which the vendor was aware, though otherwise the statement amounts to nothing more than a representation.²

The vendor may qualify his warranty by excepting from it a specified defect, and in such cases he cannot be made responsible for the excepted defect.³ Or, the warranty may be made conditional upon the vendee pursuing a prescribed course in regard to specified curable defects.⁴

X. WARRANTY OF PARTICULAR ARTICLES⁵—1. Of Pictures.—The

In cases of this kind, however, the tendency is strongly toward a strict construction in favor of the vendee. Thus, where a horse sold at public auction is warranted sound and six years old, and it is one of the conditions of the sale that the horse shall be deemed sound unless it is returned in two days, this condition applies to the warranty of soundness only. Therefore, where a horse sold with such a warranty was discovered to be twelve years old, ten days after the sale, and was then offered to the seller, who refused to take him back, it was held that an action might be maintained by the buyer against the seller; and that his right to recover was not affected by his having sold the horse after offering him to the seller. *Buchanan v. Parnshaw*, 2 T. R. 745.

1. Warranty Limited in Its Duration.

—The seller of a horse signed the following document: "Mr. C. bought of Mr. G. a brown horse, six years old, warranted sound, for the sum of £180. G." The buyer sent the seller a check payable to order, with the following memorandum written on the back: "This check is received by me for a bay horse, price £90, which I warrant sound for one month from the date of delivery." The seller indorsed the check but did not sign the memorandum. It was held that the words "warranted sound for one month" limited the warranty to continue in force for only one month from the sale, and that the memorandum on the check was no part of the contract. *Chapman v. Gwyther*, 7 B. & S. 417; L. R., 1 Q. B. 463; 35 L. J. Q. B. 142; 14 W. R. 671.

2. "Sound so Far as I Know."—*Wood v. Smith*, 5 M. & R. 124; 4 C. & P. 45; 19 E. C. L. 267; *Myers v. Conway*, 62

Ind. 474; *Jones v. Edwards*, 1 Neb. 170. In *Wood v. Smith*, 5 M. & R. 124, it appeared that the vendor, in selling a horse, said: "I never warrant, but he is sound so far as I know;" the vendee was allowed to recover on showing that the horse had an unsoundness at the time of the sale of which the vendor was aware.

3. *Jones v. Cowley*, 6 D. & R. 533; 4 B. & C. 445; 10 E. C. L. 377; *Garment v. Barrs*, 2 Esp. 673. Thus, where a horse is warranted sound except as to a specified defect, and it appears that at the time of the sale he was sound except as to this defect, there is no breach of the warranty, though the defect afterward causes the horse to become lame. *Morrill v. Bemis*, 37 Vt. 155.

4. In *Smith v. Borst*, 63 Barb. (N. Y.) 57, an action on a warranty given on the sale of a pair of horses, the warranty was shown to have been a qualified and conditional one, involving the necessity of the plaintiff's following a specified condition, viz., to treat the defect (a bunch on the leg) with salt and vinegar. It was held that the plaintiff was bound so to treat it, and that this requirement was a sufficient excuse to him for refusing to try another treatment which might hazard the effect of the warranty. Compare *Milburn Wagon Co. v. Nisewarner* (Va. 1894), 19 S. E. Rep. 846.

5. Reference is here made to cases in which warranties in the sale of various particular articles, other than those treated in the text, have been considered.

In Sales of Seed.—See *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13 (the "Bristol cabbage seed case"); *Walcott v. Mount*, 38 N. J. L. 496; *Allan v. Lake*, 18 Q. B. 560; 83 E. C.

principal question in this connection arises as to the effect of a statement in a catalogue that the pictures advertised for sale therein are the productions of the artists whose names are under them. The general rule seems to be that such a statement amounts to a warranty, except in the sale of very old pictures, where an assertion as to their painters necessarily must be one of opinion merely.¹

2. In Sales of Horses.—It has been so long a custom, in the sale and exchange of horses, to warrant the soundness and other qualities of the animal sold, that the courts are inclined in such cases to construe representations made to the purchaser as warranties.² The general rule, therefore, is that all material representations, made by the vendor during the course of the sale, are to be construed as warranties, unless it can be shown affirmatively that they were not so.³

L. 560; *Carter v. Crick*, 4 H. & N. 412; 28 L. J. Exch. 238; *Wieler v. Schilizzi*, 17 C. B. 619; 25 L. J. C. P. 89.

Of Engines and Machinery.—See *Parsons v. Sexton*, 4 C. B. 899; 11 Jur. 849; *Cowdy v. Thomas*, 36 L. T. N. S. 22.

1. Thus, where pictures are sold with a bill of parcels containing the words "Four pictures, Views in Venice, Canaletti," the jury may find that such a statement amounted to a warranty of their genuineness as paintings by Canaletti, he being then not a very old painter. Lord Kenyon observed: "Now words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words and whether they implied a warranty of genuineness, or conveyed only a description or expression of opinion. I think their finding [that it was a warranty] was right." *Power v. Barham*, 4 Ad. & El. 473; 31 E. C. L. 114; 6 N. & M. 62; 7 C. & P. 356; 32 E. C. L. 541; 1 M. & R. 507. The same rule is upheld in *Lomi v. Tucker*, 4 C. & P. 15; 19 E. C. L. 255; *Desewhanberg v. Buchanan*, 5 C. & P. 343; 24 E. C. L. 352.

The case of *Jendwine v. Slade*, 2 Esp. 572, was an action for damages for a breach of an alleged warranty on the sale of pictures; the pictures had been represented in the catalogue as being those of certain old artists, when in fact they were mere copies. Lord Kenyon held that there was no warranty, observing that "the pictures were the work of artists some centuries back,

and there being no way of tracing the picture itself, it could only be a matter of opinion whether the picture in question was the work of the artist whose name it bore or not. What, then, does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it."

But if the agent of the seller of a picture, knowing that the buyer labors under a delusion with respect to the picture, which materially influences his judgment, permits him to make the purchase without removing that delusion, the sale may be set aside as void. *Hill v. Gray*, 1 Stark. 434; 2 E. C. L. 167.

2. *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; 34 Am. Dec. 108; *Murphy v. McGraw*, 74 Mich. 318.

In *Burnham v. Sherwood*, 56 Conn. 229, the court instructed that any representation as to the mare's condition, which the seller intended the buyer should rely on as a fact, amounted to a warranty. See also *Johnson v. Wallover*, 15 Minn. 472; *Crossman v. Johnson*, 63 Vt. 333. Compare here the case of *Holmes v. Tysen*, 147 Pa. St. 305, in which it appeared that at the time of the sale the buyer said to the seller, "I have nothing to show that you warrant this horse to be as you represent him;" to which the seller replied, "The horse is just the same as when you drove him on Monday." The court, following *McFarland v. Newman*, 9 Watts (Pa.) 55; 34 Am. Dec. 497, held that these words did not constitute a warranty, and were properly withdrawn from the jury.

3. *Wood v. Smith*, 5 M. & R. 124; 4 C.

3. Of Other Animals.—In sales of animals other than horses, warranties are not so usual, and it is only in rare instances that peculiar applications of the general rules are necessary. This section is confined, therefore, to a mere statement of the cases as they have arisen.¹

& P. 45; 19 E. C. L. 267; *Vates v. Cornelius*, 59 Wis. 615; *Chase v. Nichols* (Supreme Ct.), 9 N. Y. Supp. 878. *Compare Holmes v. Tyson*, 147 Pa. St. 305.

Thus, an affirmation in the bill of sale of a jack, that he is a good and sure foal-getter, is a warranty that he is so. *Dickens v. Williams*, 2 B. Mon. (Ky.) 374. In another case, the contract of sale of a stallion warranted him to be "an average breeder," but provided that the seller assumed no responsibility on account of disease or accident after the horse left the stable; also, that the horse should not be considered as having been fully tested until he had been kept by the buyer for two years. The horse having died within the two years, the buyer set up a breach of warranty in defense of an action for the price. It was held that the breach of warranty could not be shown in defense. *Scrogin v. Wood* (Iowa, 1893), 54 N. W. Rep. 437.

A statement by the vendor: "I recommend this horse as having one good eye," was considered a warranty in *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; 34 Am. Dec. 108. And testimony that the plaintiff, in an action on a warranty, had offered a certain price for a mare, upon condition that she was sound, and that the defendant had received the price offered, is sufficient to go to the jury as evidence of a warranty. *Quintard v. Newton*, 5 Robt. (N. Y.) 72.

Proof that the vendor, in answer to an inquiry by the vendee, asserted that the horse was "all right," establishes a warranty that the horse's eyes were sound. *Little v. Woodworth*, 8 Neb. 281. So, also, representations that a horse is "sound, straight, and all right," and just such a horse as purchaser wants, constitute a warranty; and such warranty is broken if the horse has an incurable disease of the feet. *Murphy v. McGraw*, 74 Mich. 318.

In a suit on a warranty of a horse, it was shown positively, and was undisputed, that the defendant assured the plaintiff that the animal was a good work horse, that he was true and all right, and true as a dollar, kind as a kitten, and as good a horse as any in

the county. It was held that the trial court did not err in refusing to require the jury to find specifically and report whether the defendant had warranted the horse, and if so, in what words, since the evidence, if believed, was enough to make out a warranty, and there could not have been any finding inconsistent with it. *Daniells v. Aldrich*, 42 Mich. 58.

A statement by the seller in the course of the sale, made to the buyer, that he "may depend upon it, the horse is perfectly quiet and free from vice," is a warranty. *Cave v. Coleman*, 3 M. & R. 2.

To the name of a mare, in a printed catalogue of horses to be sold by auction, were appended the words: "In foal to Warlock." Other mares in the same catalogue were described as having been "served by" or "stinted to" certain horses. It was held that, looking to the expressions used with respect to the other mares and to the nature of the fact represented, the words must be taken as having been intended by the parties as a warranty. *Gee v. Lucas*, 16 L. T. N. S. 357.

But it is not a warranty to sell a horse as being of the age stated in a printed pedigree, if, at the time, the seller declared that he knew nothing of the horse's age except what he learned from the printed pedigree. *Dunlop v. Waugh*, Peake 123.

A complaint, upon an alleged warranty made on the sale of a horse, set forth "that at the time of said purchase, and before it was made, one of the said horses was affected with what the defendant said was a cold, which caused the horse to discharge at the nose; that before the plaintiff bought the horses, the defendant told him that nothing ailed the horse except a cold, and that it was only such cold that caused the discharge at the animal's nose." It was held that this set forth no contract of warranty and would not support an action for a breach of warranty. *Zimmerman v. Morrow*, 28 Minn. 367.

1. In *Joliff v. Bendell*, 1 R. & M. 136; 21 E. C. L. 397, it appeared that sheep, apparently healthy and sound in every re-

4. Of Fertilizers.—A vendor of fertilizers, by selling a compound as a fertilizer, thereby expressly warrants that it is capable of giving additional producing capacity to land. He does not warrant, however, that it is suited to the vendee's peculiar soil, and if its failure to produce any good effect is due to the peculiar character of the soil, or to the unusual seasons, the vendor cannot be held as for a breach of warranty.¹ The opinion of a chemist, who has

spect, were sold, warranted sound. Two months afterward a greater part of them died. There was nothing to connect the disease of which they died with their previous condition, but it was, in the opinion of farmers and breeders, a hereditary disease called the "goggles," and incapable of discovery until its fatal appearance. It was held that this disease was an unsoundness existing at the time of the sale, the jury being of the opinion that "it existed in the constitutions of the sheep at that time." See also *Hogan v. Shuart*, 11 Mont. 498.

In another case, the facts were that A wrote to B that he had a fine steer for sale, and that the steer had a sore under his neck, "but that don't hurt him; it is most well." B wrote that if the steer was as good as represented he would buy it, and that A might send it. It was held that A's statement that the sore would get well amounted to a warranty. *Branson v. Turner*, 77 Mo. 489.

In *Hunt v. Van Deusen*, 42 Hun (N. Y.) 392, the vendor of a lot of hogs represented that there were no stags, or coarse, unmerchable hogs among them, and that they were a choice, first-class lot. It was held that these representations amounted to a warranty, and that if some of the hogs were unmerchable, there was a breach of it which was not waived by the vendee's acceptance of the pork. It was also held that it was error to compel the buyer, who made the pork into sausages and lard, to answer that he sold the sausages and lard at the ordinary price, as the seller could not, because of the dexterity of the buyer, escape from liability for the damages as stated.

1. *Wilcox v. Hall*, 53 Ga. 635; *Hamlin v. Worsham*, 78 Ga. 631; *Robson v. Miller*, 12 S. Car. 586; 32 Am. Rep. 518; *Walker v. Pue*, 57 Md. 155.

In *Wilcox v. Henderson*, 64 Ala. 542, which was an action on a note given for the price of certain guano, the defense being a breach of warranty, Stone, C. J., speaking for the court, said: "The charge to the jury, that if they believed, from the evidence, that 'M., the

agent of the plaintiffs, represented to the defendant that the guano was a good guano, and that, from the application and tests of its utility made by the defendant, they believed it was not a good guano, then they must find for the defendant,' is objectionable. It assumes, as matter of law, that such representation by the agent would amount to a warranty. It was only evidence to be submitted to the jury, and to be weighed by them, in determining whether or not there was a warranty of the fertilizing qualities of the guano. Moreover, the guano may not have been, in strict sense, good, and yet the defendant may have derived some benefit from it. The second paragraph of the charge is also objectionable, in assuming that such representation was, in itself, and necessarily, a warranty."

In *Robson v. Miller*, 12 S. Car. 586; 32 Am. Rep. 518, it appeared that the vendor introduced a fertilizer, his circular stating that it was "compounded of the purest materials, . . . of the highest standard," and "introduced under my own name and guaranty;" also that when properly composted it would produce certain beneficial results. The labels on the preparation contained a chemical analysis of the substance. In an action for the price, in which the vendee set up a breach of warranty by way of defense, it was held that there was an express warranty of good results from the use of the fertilizer, but that the vendor's right to recover the price did not depend on the correctness of the analysis.

In *Walker v. Pue*, 57 Md. 155, W. sued P. on a note given by him for three tons of a fertilizer, bought by him (P.) and delivered to and used by him, prior to the execution of the note. This note was not paid at maturity, and P. obtained an extension, and it appeared that when the extension was obtained P. said he would pay it, but intimated nothing as to any breach of warranty. The defense of P. was failure of consideration, and breach of an alleged warranty given to him at the

made an analysis of the fertilizer, is some evidence, but not conclusive, of its suitableness for the purposes which it is represented as accomplishing.¹

5. Of Bonds and Notes.—The general rule is that one who purchases a bond, relying on the seller's representations that it is valid when it is in fact worthless, may recover the price paid for it, although the seller may have been honest in making the representations, and the buyer may have had full opportunity to examine the bond.² The subject of warranties of promissory notes by indorsement or by verbal agreement belongs more properly to another discussion.³

time of the purchase, by the agent for the sale of the fertilizer, that it would keep up to its former standard in analysis and preparation for drilling; there having been a previous sale to P. of this fertilizer, application of the fertilizer by him to his crops, and a certificate from him that it was satisfactory. And as the agent was about to take P.'s order, P. said to him, that he did not want the fertilizer, unless it would drill all right, and the agent replied, "You need not fear, it will do that." After using the fertilizer, P. had a bad crop. No evidence was offered by him tending to prove a different standard of analysis, but it was proved by W. that the fertilizer was invariably prepared in the same way, by the same formula, and in the same proportions of ingredients. It was held that the defense was not good, as P. did not purchase an article unknown to him; it was on the market, and he had used it and tested its qualities, and he purchased the specific article, well knowing what it was, as the one he wished to apply to his crops, all that he required being, that it should be up to the former standard of analysis of that specific article, and of the standard in preparation for drilling; he did not ask any guaranty that the article would produce a good crop, nor was any such warranty given. The law does not imply a warranty, where a party selects a specific article, that it will answer the purpose for which the buyer intends it. See also *Hamlin v. Worsham*, 78 Ga. 631, a case construing contractual and statutory warranties.

1. *Wilcox v. Hall*, 53 Ga. 635.

2. *Ripley v. Case*, 86 Mich. 261.

A statement in an advertisement of railroad bonds for sale, that "the road is in successful operation and earning net more than the interest on all its

bonds," is a representation, not that the road was earning that amount at the exact date of the advertisement or during the time it might appear in the newspaper, but that the road was then on a paying basis and was earning steadily net more than all the interest on all its bonds. *Blake v. Watson*, 45 Conn. 323; 29 Am. Rep. 683.

In an action on a warranty given in the sale of a lot of city bonds, it was alleged that "the defendants agreed that the principal and interest of the bonds was, or should be, guaranteed and provided for by a sinking fund set aside for that purpose;" and "that such representations and agreements for the securing of the bonds were a material part of the contract," etc. It was held that the representations alleged, constituted a warranty that the bonds were or would be secured by an adequate fund for their ultimate payment. *Callahan v. Brown*, 31 Iowa 333. See also *Baker v. Arnot*, 5 Thomp. & C. (N. Y.) 215; 2 Hun (N. Y.) 682.

A warranty in the sale of shares of stock, that there were no assessments about to be made on it, is not broken by the fact that shortly after the sale, the stockholders, by agreement, issued new stock to be purchased by themselves, the proceeds to be applied to the payment of the debts of the corporation. *Humphrey v. Merriam*, 46 Minn. 413.

3. See *BILLS AND NOTES*, vol. 2, p. 380; *BONDS*, vol. 2, p. 466e; *GUARANTY*, vol. 9, pp. 67-84; *SURETYSHIP*, vol. 24, p. 714.

If a vendor sells to a third person a note given by the vendee, representing that it is good and secured by a mortgage held by him to cover this and other notes given by the vendee, and then privately trades off the mortgage in exchange for other property to the

6. Of Cotton.—A contract for the sale of cotton of a certain quality, the quality being stated in the technical terms in use in the cotton trade, constitutes a warranty that the cotton is of the quality the contract provides for. And as the true quality of cotton cannot be determined always by the inspection of samples drawn from the bales, the warranty extends to latent defects and is not complied with merely by supplying cotton which is of the prescribed grade according to a particular method of inspection.¹

7. Of Patents—(See also PATENT LAW, vol. 18, pp. 140–142).—Any positive statements by the vendor of a patent, as to its originality, value, or genuineness, made with a view to inducing its purchase and relied on by the vendee, constitute a warranty; the rule is, to some extent, more strict in this connection, because, from the nature of the circumstances, the vendee has no means of determining for himself the truth of the representations.²

maker, who becomes insolvent, he will be liable to the third person for the value of the note. *Holbrook v. Davidson*, 59 Ga. 503. See also *Gompertz v. Bartlett*, 2 El. & Bl. 849; 75 E. C. L. 849; 18 Jur. 266.

A warranty, by the vendor of a promissory note, that it is good and will be paid at maturity, is valid, though not in writing. *Milk v. Rich*, 15 Hun (N. Y.) 178; *Johnson v. Gilbert*, 4 Hill (N. Y.) 178; *Cardwell v. McNiel*, 21 N. Y. 336.

A. agreed to deliver to B., in part payment of a debt, the note of W., indorsed by two other persons, and afterward wrote to B. this letter: "I inclose you the note of W.'s, indorsed as proposed, which you will please pass to my credit." It was held that this was a warranty that the indorsements on the note inclosed in the letter were genuine. *Coolidge v. Brigham*, 5 Met. (Mass.) 68; 1 Met. (Mass.) 547.

1. *Love v. Miller*, 104 N. Car. 584; 20 Am. St. Rep. 329. This case was an action for a breach of warranty of cotton. The defendants contracted to sell and deliver to the plaintiff's order, one hundred bales of cotton, "to be of the average grade of middling and nice, good stains or tinges, and not more than one bail in four to be as low as that." The court held that this amounted to a warranty, on the principle stated in *Lewis v. Rountree*, 78 N. Car. 323; *Jones v. Just*, L. R., 3 Q. B. 197; 9 B. & S. 141; *infra*, this title, *Sales by Description*; also that the warranty was not that the cotton should be of good middling grade according to any particular mode of inspection,

but that it was to be in fact of that quality. See also *Miller v. Moore*, 83 Ga. 684; *Ormsrod v. Huth*, 14 M. & W. 651.

2. *Tabor v. Peters*, 74 Ala. 90; *Nelson v. Wood*, 62 Ala. 175; 49 Am. Rep. 804; *Bigler v. Flickinger*, 55 Pa. St. 279; *Electro Dynamic Co. v. The Electron*, 56 Fed. Rep. 304; *Dillman v. Nadelhoffer*, 19 Ill. App. 375; *Kingman v. Martin*, 24 Ill. App. 435; *Rose v. Hurley*, 39 Ind. 77; *Elkins v. Kenyon*, 34 Wis. 93; *Prideaux v. Bunnett*, 1 C. B. N. S. 613; 87 E. C. L. 613.

In *Tabor v. Peters*, 74 Ala. 98; 49 Am. Rep. 804, the court said: "The parties to the sale, moreover, were not in a condition of relative equality touching their knowledge, or ability to judge accurately of the thing sold. The plaintiff was a specialist or an expert, being a manufacturer of such articles, and was therefore possessed of a knowledge of facts in reference to their nature, capacity, and structure, of which the defendant was both actually and professedly ignorant. In such cases, the misrepresentations of the seller will the more readily avoid the contract, and many statements, when made by him, will be deemed affirmations in the nature of fact, although they might be construed as conjectural, or matters of opinion, had they emanated from one not enjoying such opportunities for information. Such is the rule, at least, when such assertions are shown to have been falsely made, and were material inducements to the contract. *Bigler v. Flickinger*, 55 Pa. St. 283; 1 Parsons on Cont., p. 580; 1 Wharton on Cont., §§ 259, 260." Compare *Chalmers*

In actions brought to recover the price agreed to be paid for a patent right, or for the right to manufacture and sell a patented article, the defendant, for the purpose of showing a failure or want of consideration, may show that the patent is void, and for that purpose may prove that the invention is valueless, or that the patentee was not the inventor of the patented article; and he may establish this latter fact by proof that the invention had been in use before the patent issued, or that the patent is an infringement of a prior patent.¹

XI. WARRANTY IN PARTICULAR SALES—1. Sales "With All Faults."—A vendor who sells an article "with all faults," is nevertheless liable for a latent defect which was known to himself, and which the vendee could not discover, either because it was not discoverable by examination, or because art had been used to conceal it.²

2. Sales by Description.—In the sale of goods by description, there is a warranty that they shall answer the description, where it is given by way of indicating the quality of the article, and not to identify it merely, and when the vendee relies upon such description as a warranty. It is not an implied warranty, but is

v. Harding, 17 L. T. N. S. 571; *Hall v. Conder*, 2 C. B. N. S. 53; 89 E. C. L. 20; 3 Jur. N. S. 366, 963. See also *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111; 44 Am. Rep. 509; *Hight v. Bacon*, 126 Mass. 10; 30 Am. Rep. 639; *Benjamin on Sales* (6th Am. ed.), §§ 657, 661.

The vendor of a patent match box, and of territory covered by the patent, represented to the vendee, who had himself no knowledge on the subject and no means of obtaining it, that the territory proposed to be sold was very valuable; that other parties had made purchases, and all had done well, realizing large profits. It was held that the vendee had the right to rely on these statements, and having done so, and the statements having turned out to be false, he had a right of action to recover back the money paid for such patent right; and that whether the seller knew the falsity of his statements or was merely ignorant, could make no difference. *Allen v. Hart*, 72 Ill. 104. The court went on to say: "It will not do to say that these were simply expressions of opinion as to the value of the territory to be embraced in the patent deed. They were intended to be, and were relied upon as assurances of its value as an article of trade, and being false, it would be a reproach to the law if it did not afford the injured party redress." See also

Croninger v. Page, 48 Wis. 229; *Olivant v. Bayley*, 5 Q. B. 288; 48 E. C. L. 287; 7 Jur. 1130; *Chanter v. Hopkins*, 4 M. & W. 399; 3 Jur. 58.

1. *Croninger v. Page*, 48 Wis. 233; *Rowe v. Blanchard*, 18 Wis. 441; 86 Am. Dec. 783; *Page v. Dickerson*, 28 Wis. 694; 9 Am. Rep. 532; *Swann v. Dodd*, 3 Coldw. (Tenn.) 279; *Cowan v. Mitchell*, 11 Heisk. (Tenn.) 87; *Green v. Stuart*, 7 Baxt. (Tenn.) 419; *PATENT LAW*, vol. 18, p. 140.

2. *Mellish v. Motteux*, Peake 115; *Schneider v. Heath*, 3 Campb. 506; *Fletcher v. Bowsher*, 2 Stark. 561; *Taylor v. Bullen*, 5 Exch. 779; 20 L. J. Exch. 21. *Compare Freeman v. Baker*, 5 B. & Ad. 797; 27 E. C. L. 194; 5 C. & P. 475; 24 E. C. L. 414; 2 N. & M. 446.

In *Baglehole v. Walters*, 3 Campb. 154, it appears to have been held that the seller of a ship "with all faults" was not liable for latent defects, unless he had used some artifice to conceal them from the buyer.

Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding that she was to be taken with all faults, without allowance for any defects whatever, and it appeared that she was only partially copper-fastened, it was held that notwithstanding the words "with all faults," without allowance for any defects whatsoever," the vendor was liable as for breach of warranty. *Shepherd v. Kain*, 5 B. & Ald. 240; 7 E. C. L. 82.

construed, under such circumstances, as constituting an express undertaking that the goods shall be as described.¹

3. Sales on Approval—Warranty of Satisfaction.—Where the contract contains a warranty with a stipulation that the property sold shall be satisfactory to the vendee, his determination made in good faith is conclusive as to the fulfillment of the warranty;²

1. Jones v. Just, L. R., 3 Q. B. 197; 9 B. & S. 141; Lewis v. Rountree, 78 N. Car. 323; Love v. Miller, 104 N. Car. 584; Gould v. Stein, 149 Mass. 570; 14 Am. St. Rep. 455; IMPLIED WARRANTY, vol. 10, p. 138; *supra*, this title, *Warranty Distinguished from Descriptions*.

In Jones v. Just, L. R., 3 Q. B. 197; 9 B. & S. 141, Mellor, J., observed: "In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall answer reasonably such description, and if they do not, it is unnecessary to put any other question to the jury." In Lewis v. Rountree, 78 N. Car. 323, the court, in approving this statement of the rule, goes on to say: "It is not meant that words of description are always a warranty; but the cases in which that is held have all something special to take them out of the rule, and to show that in those cases it was not so intended." See also Whitaker v. McCormick, 6 Mo. App. 114; Bridge v. Wain, 1 Stark. 504.

In Allen v. Mutual Compress Co. (Ala. 1892), 14 So. Rep. 362, where there was a warranty that certain work done should "give satisfaction" to the party for whom it was done, the court, in holding that the contractee's determination as to whether the work was satisfactory was conclusive, whether his objection was reasonable or not, said: "The provision of the contract under which this right is claimed is as follows: 'We guaranty to give satisfaction in sewing and tying or any other work that we may be required to do.' The defense to the complaint was that plaintiff failed to give satisfaction. The authorities are not altogether harmonious. In some it is held that a stipulation of similar import in a contract arms the party for whose benefit it was made with unquestioned authority to consult only his own judgment, will, or feelings, and the reasonableness of the grounds of dissatisfaction is not a matter of inquiry. Cline v.

Libby, 46 Wis. 123; 32 Am. Rep. 700; Gibson v. Cranage, 39 Mich. 49; 33 Am. Rep. 351, and authorities cited in note; McCarren v. McNulty, 7 Gray (Mass.) 139; Tyler v. Ames, 6 Lans. (N. Y.) 280. On the other hand, there are authorities which hold that an employer cannot dismiss his servant without actual cause. Jones v. Graham, etc., Transp. Co., 51 Mich. 539; Daggett v. Johnson, 49 Vt. 345. The latter case grew out of a purchase of milk pans, and the stipulation was that the purchaser was to pay for them 'if satisfied with the pans.' The supreme court held 'that the defendant had no right to say, without cause, that he was dissatisfied, and would not pay for the pans;' 'that the dissatisfaction must be actual, not feigned; real, not merely pretended.' It seems to us the latter authorities render nugatory an important provision in the contract. Exclude from the contract the provision, 'satisfaction guaranteed,' or 'if satisfactory,' and it is clear that 'for cause,' 'actual cause,' 'good cause,' the party would have the right to discharge the employee or reject the article. Parties make their own contracts, and either may stipulate as he may deem it necessary for his own protection, and it is optional whether the other accepts the terms proffered. Having once made the contract, neither can hold the other to a different contract. When, therefore, one guaranties to give satisfaction, he assumes the undertaking to perform the work in such manner as to satisfy the other, and invests the latter with full power to determine the reasonableness of the cause."

2. Warranty of Satisfaction—Vendee's Determination Conclusive.—Baltimore, etc., R. Co. v. Brydon, 65 Md. 223; 57 Am. Rep. 318; Seely v. Wells, 120 Pa. St. 75; Krum v. Mersher, 116 Pa. St. 17; Singlerly v. Thayer, 108 Pa. St. 291; Plano Mfg. Co. v. Ellis, 68 Mich. 101; Wood Reaping, etc., Co. v. Smith, 50 Mich. 570; Gray v. Alabama Nat. Bank (City Ct.), 10 N. Y. Supp. 5; Campbell Printing Press Co. v. Thorp,

and the same rule prevails in the case of sales on approval.¹ But such a provision in the contract does not give the vendee an arbitrary discretion to reject the property; if it complies with the warranty in every particular, he is bound to accept it.²

The vendor, however, may agree that the vendee shall have a right to return the article if it does not satisfy him, whether his objection is reasonable or not, but a contract is not to be construed as granting such right except where the terms are clear and explicit.³

The vendee must express his disapproval within a reasonable time, or within the time limited by the contract; his failure to do so amounts to a waiver of his right to return the article because it proves unsatisfactory.⁴

36 Fed. Rep. 414. The rule is discussed, also, in *CONTRACTS*, vol. 3, p. 845*n*; *SATISFACTION*, vol. 21, p. 713.

1. *De Bavier v. Funke* (Supreme Ct.), 21 N. Y. Supp. 410.

2. *May v. Hoover*, 112 Ind. 455.

Thus, in the case of *De Bavier v. Funke* (Supreme Ct.), 21 N. Y. Supp. 410, which was an action for the price of certain goods, it was shown that the defendant, a manufacturer of silks, ordered the plaintiffs, commission merchants, to purchase for him in *Italy* several bales of material, "subject to approval . . . and equal to cornaredo;" this cornaredo, it appeared, was the product of a certain factory. It being shown that the goods furnished were equal to cornaredo, the court refused to dismiss the action on the ground that the defendant had a right to reject the goods because he bought "on approval."

3. In *Adam Boiler Works v. Schnader*, 155 Pa. St. 394; 32 W. N. C. 281, there was a sale of a heating apparatus which the seller guaranteed would "give entire satisfaction in its operation;" the contract also provided that "should it prove unsatisfactory, after a thorough and reasonable trial, we will remove it at our expense." An action for the price having been brought, it was held error to direct a verdict for the plaintiff, if it had performed the contract according to its own satisfaction and that of the jury, as the contract required the apparatus to satisfy the defendant. Dean, J., speaking for the court, said: "The reasonable interpretation of the contract is that Schnader was to be satisfied with the heater; not the plaintiffs; not the plumber, nor other witnesses; not the jury. As is said in *Zaleski v. Clark*,

44 Conn. 218; 26 Am. Rep. 446: 'It is not enough to say she [the defendant] ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, not the court, is entitled to judge of that. The contract was not to make one that she ought to be satisfied with, but one she would be satisfied with.' The rule laid down by this court, in *Singerly v. Thayer*, 108 Pa. St. 291, is to the same effect, and is clearly applicable to this contract and this evidence. The court says: 'He [the defendant], therefore, was the person to decide and to declare whether it was satisfactory. He did not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was the fact which the contract gave him the right to decide. He was the person who was to test and use it. No other persons could intelligently determine whether in every respect he was satisfied therewith.' "

4. **Waiver of Special Provision.**—*Gen-tilli v. Starace*, 59 N. Y. Super. Ct. 449; *Potter v. Lee*, 94 Mich. 140; *Columbia Rolling Mill Co. v. Beckett Foundry, etc., Co.* (N. J. 1893), 26 Atl. Rep. 188.

Where the buyer is allowed thirty days in which to determine whether a horse sold to him is satisfactory, and he returns it within that time, the seller, by receiving it back, waives his right to complain and is bound to restore the purchase-money paid. *Maurer v. Wolff* (Supreme Ct.), 21 N. Y. Supp. 202.

The defendant agreed to take a certain amount of cheese, saying: "If, in the course of ten days, we find this cheese as you have represented it, we will pay." The defendant received all the cheese, and after twenty-six days, gave notice to the plaintiff that the cheese

XII. AUTHORITY OF AGENT TO WARRANT.—The question of the authority of the vendor's agent to bind his principal by a warranty can arise only in relation to express warranties. An implied warranty is not created by any special acts or language of the vendor or his agent, but by implication of law from the circumstances of the sale; it is an involuntary incident of the transaction. And this principle embraces express warranties which amount to nothing more than what the law would have implied had the vendor been silent.¹ Whether an agent is authorized to give a warranty in a particular case, must depend upon the character of his agency, the usage of trade in the locality in which the sale is made, and the subject of the sale. Ordinarily, a general agent vested with discretion, and having authority to do whatever is necessary to carry out the object of his agency, may bind his principal by a warranty.² So where it is the usage in

was not as represented and refused payment. It was held that having failed to return it within ten days, he must be considered as having accepted and would not be allowed to set up the defense of breach of warranty. *Potter v. Lee*, 94 Mich. 140.

1. Question Relates Only to Express Warranties.—See *Tiedeman on Sales*, § 183; *Murray v. Smith*, 4 Daly (N. Y.) 280. See also *Benjamin on Sales* (6th Am. ed.), § 624; *IMPLIED WARRANTIES*, vol. 10, p. 85; *AGENCY*, vol. 1, p. 358.

2. *Palmer v. Hatch*, 46 Mo. 585; *Gaines v. McKinley*, 1 Ala. 446; *Wilcox v. Henderson*, 64 Ala. 542; *Meister v. Cleveland Dyer Co.*, 11 Ill. App. 227; *Talmage v. Bierhausa*, 103 Ind. 270; *Randall v. Kehlror*, 60 Me. 37; 11 Am. Rep. 169; *Ahern v. Goodspeed*, 72 N. Y. 108; *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Dayton v. Hooglund*, 39 Ohio St. 671; *Fay v. Richmond*, 43 Vt. 25; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Taggart v. Stanbery*, 2 McLean (U. S.) 542; *Dingle v. Hare*, 7 C. B. N. S. 145; 97 E. C. L. 144; *Barwick v. English Joint Stock Bank*, L. R., 2 Exch. 259; 36 L. J. Exch. 147; *Routh v. MacMillan*, 2 H. & C. 750; 10 Jur. N. S. 158; *Benjamin on Sales* (6th Am. ed.), § 624; *Story on Agency* (9th ed.), § 85. See also *Victor Sewing Mach. Co. v. Rheinschild*, 25 Kan. 534.

An agent authorized to sell property, in the absence of any express limitation of his powers, is authorized to make any declaration in regard to the property, or to do any act which may be found necessary to make a sale, and which is usual and incidental thereto. *Ahern*

v. Goodspeed, 72 N. Y. 108. See *Wait v. Borne*, 123 N. Y. 592.

A general agent for the sale of reaping and mowing machines is presumed to be invested with power to warrant them, and such authority, nothing appearing to the contrary, is not restricted to warranties in writing. *Murray v. Brooks*, 41 Iowa 45; *Gale Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606; 23 Am. St. Rep. 739.

If an agent, employed by the indorsee of a bill to get it discounted, warrants it to be a good one, his employers are bound by this act, and are liable to refund, if the acceptor afterward dishonors the bill. But the rule would be otherwise if the principal, at the time of employing such agent, had said that he would not warrant or indorse the note. *Fenn v. Harrison*, 4 T. R. 177.

In *Skinner v. Gunn*, 9 Port. (Ala.) 305, the rule is stated that power given to an agent to sell a slave implies a power to warrant, but that a warranty given by the agent in his own name will not bind the principal, unless it is recognized and adopted by him. *Fenn v. Harrison*, 3 T. R. 757; 4 T. R. 177.

In *Helgear v. Hawke*, 5 Esp. 72, Lord Ellenborough said: "I think, the master having intrusted the servant to sell, he is intrusted to do all that he can to effectuate the sale, and if he does exceed his authority in so doing he binds his master." And in *Alexander v. Gibson*, 2 Campb. 555, the same justice said that if the servant was authorized to sell the horse, and to receive the stipulated price, he thought he was incidentally authorized to give a warranty

the sale of such goods, in the market where the sale takes place, to give a warranty, the agent may be deemed authorized to give one; in such cases the power to warrant is implied from the power to sell.¹ Thus, in sales of horses by a horse dealer, it is

of soundness. See also *Lane v. Dudley*, 2 Murphy (N. Car.) 119; 5 Am. Dec. 523.

But these last three cases are declared in *Cooley v. Perrine*, 41 N. J. L. 328; 32 Am. Rep. 210, to be no longer authority. In this case, the court, by Dixon, J., in commenting on the rule stated in the text, said: "If by this were meant that the agent is intrusted with all powers proper to the making of an effectual sale, its accuracy cannot be questioned. Undoubtedly, his (the agent's) authority extends to whatever is proper to be done in fixing the price, and the time and mode of payment, and the time and mode of vesting the title and delivering the chattel. All these are incident to the sale. But if the expression meant that the agent is intrusted with all powers convenient for the purpose of inducing the purchaser to buy, even to the extent of enabling him to make collateral contracts to that end, then I think it is in violation of the settled rule that the special agent must be confined strictly to his express authority, and is in opposition to well considered and authoritative decisions." See also *Perrine v. Cooley*, 42 N. J. L. 623.

When, however, the servant is merely authorized to deliver to the vendee the thing sold, and to take from him a receipt therefor, he has no implied authority to give a warranty. *Woodin v. Buford*, 2 C. & M. 391; 4 Tyr. 264; *Strode v. Dyson*, 1 Smith 400. And if what an agent to sell represents, is binding upon his principal as a warranty at all, the rule is confined to such representations of the agent as are made at the time of the sale, and not at another time. *Helgear v. Hawke*, 5 Esp. 72.

In *Boothby v. Scales*, 27 Wis. 626, it is said that an agent, who is authorized to sell a manufactured article for the makers, may bind them by an express warranty, notwithstanding any private instructions which are not known to the purchaser.

By Officer of a Corporation.—The representations of the manager and general superintendent of a corporation, as to the quality of certain goods sold by it, constitute a warranty, binding on the corporation, when it is

shown that he was in the habit of negotiating such sales, and that no limitation was put upon his power in that regard, except that prices were to be fixed by the president. *Decker v. Gutta Percha, etc., Mfg. Co.* (Supreme Ct.), 16 N. Y. Supp. 352.

1. Where Usage Is to Give Warranty.—*Skinner v. Gunn*, 9 Port. (Ala.) 305; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Alexander v. Gibson*, 2 Campb. 555; *Benjamin on Sales* (6th Am. ed.) 624.

Thus, in an action for a breach of warranty of certain rubber sold to the plaintiff by the defendant, a corporation which manufactured it, it is error to exclude the representations made by the defendant's general manager and superintendent as to its quality, where it appears that he was in the habit of negotiating sales, and that no limitation was put upon his power in that regard, save that prices were to be fixed by the president. *Decker v. Gutta Percha, etc., Mfg. Co.* (Supreme Ct.), 16 N. Y. Supp. 352. Compare *Dodd v. Farlow*, 11 Allen (Mass.) 426; 87 Am. Dec. 726.

"An agent to sell has a general authority to do all that is necessary and usual in the course of such employment. If it was usual, therefore, to warrant the quality of the article in question, even though Wilson had no express authority from the defendant to warrant, if he had a semblance of authority communicated to him by his principal, upon which those who dealt with him might rely, his principal is bound." *Byles, J.*, in *Dingle v. Hare*, 7 C. B. N. S. 145; 97 E. C. L. 144. The jury in this case having found that it was the custom in the locality of the sale to warrant guano, the agent selling such article was held to have been authorized to warrant its quality.

A custom from which the authority to make a warranty or representation may be implied, must be a usage of sellers of such articles, so well settled, notorious, and continuous, as to raise a fair presumption that it was known to buyer and seller, and that sales were made in reference to it. Such a custom is a fact, and is capable of proof as any other fact. It may be proved by

a general custom to warrant, and the vendor's agent is presumed to have authority to give a valid warranty.¹ But in the absence

evidence of facts and instances in which it has been acted upon; but it is not proved by evidence that it was acted upon in a few particular instances of dealing; nor is such evidence admissible to establish its existence. *Herring v. Skaggs*, 73 Ala. 447; 62 Ala. 180; 34 Am. Rep. 4. The existence of the usage to warrant is a question for the jury. *Wait v. Borne*, 123 N. Y. 592.

Warranty by Husband or Wife.—That a husband, in selling property for his wife, has general authority to warrant, see *Savage v. Eakins*, 31 Ill. App. 267.

In the case of *Taylor v. Green*, 8 C. & P. 316; 34 E. C. L. 407, it appeared that a baker being desirous of selling his shop and the good will of his business, an advertisement was inserted in a newspaper, stating that the house was doing twelve sacks a week. The advertisement was inserted by a broker, in consequence of a conversation with the baker's wife, who managed the business for him; in which conversation she told the broker that they did between nine and ten sacks a week, upon which the latter said, "We must make it twelve for the paper." In consequence of the advertisement, a person desirous of purchasing went to the wife, and said to her, "Are you really doing anything like this business?" to which she replied, "Yes, we are doing eleven sacks;" and appealed to the man in the shop, who confirmed her statement. The baker himself did not appear at all in any part of the transaction, except that he received the purchase-money, and paid the broker his commission. In an action brought by the purchaser on the representations contained in the advertisement, it was held that the baker was personally and individually answerable in damages, inasmuch as though he did not make any representations himself, yet he made his wife his agent, and was bound by her statements.

1. Sales of Horses by Horse Dealers.—*Howard v. Sheward*, L. R., 2 C. P. 148; *Bank of Scotland v. Watson*, 1 Dow. 45; *Alexander v. Gibson*, 2 Campb. 555 (a case where an agent's special authority to warrant did not need to be proved); *Foster v. Smith*, 18 C. B. 156; 86 E. C. L. 155; 1 Minor's Inst. (3d ed.), p. [205] 228.

Where a horse dealer, on a single occasion, employs another horse dealer, who occasionally assists in his business, to sell a horse for him, the latter has an implied authority to give a warranty of soundness; and evidence of an alleged custom among horse dealers not to give a warranty where the purchaser obtains a veterinary surgeon's certificate of soundness, is not admissible to contradict such implied authority. *Howard v. Sheward*, L. R., 2 C. P. 148; 36 L. J. C. P. 42; 15 W. R. 45; 15 L. T. N. S. 183.

But the rule of the text is confined to sales by the agents of horse dealers. Where the owner of a horse, who is not a dealer in horses, authorizes his agent to sell there is no implied authority to warrant. The buyer assumes the risk of proving the agent's authority. *Brady v. Todd*, 9 C. B. N. S. 591; 99 E. C. L. 592; *Cooley v. Perrine*, 41 N. J. L. 322; 32 Am. Rep. 210; *affirmed* 42 N. J. L. 623.

Thus, where the owner of a horse employed a person to sell it or exchange it for another horse suitable for staging, and the agent exchanged him for a span of ponies not suitable for staging, at the same time warranting him, it was held, in an action on the warranty, that the principal was not liable. *Scott v. McGrath*, 7 Barb. (N. Y.) 53; *Decker v. Fredericks*, 47 N. J. L. 469.

The distinction is very clearly set out in the opinion of Ashhurst, J., in *Fenn v. Harrison*, 3 T. R. 757; 4 T. R. 177: "I take the distinction to be that if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant, nevertheless, did warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his

of any of these circumstances, neither a general,¹ nor a special agent, has authority to give a warranty unless the authority is conferred on him expressly.²

employment." This rule is also laid down in *Bank of Scotland v. Watson*, 1 Dow. 45.

Warranty on Delivery After the Sale.—

Even where the sale is by a horse dealer, a warranty given after the sale by the servant who is authorized merely to deliver the animal, is not binding on the vendor. Thus, where a horse had been sold by A to B, and A's servant, on delivering the horse to B, made certain statements, and signed a receipt for the price of the horse, containing a warranty, it was held that A was not bound by the statements of the servant, nor by the warranty contained in the receipt signed by the servant, as no express authority to give the warranty was shown. *Woodin v. Buford*, 2 C. & M. 391; 4 Tyr. 264. So, also, where, on the purchase of a horse, the seller had given a warranty of soundness generally, and the servant, who was sent with the receipt to the agent of the other party, inserted, at his request, but without a special or general authority from his master the words "warranted sound to the regiment," it was held that the master was not bound by this alteration of the warranty, notwithstanding the money afterward came to his hands, and was retained by him. *Strode v. Dyson*, 1 Smith 400.

In *Miller v. Lawton*, 15 C. B. N. S. 834; 109 E. C. L. 833, in an action for a breach of warranty made on the sale of a horse, by the servant of a private owner at a fair, it was held that a letter from the plaintiff's attorney to the defendant, referring to the alleged warranty, and averring a breach of it, and an answer from the defendant, merely denying that there had been any breach of warranty, afforded evidence from which the jury might properly find that the servant had in fact authorized to warrant.

1. *Howard v. Sheward*, L. R., 2 C. P. 148; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; *Boothby v. Scales*, 27 Wis. 626. See also, in support of the general rule that a principal cannot limit the authority of a general agent by special private instructions, *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; 34 Am. Dec. 317; *Lob-*

dell v. Baker, 1 Met. (Mass.) 193; 35 Am. Dec. 358; *Blane v. Proudfit*, 3 Call (Va.) 207; 2 Am. Dec. 546.

2. Special Agent No Authority to Warrant in Absence of Usage, etc.—

In *Smith v. Tracy*, 37 N. Y. 79, it was held that an agent expressly authorized to sell bank stock had no authority to warrant it. *Wait v. Borne*, 123 N. Y. 592; *Cooley v. Perrine*, 41 N. J. L. 322; 32 Am. Rep. 210; *affirmed* 42 N. J. L. 623; *Graul v. Strutzel*, 53 Iowa 712; 36 Am. Rep. 250 (which was a sale of notes). And in *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586; 59 Am. Dec. 163, it was held that an agent has no power to warrant that certain flour would keep sweet during a voyage. *Croom v. Swann*, 1 Fla. 246; *Kircher v. Conrad*, 9 Mont. 191; 18 Am. St. Rep. 731 (which was a case of warranty by a clerk in a store); *Anderson v. Bruner*, 112 Mass. 14. In *Brady v. Todd*, 9 C. B. N. S. 592; 99 E. C. L. 591, it was held that the servant of a private owner of a horse had no power to warrant. So, also, in *Scott v. McGrath*, 7 Barb. (N. Y.) 53, which was a similar case. In *Field v. Allen*, 9 M. & W. 649, an agent of executors to sell two horses belonging to the estate, was held to have no authority to warrant their quality.

The rule is well stated in *Wait v. Borne*, 123 N. Y. 592, in the opinion of the court, by Peckham, J., "Whatever may be the law in regard to the customary power of an agent to warrant the article which he sells, there is no case, which I have found after considerable search, in which it has ever been held that an agent to sell a particular article has the right not only to warrant the article which he then sells, but to warrant all which may thereafter be sold by his principals to the party with whom he closes his own sale. There is no principle upon which such a claim can be founded. The idea upon which is founded the right to warrant, on the part of an agent to sell a particular article, is that he has been clothed with power to make all the common and usual contracts necessary or appropriate to accomplish the sale of the article intrusted to him, and if, in the sale of

Auctioneers, as a rule, have no implied power to warrant the articles sold by them,¹ nor have brokers or commission merchants,² except under the special circumstances stated.

If a vendor constitutes one his agent to sell a certain article, and specifies accurately the kind of warranty he is authorized to give, a purchaser having full knowledge of the extent of the agent's authority cannot enforce, against the principal, a warranty given by the agent in excess of his authority.³ This follows from the general rule that if the limitations of the agent's authority are public, or known to the person with whom he deals, the principal will not be liable where the agent exceeds his authority; but if such limitations be private, or not imposed by implication

that kind or class of goods thus confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority. If the agent, with express authority to sell, has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty. *Smith v. Tracy*, 36 N. Y. 79."

A general agent for the sale of iron safes has no implied authority to warrant or represent the safes to be burglar-proof; and, in the absence of an express authority, the act of the agent in making such warranty or representations would not be binding on the principal, unless there existed at the time of the sale, a custom in the sale of safes to warrant them as burglar-proof. *Herring v. Skaggs*, 73 Ala. 446; 34 Am. Rep. 4.

In *Palmer v. Hatch*, 46 Mo. 585, the rule is laid down that an authority to an agent to sell goods includes, in the absence of opposing circumstances, authority to employ the usual modes and means of accomplishing the object, such as giving a warranty of the quality and condition of the article sold. But a naked general power of sale given to an agent, does not carry with it such unusual authority as a right to warrant against any seizure of the article sold, *e. g.*, whisky, for a violation of the revenue laws.

1. Auctioneers.—*Blood v. French*, 9 Gray (Mass.) 197; *The Monte Allegre*, 9 Wheat. (U. S.) 616, which was a case of judicial sale; *AUCTIONS AND AUCTIONEERS*, vol. 1, p. 981. See also *McGaughey v. Richardson*, 148 Mass. 608.

But he may be liable personally where he volunteers a personal guar-

anty. *Dent v. McGrath*, 3 Bush (Ky.) 174; *AUCTIONS AND AUCTIONEERS*, vol. 1, p. 981.

The fact that the owner, prior to an auction sale of his cattle, warranted them in private to one who subsequently bought them at the sale, while neither the notice and advertisement of the sale, nor the auctioneer, mentioned any such warranty, cannot be set up as a fraud on other bidders, in order to annul the sale. *Bronson v. Leach*, 74 Mich. 715.

Proof that the owner, in the sale of a cow at auction, offered to warrant her to one of the bidders, is not of itself sufficient to prove a warranty to the purchaser. *Palmer v. Hamilton* (Ky. 1894), 24 S. W. Rep. 613.

2. Brokers and Commission Merchants.—*Dodd v. Farlow*, 11 Allen (Mass.) 426; 87 Am. Dec. 726. In this case, the vendee was not allowed to introduce evidence of a usage of trade, by which certain brokers were authorized to warrant merchandise sold by them. The court, by Bigelow, C. J., said: "The alleged usage . . . is unauthorized by law, and cannot be regarded as valid. It contravenes the principle which has been sanctioned and adopted by this court, upon full and deliberate consideration that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but which also engrfts on a contract of sale, a stipulation or obligation which is different from, or inconsistent with, the rule of the common law on the same subject." See also *COMMISSION MERCHANTS*, vol. 3, p. 324; *Smith v. Tracy*, 36 N. Y. 79. Compare, however, *Randall v. Kehlor*, 60 Me. 37; 11 Am. Rep. 169.

3. Wood Mowing Mach., etc., Co. v. Crow, 70 Iowa 340.

of law, the agent may bind his principal, although in so doing he exceeds his authority.¹

An authorized warranty by an agent may become binding on the principal by his subsequent ratification of it;² but a ratification is not to be implied from a mere acceptance by the principal of the price paid by the vendee, when his acceptance is made in ignorance of the warranty.³ Where the vendee relies upon a warranty given by an agent alleged to have express authority to give it, he has the burden of proof to establish the fact that such authority on the part of the agent existed.⁴

A vendor, who refers a purchaser to a third person for information in regard to the character and quality of the thing to be sold, is bound by the declarations of the person referred to, in the same degree as if he had made them himself.⁵

If the agent signs his own name to a written warranty, or otherwise gives a personal guaranty, the vendee may hold the agent liable upon it, even though the vendee could not proceed

1. *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; *Canham v. Piano Mfg. Co.* (N. Dak. 1893), 55 N. W. Rep. 583; *Howard v. Sheward*, L. R., 2 C. P. 148.

2. *Ratification of Unauthorized Warranty*.—See AGENCY, vol. 1, p. 429 *et seq.*; also *Churchill v. Palmer*, 115 Mass. 310, in which the evidence was held sufficient to show ratification.

3. *Not Implied from Vendor's Acceptance of the Price*.—*Smith v. Tracy*, 36 N. Y. 79 (a case of warranty of bonds); *Graul v. Strutzel*, 53 Iowa 712; 36 Am. Rep. 250 (a case of guaranty of a promissory note); *Wood Mowing Mach., etc., Co. v. Crow*, 70 Iowa 340; *Herring v. Skaggs*, 62 Ala. 180; 34 Am. Rep. 4; 73 Ala. 446; *Pennsylvania, etc., Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248; 29 Am. Dec. 543.

An agent for the sale of reapers, authorized to sell with warranty, sold a machine and warranted it, after the expiration of his agency and the appointment of a new agent who was not authorized to warrant; the notes he had received in part payment he turned over to his successor, who sent them to his principal without apprising him by whom the sale was made. The machinery proved defective and was returned to the agent who sold it. It was held that the principal, by accepting the notes and attempting to collect them, had ratified the acts of the assumed agent, and was bound by the warranty. *Eadie v. Ashbaugh*, 44 Iowa 519. *Compare Graul v. Strutzel*, 53 Iowa 712; 36 Am. Rep. 250.

4. *Burden on Vendee to Prove Existence of Agent's Authority*.—*Wood Mowing Mach., etc., Co. v. Crow*, 70 Iowa 340; *Melby v. Osborne*, 33 Minn. 492; *Churchill v. Palmer*, 115 Mass. 310; *Applegate v. Moffitt*, 60 Ind. 104.

In *Brady v. Todd*, 9 C. B. N. S. 592; 99 E. C. L. 591, it was held that a buyer who takes an animal on the agent's warranty must run the risk of being able to prove the agent's authority to give the warranty.

The record of a judgment obtained by the purchaser in an action for a false warranty against the agent who made the sale, is not, in an action by the agent against the principal to recover the amount paid on such judgment, evidence of authority from the principal to give the warranty. Evidence of such authority and of a warranty given in accordance with it must be *aliunde* such record. *Croom v. Swann*, 1 Fla. 246; 1 Chitty's Plead. (7th ed.), p. 38.

5. *Vendor Bound by Representations of Person to Whom Vendee Is Referred by Him*.—*Chadsey v. Greene*, 24 Conn. 562. In the case of *Deming v. Chase*, 48 Vt. 382, the vendor wrote to the vendee, who was negotiating with him as to the sale of a horse, that he might "trade with B.; whatever he does will be all right." It was held that the vendor was bound by B.'s warranty, and that B.'s admissions and declarations made while negotiating the bargain were admissible against him. See also *Albany, etc., Steel Co. v. Lundberg*, 121 U. S. 451.

against the principal because he had given his agent no authority to warrant.¹

XIII. RULE AS TO KNOWN OR OBVIOUS DEFECTS.—The rule is established that a warranty of quality does not embrace defects which are plain and obvious to the purchaser at the time of the sale;² or which are known to him then, unless they are referred to expressly as being included by it.³ When the property is before him during the transaction, the vendee is presumed to make some use of his senses, and to exercise a slight degree of care at least, so that he is held conclusively to have purchased with full knowledge of defects which are patent to an ordinary observer in the same situation.⁴ The rule has been held to apply to a case where the

1. Agent's Personal Warranty.—*Croom v. Swann*, 1 Fla. 246. In *Schell v. Stephens*, 50 Mo. 375, a warranty was held to be an original undertaking, and therefore not within the Statute of Frauds.

Thus, a statement by the auctioneer that he knew W. (the owner of the article being sold) well, "and he was all right, and he (the auctioneer) would warrant that his title was good," amounts to a warranty upon which recovery may be had against the auctioneer. *Dent v. McGrath*, 3 Bush (Ky.) 174. But a statement by the auctioneer to the crowd assembled around: "Now here is a nice lot of young sound sheep," does not constitute a warranty, and there can be no recovery based upon it, although the sheep turned out to be diseased. *McGrew v. Forsythe*, 31 Iowa 179. See also *Woodward v. Boston*, 115 Mass. 81.

2. Livingston v. Arrington, 28 Ala. 424; *Brown v. Freeman*, 79 Ala. 406; *Marshal v. Drawhorn*, 27 Ga. 275; *Skinner v. Moye*, 69 Ga. 476; *Miller v. Moore*, 83 Ga. 684; 20 Am. St. Rep. 329; *Hoffman v. Oates*, 77 Ga. 701; *House v. Fort*, 4 Blackf. (Ind.) 293; *Storrs v. Emerson*, 72 Iowa 390; *Richardson v. Johnson*, 1 La. Ann. 389; *Edwards v. Glasson*, 12 La. Ann. 586; *McCormick v. Kelly*, 28 Minn. 135; *Leavitt v. Fletcher*, 60 N. H. 182; *Schuyler v. Russ*, 2 Cai. (N. Y.) 202; *Loop v. Litchfield*, 42 N. Y. 351; 1 Am. Rep. 543; also *Bennett v. Buchan*, 76 N. Y. 386, a case of warranty of a judgment, in which it was held that the purchaser was bound by knowledge of his agent. *Studer v. Bleistein*, 115 N. Y. 316; *Mulvany v. Rosenberger*, 18 Pa. St. 203; *Scarborough v. Reynolds*, 13 Rich. (S. Car.) 98; *Fisher v. Pollard*, 2 Head (Tenn.) 314; 75 Am.

Dec. 740; *Long v. Hicks*, 2 Humph. (Tenn.) 305; *Williams v. Ingram*, 21 Tex. 300; *Story on Contracts* (4th ed.), § 830; *Tiedeman on Sales*, § 195; *Benjamin on Sales* (6th Am. ed.), § 616; 3 *Minor's Inst.*, p. 247. See also *Jordon v. Foster*, 11 Ark. 139; *Dana v. Boyd*, 2 J. J. Marsh. (Ky.) 587; *Vanderhorst v. McTaggart*, 2 Bay (S. Car.) 498. And see *Synnott v. Shaughnessy*, 130 U. S. 572, where there were obvious defects in a mine purchased. See also *Byrd v. Campbell Printing Press, etc., Co.* (Ga. 1892), 16 S. E. Rep. 267.

3. McCormick v. Kelly, 28 Minn. 135; *Nye v. Iowa City, etc., Works*, 51 Iowa 129; 33 Am. Rep. 121.

4. In Vanderwalker v. Osmer, 65 Barb. (N. Y.) 561, *Mullin, J.*, said: "It will not do to permit a vendee, having the property before him, and defects in it plainly discoverable, to close his eyes and ears and omit to use his senses, and pretend that he relied on the representations, and was thereby misled. In cases of warranty, an obvious defect is not covered by the warranty; and it is because the law requires the purchaser to examine the property with that degree of care and skill that men are generally capable of exercising in respect to property they are proposing to purchase. The same principles should apply in cases of false representation." See also *Hoffman v. Oates*, 77 Ga. 701.

The rule of *caveat emptor* applies to the sale of a cribbing horse, where it appears that a slight examination of the horse's mouth would have revealed the defect to the purchaser. *Dean v. Morey*, 33 Iowa 120.

In the case of *Liddard v. Kain*, 9 Moore 356; 2 Bing. 183, the seller informed the buyer that one of two horses he was about to sell him had a cold, but agreed to deliver both at the

vendee's omission to observe the defects was caused by the vendor's misrepresentations,¹ though it seems that in such case the vendee would have a remedy against his vendor, either for the fraud, or on the ground that such representations amounted to an explicit warranty against the defects.²

The general rule is apt to open the way to fraud, and the courts are usually inclined to restrict its application. It applies only to such defects as are obvious to the senses, that is, to such as are discernible by an ordinary observer, having no special knowledge or skill, examining the property with a view to purchasing it.³ It does not extend to defects which, though apparent to some extent, are equivocal and in their character doubtful as to whether permanent or temporary, or are mere harmless blemishes or partially developed unsoundness;⁴ nor to defects, the consequences of which cannot be determined in advance;⁵ nor to defects such as would require the exercise of special skill or care

end of a fortnight sound and free from blemish. At the expiration of that time, the horses were delivered, but one had a cough and the other a swelled leg, which was apparent at the time of the sale. The buyer having brought an action to recover the price, it was held that a verdict in favor of the seller was properly brought in, as the warranty did not relate to the time of the sale, but to a subsequent period.

Purely surface indications, open to all ordinary observers, and situated on the path which the plaintiffs (the vendees) traveled in going to and from their work, and which must have been known to them, are not the subject of concealment or misrepresentation. *Synnott v. Shaughnessy*, 130 U. S. 572.

1. *Vandewalker v. Osmer*, 65 Barb. (N. Y.) 561; *Fox v. Everson*, 27 Hun (N. Y.) 355, set out in Benjamin on Sales (6th Am. ed.), § 616, n.

2. *Richardson v. Johnson*, 1 La. Ann. 389; also *Henshaw v. Robins*, 9 Met. (Mass.) 83, a case where the goods were wrapped up in a bundle so that defects could not be seen. See also *supra*, this title, *What Constitutes a Warranty*.

3. *Birdseye v. Frost*, 34 Barb. (N. Y.) 367; *Hill v. North*, 34 Vt. 604; *Pinney v. Andrus*, 41 Vt. 631. In *Thompson v. Botts*, 8 Mo. 710, scrofula in a slave was held to be included in a warranty, it being not easily detectable. *Henshaw v. Robins*, 9 Met. (Mass.) 83; 43 Am. Dec. 367; *Jordan v. Foster*, 11 Ark. 139.

4. *Doubtful Defects*.—*Fisher v. Pollard*, 2 Head (Tenn.) 314; 75 Am. Dec.

740. In *Hill v. North*, 34 Vt. 604, the court said: "The rule excluding from a warranty such defects as are known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them." It was, therefore, held that a small bunch on a horse's leg, which was obvious at the time of the sale but which did not then materially affect his value, and which afterward developed into a serious defect, was included in the warranty. See also, as supporting the same view, *Shewalter v. Ford*, 34 Miss. 417; *Vates v. Cornelius*, 59 Wis. 615. In *Fletcher v. Young*, 69 Ga. 591, recovery was allowed on a warranty of "both horses sound and without blemish; one horse having now a little cough," it appearing that one horse was diseased. *Shillitoe v. Claridge*, 2 Chitty 425; 18 E. C. L. 386.

An express warranty against all unsoundness in a horse protects the purchaser against defects arising from disease of the kidneys or spine, where these defects are not apparent to the eye, although some symptoms of the disease are apparent but are not known to the buyer as such. *Storrs v. Emerson*, 72 Iowa 390.

5. The defect must be such as to disclose to the vendee at the time of the sale, not only its existence, but its actual extent and character. *Fisher v. Pollard*, 2 Head (Tenn.) 314; 75 Am. Dec. 740. In this case it is also held that

to be detected.¹ The warranty may be, of course, in such terms that it will embrace all defects of whatever kind or character, and in such a case the presumption of law as to patent defects has no application.² And where it appears conclusively that the purchaser relied upon the representations and warranty of the vendor, the warranty, it seems, will cover all defects, although the purchaser had abundant opportunity to examine and inspect but neglected to do so.³ Parol evidence may be introduced to show that the defect was obvious, or that the vendor disclosed the unsoundness at the time of the sale, and this notwithstanding the recognized rule that, when the contract is in writing, no parol evidence can be introduced to establish a warranty not in the written agreement.⁴ So, also, such evidence is admissible to show that at the time of the sale the purchaser had knowledge of the defects.⁵

The reason for the rule, and therefore the rule itself, ceases, when the vendor uses art to conceal, and actually does conceal, from the purchaser defects which ordinarily would be obvious;⁶

parol evidence to show that the defect was obvious, or that the vendor disclosed it at the time of the sale, is admissible, notwithstanding the warranty may be in writing.

1. In *Meckley v. Parsons*, 66 Iowa 63; 55 Am. Rep. 261, the vendor warranted a certain kiln of bricks "to be good brick and all right." It appeared that in the kiln of 50,000 bricks there were about 10,000 which were worthless; that the purchaser saw the kiln, the exterior of which was made of good bricks; that in the interior was a "cold spot" where the bricks were imperfectly burned, but this could not be detected except by going on top of the kiln and removing the covering. The court held that this defect was covered by the warranty; that it was error to instruct the jury that "if by the exercise of ordinary care at the time of the sale, the purchaser might have discovered and known the character, quality, and number of bricks in the kiln and failed to do so, he cannot recover because of a breach of warranty." *Citing Benjamin on Sales* (6th Am. ed.), § 616.

So where the vendor of a mare and a mule had them both in a single stall, where defects were not easily discoverable, when the buyer called to examine them, and the latter, being inexperienced, and being warned by the vendor not to enter the stall because the mule would kick, made the purchase relying on the assurances given him by the vendor, it was held that the assurances amounted to a warranty of soundness which would extend to visible defects.

Kenner v. Harding, 85 Ill. 264; 28 Am. Rep. 615.

2. **Obvious Defects May Be Expressly Included.**—*Pinney v. Andrus*, 41 Vt. 631; *Storrs v. Emerson*, 72 Iowa 390; *First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Fletcher v. Young*, 69 Ga. 591; *Callaway v. Jones*, 19 Ga. 277; *Fitzgerald v. Evans*, 49 Minn. 541; *Watson v. Roode*, 30 Neb. 264. See also *Liddard v. Kain*, 2 Bing. 183; 9 E. C. L. 373; and *Margetson v. Wright*, 7 Bing. 603; 20 E. C. L. 255; 8 Bing. 454; 21 E. C. L. 342, both of which cases are set out at length in *Benjamin on Sales* (6th Am. ed.), § 617.

3. *First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Vates v. Cornelius*, 59 Wis. 615.

4. *Fisher v. Pollard*, 2 Head (Tenn.) 314; 75 Am. Dec. 740.

5. *Bennett v. Buchan*, 76 N. Y. 386. In *Birdseye v. Frost*, 34 Barb. (N. Y.) 367, it was said that the question as to whether the defects complained of were visible, is not one of law merely, but is so far a mixed question of law and fact, that the finding of the justice at the trial will not be reversed where the evidence is conflicting.

6. *Chadsey v. Greene*, 24 Conn. 562; *Gant v. Shelton*, 3 B. Mon. (Ky.) 423; *Kenner v. Harding*, 85 Ill. 264; 28 Am. Rep. 615 (leading case); *Irving v. Thomas*, 18 Me. 418.

Thus, in *Robertson v. Clarkson*, 9 B. Mon. (Ky.) 507, the horse sold had badly diseased eyes, their character being discoverable upon a slight inspection. The vendor, however, represented that the

for if the vendor says or does anything with an intention to divert the eye or obscure the observation of the buyer, even in relation to patent defects, he is guilty of an act of fraud.¹ So, also, the rule does not extend to cases in which the vendee had no opportunity to examine the thing sold.² The fact that the vendee at the time of the sale was aware of a slight defect does not prevent his recovery upon a general warranty, where he can show a breach of it in respect of a defect other than that of which he was aware.³

Whether any alleged defect was obvious at the time of the sale, and consequently not covered by the warranty, is a question of fact to be determined by the jury, except in cases where the facts are too plain to admit of reasonable doubt.⁴ In the subjoined note various cases are given as illustrating and applying the rules just stated.⁵

XIV. CONSTRUCTION AND INTERPRETATION OF WARRANTIES—1. General Rule of Construction.—Words used in a warranty are to be

soreness of the eyes was due to a switch stroke inflicted some weeks previously, and that the eyes were rapidly getting well. The vendee having relied upon these representations, it was held that he might recover upon the warranty, since the horse's eyes were really diseased so that he became blind.

1. *Chadsey v. Greene*, 24 Conn. 562.

2. Where it appears that the property purchased was not present at the time of the sale; that the purchaser had not seen it, and relied entirely on the vendor's representations, the rule that the purchaser is bound to notice patent defects does not apply. *Hanks v. McKee*, 2 Litt. (Ky.) 227; 13 Am. Dec. 265.

3. Thus the fact that on the sale of a mare the buyer knew she was slightly lame, will not prevent his recovering for a breach of a general warranty of soundness, on proof that she was afflicted with navicular disease. *Huston v. Plato*, 3 Colo. 402.

4. *Question for the Jury.*—*Birdseye v. Frost*, 34 Barb. (N. Y.) 367.

5. *Illustrative Cases—What Are Obvious Defects.*—On the sale of a patent right to an improved churn, which the vendor himself was manufacturing, and a specimen of which he exhibited to the purchaser, stating that it was made of juniper wood, when, in fact, it was made of white pine, and that the dasher was nickel-plated, and would not discolor butter, when, in fact, it was made of polished iron, which would discolor milk and butter, it cannot be said that the difference in the appearance of these substances is so plain and obvi-

ous as to bring the case within the principle applicable to patent defects. *Tabor v. Peters*, 74 Ala. 90; 49 Am. Rep. 804. And in the sale of a steam engine, a defect in the steam chest, readily discernible on taking off the lid, is not a latent defect. *Drew v. Edmunds*, 60 Vt. 401; 6 Am. St. Rep. 122.

The blindness of a horse in one eye, where the organ is entirely destroyed, constitutes an obvious defect. *Margetson v. Wright*, 7 Bing. 603; 20 E. C. L. 255. But where the organ remains apparently perfect, so that the exercise of skill and a careful examination are necessary to detect the blindness, it is not an obvious defect of which the vendee is bound to take notice. *House v. Fort*, 4 Blackf. (Ind.) 296.

A horse's habit of "cribbing," where it can be detected by a slight examination of the animal's mouth, is an obvious defect. See *Dean v. Morey*, 33 Iowa 120.

Sourness or unsoundness in salted fish in barrels, where they are defects which may be detected by smell when the barrels are opened and inspected, are patent defects within the rule where the sale is made subject to the buyer's inspection. *Vipond v. Findlay* (Super. Ct.), 7 Montreal L. Rep. 243.

A guaranty that county warrants were genuine and were regularly issued, made upon a sale to a citizen of another state, is broken by want of the seal required by statute to be on them. This is not a patent defect of which the vendee is bound to take notice. *Smelzer v. White*, 92 U. S. 390.

construed according to their natural import; they must be presumed to have been used in their ordinary sense, that is, in the sense in which they are used by people in similar connections; a technical meaning is not to be given them, unless it can be shown that the parties intended to use them in their technical sense.¹

The warranty is not to be extended unduly by implication from other parts of the contract in which it is contained; it is to be given such a construction as a reasonable and unprejudiced person would place upon it, and is not to be taken as embracing all that the vendee might have construed it to include when he made the purchase.²

If the contract is in writing, the question of whether warranties exist, and of the interpretation and construction of those shown to exist, is for the court. Proof of parol warranties cannot be made in such a case, and the rule that written instruments are to be construed by the court applies.³ And even where the contract is not in writing, but its terms have been established clearly by parol evidence, the extent and effect of the warranties are to

1. *Gentili v. Starace*, 133 N. Y. 140. See also *Troy Laundry Machinery Co. v. Henry*, 23 Oregon 232; *Scrogin v. Wood* (Iowa, 1893), 54 N. W. Rep. 437.

Thus, in a contract of sale of tobacco to a manufacturer, a warranty that the tobacco is in "sound order" means such order as would, with ordinary care, insure the sound condition of the tobacco at the time of its arrival at the place where it is to be manufactured, and for a reasonable time thereafter. *Reynolds v. Palmer*, 21 Fed. Rep. 433.

Applications of the Rule.—Where the warranty upon a sale of a reaping machine is that the machine is a "good grain-cutting machine," upon which "two experienced binders will bind as much grain in one day, as they could on the ground in two," etc., the words "experienced binders" are to be taken as meaning those accustomed to do such work and having the requisite knowledge, and not necessarily those who were experienced in binding on that particular machine. *Gammar v. Borgain*, 27 Iowa 369.

The words "I warrant and defend," used in the sale of a chattel, mean a warranty of soundness as well as of title. *Duff v. Ivy*, 3 Stew. (Ala.) 140.

In an action for the breach of warranty of a horse, the proof was that when the defendant swapped the horse to plaintiff, he told him that "one of the horse's eyes was blind, but that the other eye was as good as any other horse's."

It was held that this was sufficient evidence of a warranty to sustain a verdict for the plaintiff. *Buckman v. Haney*, 11 Ark. 339.

2. Question for the Court.—See the general subject discussed in *QUESTIONS OF LAW AND FACT*, vol. 19, p. 646. See also *infra*, this title, *Parol Warranty Where Contract Is in Writing*; *Wason v. Rowe*, 16 Vt. 525; *Brown v. Bigelow*, 10 Allen (Mass.) 244; *Stroud v. Pierce*, 6 Allen (Mass.) 416; *Randall v. Thornton*, 43 Me. 226; 69 Am. Dec. 56; *Halliday v. Briggs*, 15 Neb. 223; *Behn v. Burness*, 3 B. & S. 751; 113 E. C. L. 749.

Although parol evidence is not, as a rule, admissible to contradict, vary, or add to the written agreement, the court may look, not only to the language of the correspondence by which the transaction was made, but also to the subject-matter of the agreement and the surrounding circumstances, in order to be placed as nearly as possible in the position in which the contracting parties were when they entered into the agreement. *Dayton v. Hooglund*, 39 Ohio St. 671.

3. See *Dickson v. Zizinia*, 10 C. B. 602; 70 E. C. L. 600; 15 Jur. 359. In this case, the vendor sold a cargo of corn then shipped at Orfano on board a vessel, at a certain price, including freight to Cork, with a stipulation that the quality of the corn was equal to the average of the shipments of S. that season, and that the corn had been shipped

be determined by the court.¹ It is the jury's province to say what were the terms of the contract where they are in dispute, but their construction is for the court.² When the contract is wholly in writing, therefore, there is no occasion for the exercise of the jury's functions. Some cases consider, however, that in oral contracts it is for the jury to say whether certain representations amount to a warranty, since, in many instances, it is a question of the intention of the parties.³

in good and merchantable condition. It was held that the corn was not warranted to be in good and merchantable condition for a foreign voyage, but that it was only warranted to be in a good and merchantable condition generally, without reference to its fitness for the purpose for which it was bought. *Bull v. Robinson*, 10 Exch. 342; 21 L. J. Exch. 165.

The case of *Walker v. Milner*, 4 F. & F. 745, was an action by a tradesman against the manufacturers of an iron safe, for the breach of an alleged warranty that it was strong enough to resist all attempts that might be made to force it open. The proof was that it had been broken into by burglars more than six years after the sale and delivery, and there was some evidence that it was broken open easily, and that it was far less strong and secure than it ought to have been. It was held that the warranty, as an absolute warranty of perfect security for all time to come, was one so extensive, even if it would be valid, that it required very strong evidence of an express warranty to that extent, and was not sustained by proof of mere representations that the safe would be strong enough to resist burglars.

1. *Short v. Woodward*, 13 Gray (Mass.) 86.

2. *Kankakee Stone, etc., Co. v. Ugrow*, 36 Ill. App. 448. In the case of *Foster v. Smith*, 18 C. B. 156; 86 E. C. L. 155, A, as agent of B, sold a mare to C, and having no express authority from B to warrant her, refused to do so, but, at the time of the sale, told C that "if the mare was not all right, she was not his." C thereupon paid the price which was received by B. The mare having proved to be unsound, C returned her to A and sued B for a return of the money paid for her. The trial judge left the following questions to the jury: Was the mare sound or unsound at the time of the sale? Was there a warranty given

by A to C? Was the warranty given by B's authority? And when the mare was sent back to A, was she received by him for B or for C? The jury answered the first and third questions in the negative, the second in the affirmative, and as to the last, that the mare was not received back by A on B's account; and a verdict was thereupon entered for B. The court, on appeal, directed a new trial on the ground that the proper question to leave to the jury was, whether it was part of the contract that the mare should be returned if she proved unsound. *Foster v. Smith*, 18 C. B. 156; 86 E. C. L. 155.

3. **Province of the Jury.**—*Patrick v. Leach*, 8 Neb. 530. Thus, in *Tuttle v. Brown*, 4 Gray (Mass.) 457; 64 Am. Dec. 80, which was a case of the sale of a cow, the buyer remarked: "You said she was all right?" to which the seller replied: "Well, she is all right." It was held that evidence of this conversation was competent as showing an admission of a warranty at the time of the sale; that whether it amounted to a warranty or not was for the jury to say. The same view is taken in *Congar v. Chamberlain*, 14 Wis. 258; *Boothby v. Scales*, 27 Wis. 626; *Connoble v. Clark*, 38 Mo. App. 476. In *McClintock v. Emick*, 87 Ky. 167, the court said: "We are aware that some cases seem to draw a distinction between written and parol contracts, holding that if the contract be in writing, it is for the court to say whether there was a warranty; but if in parol, that is for the jury to determine. We see no reason for this distinction where it is clear, in the case of an oral contract, that the vendor has warranted the condition of the property." On a parol warranty of the soundness of an animal, it is for the jury to decide what is embraced therein; and on that question the qualities and uses for which the animal was sold or purchased may be referred to as explaining what was

Where the warranty is specifically of a particular quality or against certain named defects, there is an implied exclusion of any warranty as to other qualities or defects.¹ But where there is a mere agreement to warrant, the warranty embraces all defects, whether known to the seller or not, unless they are obvious at the time of the sale.²

The warranty must be considered as relating to the time of the sale, that is, when the transfer of title took place, and not to the time of delivery.³ This is ordinarily, though not necessarily, at the time the transfer of possession is made. Thus, in the case of a contract for the sale and delivery of goods f. o. b., the warranty is to be construed as relating to their state at the time of their delivery at the point of shipment, and not at the time the contract was entered into.⁴

2. Construction of Particular Warranties.—No precise rules, other than the general principles just stated, can be laid down for the

intended to be embraced in the warranty. *Thornton v. Thompson*, 4 Gratt. (Va.) 121. See also *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Williams v. Cannon*, 9 Ala. 348; *Stearnes v. Erwin*, 10 Ired. (N. Car.) 226; *Figge v. Hill*, 61 Iowa 430.

Whether an affirmation by the vendor, made at the time of the sale, was the mere expression of opinion, or the positive assertion of a fact intended and understood as a warranty, is for the determination of the jury. *Bradford v. Bush*, 10 Ala. 386; *Hawkins v. Pemberton*, 51 N. Y. 199; 44 How. Pr. (N. Y.) 102; 10 Am. Rep. 595. Thus, where the vendor, upon the sale of a colt, remarked: "He's sound and will make a good horse," his words did not necessarily amount to a warranty, but it should be left to the jury to find whether it was the understanding of the parties that they were to act as a warranty. *Duffee v. Mason*, 8 Cow. N. Y. 25.

In an action for a breach of warranty by the vendee against the vendor of certain goods, who has warranted them to be of a particular denomination, but not according to sample, it is a proper question for the jury as to whether the amount of adulteration in the goods supplied is such as to alter their distinctive character. *Wieler v. Schilizzi*, 17 C. B. 619; 84 E. C. L. 617; 25 L. J. C. P. 89.

1. *Jackson v. Langston*, 61 Ga. 392; *International Pav. Co. v. Smith*, 17 Mo. App. 264. See *infra*, this title, *Express and Implied Warranties*.

2. *Ricks v. Dillahunt*, 8 Port.

(Ala.) 133; *Leopold v. Van Kirk*, 29 Wis. 548.

3. **Warranty Must Be Construed as Relating to Time of Sale.**—*Price v. Barr*, Litt. Sel. Cas. (Ky.) 216; *Luthy v. Waterbury*, 140 Ill. 664; *Blewitt v. Evans*, 42 Miss. 804; *Whitworth v. Carter*, 43 Miss. 61; *Postel v. Oard*, 1 Ind. App. 252. Thus, where the contract for the sale of twine for future delivery contains a warranty that "this twine is in good condition and is a merchantable article," the warranty refers to the condition of the twine at the date of the contract and not at the time fixed for delivery. *Luthy v. Waterbury*, 140 Ill. 664.

Part of the price due on the sale of a slave was paid at the time of the sale and a receipt for it taken; on the payment of the balance, a bill of sale was given warranting his soundness. It was held that the warranty referred only to his soundness at the time of the sale. *Brown v. Frazier*, 2 Mill's Const. (S. Car.) 413.

In an action on a warranty in the sale of goods shipped from a distant point, the vendee having no opportunity of testing the quality of the goods at the place of delivery, evidence was admissible to show the bad quality of such goods when received, together with expert testimony to show the means used for their preservation, and that if good when shipped they ought to have remained so. *Ryan v. Ulmer*, 108 Pa. St. 332; 56 Am. Rep. 210.

4. *Drews v. Ann River Logging Co.*, 53 Minn. 199. See also *English v. Spokane Commission Co.*, 57 Fed. Rep. 451.

construction of all the peculiar contracts arising; the circumstances of the whole case, the character of the transaction and of the particular article sold, including the usage of trade in the sale of such articles, must control the interpretation.¹

1. Instances.—In Sales of Horses.—In *Willard v. Stevens*, 24 N. H. 271, the contract was: "J. W. bought one red horse, six years old, which I warrant sound and kind." The court held that the age was a mere matter of description, and that the warranty extended only to soundness and kindness. In this case the jury allowed damages also for a breach of the supposed warranty of age. It was held that the plaintiff might have judgment on the verdict if he would remit the amount which he had been improperly assessed for a breach of the supposed warranty of age.

So in *Budd v. Fairman*, 8 Bing. 48; 24 E. C. L. 221; 5 C. & P. 78; 21 E. C. L. 217, where the writing was "Rec'd of B. £10 for a gray four years old colt, warranted sound," the warranty was held to be restricted to the soundness of the animal and not to include its age. See *Richardson v. Brown*, 1 Bing. 344; 8 E. C. L. 540. Likewise, in *Wason v. Rowe*, 16 Vt. 525, a bill of sale of a horse, in these words: "T. W. bought of E. R. one bay horse, five years old last July, considered sound," signed by the vendor and acknowledging the receipt of the purchase-money, was considered not to amount to a warranty of the soundness of the horse.

A receipt running thus: "Received from A. the sum of £60 for black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon," was not a warranty that the horse was quiet to ride and drive. *Anthony v. Halstead*, 37 L. T. N. S. 433.

Where the warranty was stated in these terms: "To be sold, a black gelding, five years old; warranted;" it must be considered as applying to soundness only, although some ambiguity might be occasioned by the particular structure of the sentence. *Richardson v. Brown*, 1 Bing. 344; 8 E. C. L. 540.

A representation made on the sale of a horse that the animal is fourteen years old, is a warranty that he is no older. *Burge v. Stroberg*, 42 Ga. 89.

In Sales of Reapers and Harvesters.—See *HARVEST*, vol. 9, p. 304; *Wendall*

v. Osborne, 63 Iowa 99; *Fuller v. Schroeder*, 20 Neb. 631; *Aultman v. Stichler*, 21 Neb. 72.

Where a machine sold as a "self-binding harvester" is warranted to be capable of "cutting" a certain number of acres per day, the "cutting" includes the binding. *Osborne v. McQueen*, 67 Wis. 392.

In *McCormick Harvesting Mach. Co. v. Brower* (Iowa, 1893), 55 N. W. Rep. 537, the contract of sale of a harvesting machine provided that the machine was "warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should fail to work well, the purchaser shall give immediate notice to the company," etc. It was held that the terms as stated did not confine the warranty to the condition of the machine as being "well made and durable," but embraced an undertaking that the machine would work well. See also, generally, *Fairfield v. Madison Mfg. Co.*, 38 Wis. 346.

In Sales of Other Machinery.—See *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299; *Latham v. Shipley*, 86 Iowa 543. A warranty that a cotton press will press "at the rate of sixty bales per hour," is not to be construed as a warranty that it will press at that rate for ten hours every day, but only for a limited time, since it is not presumed that such machines are to be operated to the utmost limit of their capacity continuously. *Hazlehurst Compress, etc., Co. v. Boomer, etc., Compress Co.*, 48 Fed. Rep. 803; 1 C. C. A. 102; 2 U. S. App. 139.

Contractors, in agreeing to furnish machinery "adapted to and suitable for a boat, and that will drive her from twelve to fifteen miles an hour," do not undertake to furnish machinery that would propel her "as she was" at that speed, but only machinery adequate to propel a boat of her size at that speed; they are not liable for her sufficiency for the machinery after it is put in. *Fisk v. Tank*, 12 Wis. 276.

A contract to "furnish a steam boiler suitable to the engine," and a delivery, under such contract, of a boiler,

amounts to a warranty that it is suitable for the purpose proposed. *Street v. Chapman*, 29 Ind. 142.

A purchaser contracted with a dealer for the purchase of a windmill, tank, and fixtures, the whole being an appliance for drawing and storing water for the use of stock. On the contract were indorsed certain warranties of "the within ordered windmill." The court considered that the warranty should be construed in the light of the surrounding circumstances, and therefore held that it included the whole plant, the tank, pump, and appliances, and not merely the windmill alone. *Fairbanks v. DeLissa*, 36 Mo. App. 711. For a similar case, see *Raynor v. Bryant*, 43 Kan. 492.

In a contract for the sale and delivery of a patent diamond drill, the proviso that the machine was "to be complete in everything 'for working'" is not an express warranty that the machine would do the work for which it was purchased, but means only that the machine, such as it was in principle and range of usefulness, should be delivered fully equipped and prepared to do what, in principle, it was capable of doing. *McGraw v. Fletcher*, 35 Mich. 104.

Where milling machinery is warranted to make flour "to satisfy the trade" of the party to whom it is sold, the "trade" meant is the trade in and around the place where the mill is situated. *Knowlton v. Oliver*, 28 Fed. Rep. 516.

In the case of *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, the contract called for machinery capable of applying a pressure of 1,500 tons to a bale of tan bark. It was held that the warranty was broken unless the machinery furnished was such as would work efficiently, and be capable of continuous operation for the ordinary duration of such mechanism constructed for similar uses, and be able to supply a pressure of 1,500 tons to every bale for the length of time such machinery should work, under reasonably careful management.

An agreement to furnish "a first-class machine" does not mean the best machine made by the manufacturer who makes the agreement, but means a first-class machine as compared with those in general use. *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299.

Where a contractor agrees to construct an experimental engine, the

first under a new patent, on plans to be approved by the patentee, with a warranty for the workmanship and materials of his own shop, but expressly excepting from the warranty the boiler and other parts, bought from outside parties, and the working of the machine as a whole, the relative capacity of the boiler and the engines is not within the warranty of the workmanship, and the contractor is not liable for an error therein. *Cyclone Steam Snow Plow Co. v. Vulcan Iron Works*, 52 Fed. Rep. 920; 3 C. C. A. 352; 10 U. S. App. 387.

Cargoes at Sea.—A contract to sell 1,170 bales of gambier, "now on passage from Singapore and expected to arrive in London, viz., per Ravenscraig, 805 bales, per Lady Agnes, 365 bales," amounts to a warranty that the goods were then on passage. *Gorriksen v. Perrin*, 2 C. B. N. S. 681; 89 E. C. L. 681; 3 Jur. N. S. 867.

The case of *Johnson v. MacDonald*, 9 M. & W. 600; 6 Jur. 264; 12 L. J. Exch. 99, was an action on the following bought and sold note: "Sirs: We have this day bought, for your account, from M. & Co., a hundred tons of nitrate of soda, duty paid, to arrive ex Daniel Grant, to be taken from the quay at landing, weights," etc., signed by the buyer's brokers. At the bottom of the note and below the signatures was this memorandum: "N. B. Should the vessel be lost, this contract to be void." It was held that this did not amount to a warranty that the nitrate of soda should arrive by the Daniel Grant, but that it was a contract of sale in the double event of the ship's arrival with the nitrate of soda on board. *Johnson v. MacDonald*, 9 M. & W. 600. See also *Iasigi v. Rosentein* (Supreme Ct.), 20 N. Y. Supp. 491.

A contract for the sale in London of a cargo of T. wheat, then lying afloat at Queenstown in Ireland, contained the following provisions: "In case of any dispute, this contract not to be void, it being agreed by the buyers and sellers to leave the same to two London corn factors mutually chosen, or their umpire, and to be bound by their decision. The cargo is accepted on the report and samples of Scott & Co., of Queens-town." It was held that this latter stipulation amounted to a warranty that the bulk was equal to the report and samples, and was not merely a representation that the report was the genuine report of Scott & Co., and the

XV. PAROL WARRANTY WHERE CONTRACT IS IN WRITING.—1. The General Rule.—It is a general rule that parol evidence cannot be admitted to control, vary, add to, or contradict, the terms of a written contract.¹ When, therefore, the contract of sale is in writing, its terms are conclusive as to the existence and extent of express warranties made before or at the time of the sale, and evidence of oral agreements cannot be admitted to set up additional warranties or to vary those existing. The parties must be presumed to have included all the terms of the agreement in the written instrument, and the written warranty cannot be

samples taken by them. *Russell v. Nicolopulo*, 8 C. B. N. S. 362; 98 E. C. L. 362; 8 W. R. 415. See also, in this connection, *Vernede v. Weber*, 1 H. & N. 311; 25 L. J. Exch. 326; *Simond v. Braddon*, 2 C. B. N. S. 324; 89 E. C. L. 324; 2 Jur. N. S. 719; *Jones v. Clarke*, 2 H. & N. 725; 27 L. J. Exch. 165, in which the term "fair average quality," in warranties of cargoes of goods, is construed.

Other Instances of Construction.—A provision, in a contract of sale of 250 gunny bags to arrive by ship, that they shall "average 440 pounds gross per bale or no sale, buyer's option," constitutes a warranty only against deficiency in weight, and the contract is not voidable on account of their averaging nearly 450 pounds. *Whitney v. Thacher*, 117 Mass. 523. See *Rice v. Codman*, 1 Allen (Mass.) 377.

A warranty of certain plows sold under a written agreement, which further provided for the shipment of others from time to time, as the demands of trade in the territory designated should require, is co-extensive with the agreement and applies to all plows furnished under it. *Gale Mfg. Co. v. Cribb*, 55 Wis. 414.

A contract was made for the sale of a quantity of "Scott & Co.'s mess pork," and it appeared by the evidence of mercantile men that Scott & Co. were accustomed to prepare and manufacture pork of a superior quality, which insured it a premium in the market. It was held that the warranty was not satisfied by supplying pork which had merely passed through the hands of Scott & Co. as consignors, and which bore their brand mark, but that it meant pork of their manufacture. *Powell v. Horton*, 2 Hodges 12; 2 Bing. N. Cas. 668; 29 E. C. L. 452; 3 Scott 110. See also *Russell v. Nicolopulo*, 8 C. B. N. S. 362; 98 E. C. L. 362.

The words "every piano warranted for five years," contained in a contract of sale of pianos by the manufacturer, constitute a warranty that each piano sold has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale; but they do not warrant the style or grade of the instruments. *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111; 44 Am. Rep. 509.

Where the plaintiff sold wine to the defendant "to be delivered in merchantable order," and to be approved by the defendant "within three days after the delivery," there was no warranty of the quality of the wine, further than to allow the defendant three days in which to satisfy himself that the wine was merchantable. *Gentili v. Starace*, 133 N. Y. 140, *affirming* 14 N. Y. Supp. 764.

See also, for various cases in which particular contracts and warranties have been construed, *Park v. Morris Axe, etc., Co.*, 41 How. Pr. (N. Y. Supreme Ct.) 18; *Zabriskie v. Central Vt. R. Co.*, 131 N. Y. 72, *affirming* 13 N. Y. Supp. 735, which was a sale of coal; and *Galbreath v. Condon*, 48 Kan. 748, which was a sale of corn to be delivered; *Kearly v. Duncan*, 1 Head (Tenn.) 397; *Blythe v. Speake*, 23 Tex. 429; *Durfee v. Newkirk*, 83 Mich. 522; *Whittier Mach. Co. v. Graffam*, 156 Mass. 415; *Powell v. Horton*, 2 Hodges 12; 2 Bing. N. Cas. 668; 29 E. C. L. 452; and *Towerson v. Aspatria Agricultural, etc., Soc.*, 27 L. T. N. S. 276, where correspondence in negotiations for the sale of fertilizer was construed; *Kirby v. Wright*, 2 Myl. & K. 131; *Bowring v. Stevens*, 2 C. & P. 337; 12 E. C. L. 157; *Pearson v. Wheeler*, 1 R. & M. 303.

1. See PAROL EVIDENCE, vol. 17, p. 420; 1 Greenleaf on Evidence (14th ed.), § 275.

limited, extended, or varied by parol proof.¹ And this rule applies where the writing contains only a warranty of soundness, and the parol evidence relates to a warranty of title.²

1. Evidence of Oral Warranty Inadmissible Where Contract Is in Writing.—*Galpin v. Atwater*, 29 Conn. 93; *Mullain v. Thomas*, 43 Conn. 252; *Graham v. Eiszner*, 28 Ill. App. 269; *Shepherd v. Gilroy*, 46 Iowa 193; *Mast v. Pearce*, 58 Iowa 579; 43 Am. Rep. 125; *Nichols v. Wyman*, 71 Iowa 160; *Barrett v. Wheeler*, 71 Iowa 662; *Willard v. Ostrander*, 46 Kan. 591; *McMullen v. Carson*, 48 Kan. 263; *Rice v. Forsyth*, 41 Md. 389; *Salem India Rubber Co. v. Adams*, 23 Pick. (Mass.) 258; *Boardman v. Spooner*, 13 Allen (Mass.) 353; 90 Am. Dec. 196; *Frost v. Blanchard*, 97 Mass. 155; *McCray, etc., Co. v. Wood* (Mich. 1894), 58 N.W. Rep. 320; *Nichols v. Crandall*, 77 Mich. 401; *Rumely v. Emmons*, 85 Mich. 511; *Jones v. Alley*, 17 Minn. 292; *Thompson v. Libby*, 34 Minn. 374; *Bradford v. Neill*, 46 Minn. 347; *Naumberg v. Young*, 44 N. J. L. 331; 43 Am. Rep. 380 (leading case); *Van Ostrand v. Reed*, 1 Wend. (N. Y.) 424; *Lamson Con., etc., Co. v. Hartung* (C. Pl.), 18 N. Y. Supp. 143; 19 N. Y. Supp. 233; *Hungerford Co. v. Rosenstein* (C. Pl.), 19 N. Y. Supp. 471; *Pender v. Forbes*, 1 Dev. & B. (N. Car.) 250; *Wood v. Ashe*, 1 Strobb. (S. Car.) 407; *Stucky v. Clyburn*, 1 Cheves (S. Car.) 186; 34 Am. Dec. 590; *Porcher v. Caldwell*, 2 McMull. (S. Car.) 329; *Reed v. Wood*, 9 Vt. 285; *Merriam v. Field*, 24 Wis. 640; *Randall v. Rhodes*, 1 Curt. (U. S.) 90; *Chandler v. Thompson*, 30 Fed. Rep. 38; *DeWitt v. Berry*, 134 U. S. 306; *Chanter v. Hopkins*, 4 M. & W. 399; *Harnor v. Groves*, 15 C. B. 667; 80 E. C. L. 667. Compare *Cozzins v. Whitaker*, 3 Stew. & P. (Ala.) 322; *Fisher v. Pollard*, 2 Head (Tenn.) 314; 75 Am. Dec. 740. See also PAROL EVIDENCE, vol. 17, p. 425.

"Whenever there is a sale, and either a bill of sale or a sale note is given, the bill or sale note is the evidence of the contract and cannot be varied by parol evidence. The cases of *Hodges v. Drakeford*, 1 N. R. 270; *Rolleston v. Hibbert*, 3 T. R. 406, and *Gardiner v. Gray*, 4 Campb. 144, fully establish this principle." *Reed v. Wood*, 9 Vt. 287.

Where a sale is consummated by a bill of sale which contains a description of the property, a receipt for the

purchase-money, and a warranty of title, parol evidence is inadmissible to prove an additional parol warranty of the soundness of such chattel. *Rodgers v. Perrault*, 41 Kan. 385; *Johnson v. Powers*, 65 Cal. 179.

A written contract by which a person agrees to furnish another with "a No. 2 size refrigerating machine, as constructed by the contractor, to be put up and put in operation in the brewery of the buyer," is a complete and unambiguous contract, and parol evidence is not admissible to show an alleged collateral warranty that the machine should maintain a given quantity of air at a certain temperature; since that would add another term to the written contract. *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510. So of an instrument in the form of a receipt for goods, specifying kinds, numbers, prices, and total value, all in the handwriting of the receiver and upon which the other party indorses money paid at the time; it is a contract of sale and cannot be added to or varied by parol evidence. *Schultz v. Coon*, 51 Wis. 416; 37 Am. Rep. 839.

In *McQuaid v. Ross*, 77 Wis. 470, the sale was by a writing which, after stating at length the animal's pedigree, concluded: "I have this day sold the above named bull. . . . I hereby certify the above pedigree to be true." As this writing contained an express warranty beyond what the law would imply, parol evidence was inadmissible to prove a warranty against sterility.

In the case of *Powell v. Edmunds*, 12 East 6, a sale of growing timber was made by auction, on printed conditions of sale which did not state anything as to the quantity. Parol evidence was offered that the auctioneer at the sale warranted the quantity. The evidence was rejected. Lord Ellenborough said: "If the parol evidence were admissible in this case, I know of no instance where a party may not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts and rendering them of no effect."

2. *Pender v. Forbes*, 1 Dev. & B. (N. Car.) 250; *Rice v. Forsyth*, 41 Md. 389; *Mullain v. Thomas*, 43 Conn. 252. See

2. Exceptions to the Rule.—The two principal exceptions to the rule excluding parol evidence in this connection, are where the warranty attempted to be set up is a separate agreement, as where it is made after the written agreement, or where, for other reasons, it is not a part of the contract; and where the written instrument does not contain the complete contract.¹

a. WHERE THE WARRANTY IS AN INDEPENDENT AGREEMENT.—Although the warranty is a collateral undertaking, in the sense that it is not an essential feature of the contract of sale,² it is still a part of the agreement and not a separate and independent agreement, within the meaning of the rule which admits parol evidence of matters collateral to, but independent of, the principal written agreement.³

There may be cases, however, in which the representations relied on as a warranty may be regarded as undertakings, independent of the contract of sale, so that parol evidence may be admitted to prove them, notwithstanding the fact that the principal contract is in writing.⁴

also *Rodgers v. Perrault*, 41 Kan. 385. So, also, an action will not lie on an express parol warranty of soundness, when the purchaser takes a written warranty of title, omitting the warranty of soundness. *Wood v. Ashe*, 1 Strobh. (S. Car.) 407; *McMullen v. Carson*, 48 Kan. 263; *Mumford v. McPherson*, 1 Johns. (N. Y.) 414; 3 Am. Dec. 339; *Wilson v. Marsh*, 1 Johns. (N. Y.) 503. Compare *Allen v. Potter*, 2 McCord (S. Car.) 323, which held that although one may maintain an action on an implied warranty of soundness, where there is an express warranty of title only, yet he must produce the deed as evidence of the sale, and be able to show that there is no express covenant contrary to the implied warranty on which his action is brought.

1. See *Naumberg v. Young*, 44 N. J. L. 331; 43 Am. Rep. 380.

2. See *supra*, this title, *Is a Collateral Undertaking*.

3. *Thompson v. Libby*, 34 Minn. 374. In this case the court, by Mitchell J., in effect, said: We are referred to cases holding that parol evidence of a warranty may be admitted on the ground that the warranty is collateral to the contract of sale. It seems to us that this is based upon a misapprehension as to the sense in which collateral is used. In a sense, a warranty is collateral to a contract of sale, for the title would pass without a warranty. It is also collateral in the sense that its breach is no ground for a rescission of the contract. But,

when made, a warranty is a part of the contract of sale. The common sense of men would say, and correctly so, that when, in a sale, a warranty is given, it is one of the terms of the sale and not a separate and independent contract. To justify the admission of a parol promise on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates. *Dutton v. Gerrish*, 9 Cush. (Mass.) 89; 55 Am. Dec. 45; *Naumberg v. Young*, 44 N. J. L. 331; 43 Am. Rep. 380; 2 Taylor on Evidence, § 1038.

Compare the case of *Hersom v. Henderson*, 21 N. H. 224; 53 Am. Dec. 185, in which a bill of sale was offered in evidence, and parol testimony was admitted to add a warranty, on the ground that such evidence did not contradict or vary the writing; that part of the rule which forbids the admission of parol evidence to add to the writing was apparently ignored. The court also seemed to consider the warranty an independent agreement, since it was said, in the course of the opinion, that "There is no reason to presume that, because the parties made a written contract relating to the age and price of the horses, therefore, they made no other contract relating to them, touching a matter perfectly consistent with the writing."

4. See *Lindley v. Lacey*, 17 C. B. N. S. 578; 112 E. C. L. 578; *Hersom v. Henderson*, 21 N. H. 224.

The exception under consideration applies to cases where the warranty contended for was made after the sale; in such cases it is an independent contract and may be proved by parol, since manifestly it could not have been included in the writing.¹

Thus, in *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512, it was orally agreed by A and B that A should furnish B with certain machinery at a specified price, and that B should accept and pay for it in a specified manner; also, that A should guaranty that the machine would do B's work satisfactorily. The agreement was reduced to writing and signed, but it did not include the guaranty. The court held that parol evidence might be introduced to prove the guaranty. Danforth, J., delivering the opinion of the court, said: "The written contract and the guaranty do not relate to the same subject-matter. The contract is limited to a particular machine as such. The guaranty is limited to the capacity of the machine. It is one thing to agree to sell or furnish machines of a specific kind, as of such a patent, or of a particular designation, and another thing to undertake that they shall operate in a particular manner or with a certain effect, or, as in this case, that they shall do the buyer's work satisfactorily." This case is relied on in *Eighmie v. Taylor*, 98 N. Y. 297, and is explained, as regarding the warranty, as a collateral undertaking. It made the further distinction that the warranty was of what the machine would do in the future, and further held that there is a difference between a warranty of present and one of future qualities, in that a warranty of the latter may be set up by parol evidence, even where the contract is in writing. The court cited, as authority for these views, *Jeffery v. Walton*, 1 Stark. 267; 2 E. C. L. 108; *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Ersine v. Adeane*, L. R., 8 Ch. 756; *Johnson v. Oppenheim*, 55 N. Y. 280.

Evidence showing a subsequent oral warranty varying a bilateral, executory, written contract, is admissible as evidence of modification. *Thomas v. Barnes*, 156 Mass. 581.

In *Hauser v. Curran* (Cincinnati Super. Ct.), 25 Wkly. L. Bull. 52, it was held that parol evidence might be admitted for the purpose of showing an express verbal warranty that the machine sold was fit for the purpose for which it was bought, made by the seller's agent at

the time of the sale, although there was a written contract for the sale, which was silent on the subject.

In *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512, an oral agreement, which embraced an agreement to guaranty that the machines, which were the subject of the sale, should work satisfactorily, was reduced to writing, but the writing did not include the guaranty. It was held that parol evidence was competent to add the guaranty.

In *Mast v. Pearce*, 58 Iowa 579; 43 Am. Rep. 125, it was held that, in the absence of fraud, accident, or mistake, it was incompetent to show a parol warranty of agricultural implements sold by a written contract containing no warranty. In this case the court, in its opinion, on rehearing, declared that all the cases examined, except the aforementioned case of *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512, were in accord with the decision.

Galpin v. Atwater, 29 Conn. 93, was a sale of machines; the contract having been reduced to writing, the vendee was not allowed to introduce parol evidence to prove that the vendor had warranted the machines made under the patent "to work well, and not drop stitches, and to do the various sewing of a family." See also *Naumberg v. Young*, 44 N. J. L. 331; 43 Am. Rep. 380. In this case, the case of *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512, was examined, and considered to have been decided upon the ground that the written contract was a mere memorandum, and not the complete agreement between the parties.

1. Does Not Apply to Subsequent Warranties.—See *supra*, this title, *Subsequent Representations*; *Tiedeman on Sales*, § 196; *Pratt v. U. S.*, 3 Ct. of Cl. 105; *Brewster v. Countryman*, 12 Wend. (N. Y.) 446.

A parol warranty made at the time of the sale, is not affected by a written warranty, never agreed on between the parties, handed by the seller to the buyers with other papers, without any knowledge on their part, until long afterward, that any such written warranty had been given. *Valerius v. Hockspiere* (Iowa, 1893), 54 N. W. Rep. 136.

b. WHERE THE WRITING DOES NOT EMBRACE THE WHOLE CONTRACT.—The second exception to the general rule excluding parol evidence where the contract is in writing, is where the written instrument does not contain the whole contract. The rule excluding parol evidence is founded upon the presumption that the parties intended that the written instrument should include all the terms of their agreement and be the final repository of them. Therefore, where it is evident that the writing produced does not embrace, nor was intended to embrace, the whole contract, but is a mere informal memorandum or bill of parcels, parol evidence of warranties not mentioned in the writing is admissible, even though the memorandum may have embraced all of the other terms of the contract.¹ The same is true where the writing

1. When Is the Contract In Writing.

—*Atwater v. Clancy*, 107 Mass. 369; *Spalding v. Conant*, 146 Mass. 292; *Fletcher v. Willard*, 14 Pick. (Mass.) 464; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Stacy v. Kemp*, 97 Mass. 166; *Filkins v. Whyland*, 24 Barb. (N. Y.) 379; *affirmed* 24 N. Y. 338; *Sutton v. Crosby*, 54 Barb. (N. Y.) 80; *Brigg v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Lynch v. Hunneke* (Super. Ct.), 19 N. Y. Supp. 718; *Hope v. Smith*, 35 N. Y. Super. Ct. 458; *Cassidy v. Begoden*, 38 N. Y. Super. Ct. 180; *Cozzins v. Whitaker*, 3 Stew. & P. (Ala.) 322; *Bemis v. Becker*, 1 Kan. 226; *Irwin v. Thompson*, 27 Kan. 643; *Miller v. Gaither*, 3 Bush (Ky.) 152; *Richy v. Daemicke*, 86 Mich. 647; *Wallace v. Rogers*, 2 N. H. 506; *Sturm v. Boker*, 150 U. S. 312; *Harris v. Johnson*, 3 Cranch (U. S.) 311; *Gordon v. Waterous*, 36 U. C. Q. B. 321. See also *Jackson v. Mott*, 76 Iowa 263; *Cameron v. Ottinger*, 1 Head (Tenn.) 27. Compare *Harnor v. Groves*, 15 C. B. 667; 80 E. C. L. 667.

In *Towell v. Gatewood*, 3 Ill. 23; 33 Am. Dec. 437, the written evidence was this paper: "New Haven, February, 1836. A bought of B 2,000 lbs. good first and second rate tobacco at \$4.50, \$132.79½. Received payment by the hands of K," signed by B. It was held that this was a bill of parcels only, and not a complete contract, and that parol evidence of other terms of the contract was admissible. The court in effect said: I cannot consider the paper in question as containing the evidence of the bargain. It does not profess to be such. It possesses none of the constituent parts of a contract; but is in form and in fact a bill of parcels, and a receipt for the purchase-money, and as such was prop-

erly received in evidence; but it does not follow that it is all the evidence that should be received. For a similar case see *Hazard v. Loring*, 10 Cush. (Mass.) 267.

In *Koop v. Handy*, 41 Barb. (N. Y.) 454, the following writing was held not to constitute the whole contract, and parol evidence of a warranty was admitted: "Sold H. for account of E. about twenty tons *divi divi*, at \$45.00 cash per ton, to be put in bags, and delivered as soon as possible."

In *Stephen's Digest of the Law of Evidence*, it is stated as one of the exceptions to the general rule excluding parol evidence, that "oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect, as a contract or other disposition of property." Citing *Allen v. Pink*, 4 M. & W. 140. See also *Jeffery v. Walton*, 1 Stark. 267; 2 E. C. L. 108.

In *Harnor v. Groves*, 15 C. B. 667; 80 E. C. L. 667, the writing was this: "Sold W., per H., twenty-five sacks Whites (Flour) X. S. at 68s. per sack, net, G." It was held that this writing contained the whole agreement, and parol evidence could not be admitted to add other terms. But this case cannot be considered as opposing the rule of the text, as the contract was within the Statute of Frauds.

In *Randall v. Rhodes*, 1 Curt. (U. S.) 90, a writing signed by the parties, and stating that a sale had been made, describing the articles sold, the price, and terms of credit, etc., was held to contain the whole agreement, and parol evidence of other representations was excluded.

is nothing more than a receipt for the purchase-money,¹ or an agreement for the security of the vendor's lien.² It is often the case that the agreement is concluded entirely by parol, and a memorandum is afterward drawn up, merely as a recital of things which have been agreed on; in such cases a warranty may be proven by parol evidence.³ If the writing purports on its face to be complete and to contain the entire agreement of the parties, parol evidence cannot be received to add to it other terms of agreement, although the writing is silent on the subject to which the parol testimony relates.⁴ But where it is obscure and uncertain,

1. Where Writing Is Merely a Receipt.—*Perrine v. Cooley*, 39 N. J. L. 449; *Filkins v. Whyland*, 24 N. Y. 338, *affirming* 24 Barb. (N. Y.) 379. Or where the only writing is the vendee's written obligation for the price. *Curtis v. Soltau* (C. Pl.), 12 N. Y. Supp. 285; *Routledge v. Worthington Co.*, 119 N. Y. 592. See also PAROL EVIDENCE, vol. 17, p. 433 *et seq.*

The receipt may, however, contain the whole contract, and where it does, parol evidence is inadmissible. See *Schultz v. Coon*, 51 Wis. 416; 37 Am. Rep. 839; *Terry v. Wheeler*, 25 N. Y. 520.

2. Thus, where the purchaser of a horse executes a writing which evidences that the horse is to remain the property of the seller until paid for, but which does not purport to set forth any other terms of the contract of sale, parol testimony is admissible to show that the seller warranted the horse, since in such case, the writing does not embrace the entire contract between the parties. *Hadley v. Bordo*, 62 Vt. 285.

In *Gale Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606; 23 Am. St. Rep. 739, the buyer was allowed to prove an oral warranty, although the note given for the price of the machine, contained an express provision that "no promise or contract outside of this note will be recognized."

3. *Brigg v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Chase v. Evarts* (Supreme Ct.), 19 N. Y. Supp. 987; *Cassidy v. Begoden*, 38 N. Y. Super. Ct. 182; *Barker v. Bradley*, 42 N. Y. 319; 1 Am. Rep. 522; *Richards v. Fuller*, 37 Mich. 161; *Nichols v. Crandall*, 77 Mich. 401; *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539; 98 Am. Dec. 435; *Tisdale v. Harris*, 20 Pick. (Mass.) 9.

In *Frohreich v. Gammon*, 28 Minn. 476, an illiterate vendee was induced to sign a writing which was represented to

him to contain the warranties already made orally, but which did not, the court held that parol evidence might be admitted. *Dobell v. Stevens*, 3 B. & C. 623; 5 D. & R. 490; 10 E. C. L. 201. It is for the jury to say in such a case whether the written contract contains the whole agreement, and what was the nature and extent of the prior parol agreement. *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539; 98 Am. Dec. 435; *Bolckow v. Seymour*, 17 C. B. N. S. 107; 112 E. C. L. 106.

4. Criterion as to Completeness of Written Contract.—The rule of the text is stated very clearly in the opinion of the court, by Depue, J., in *Naumberg v. Young*, 44 N. J. L. 331; 43 Am. Rep. 380. In that case the parties had executed a lease, under seal, of a certain factory building, which was then in use for manufacturing purposes; in the building were an engine and a boiler for driving the machines. This engine and boiler being out of repair, and incapable of doing the work for which the premises were rented, the tenants sued for damages, alleging a breach of warranty. It was held that parol evidence of a warranty was inadmissible, and that no warranty could be implied from the letting. See also, for the rule of the text, *Lehndorf v. Schields*, 13 Mo. App. 486.

A sale note read: "Sold for account, B. to R. 15,000 oz. B. & S. sulphate of quinine . . . at 59 cents per ounce, cash ten days from delivery, to be had from March, 1887, shipment from the factory in *Europe*, subject to the manufacturers' clauses, and war risks." It was held that this stated the complete contract, and that oral evidence of warranty was therefore inadmissible. *Engelhorn v. Reitlinger*, 55 N. Y. Super. Ct. 485.

In *Hahn v. Doolittle*, 18 Wis. 196; 86 Am. Dec. 757, a note and mortgage

and does not cover the points which ordinarily would be settled between the parties in a transaction concerning a similar matter, it bears on its face evidence of its incompleteness, and may be explained or added to by parol.¹

Where the immediate issue is whether there was in fact a written contract, parol testimony bearing on that issue cannot be excluded on the assumption that such writing exists.²

A contract partly oral and partly in writing is treated as an oral contract, and parol evidence is admissible to prove its terms.³

The presumption that the written instrument contains the whole contract between the parties does not extend to an instrument given by a third person in pursuance of a parol agreement between the buyer and seller.⁴ And when representations, which may amount to a warranty, are contained in letters which constitute the contract of sale, evidence of the surrounding circumstances is admissible for the purpose of showing that no warranty was contemplated by the parties.⁵

were transferred by a written assignment which contained no words of warranty. Parol evidence was admitted to prove that the vendor warranted the security. Speaking of the rule excluding parol evidence, the court, by Paine, J., said: "No rule is better settled than this. But it is not applicable to instruments which, from their very nature, do not attempt to state the entire agreement in respect to the subject-matter, but are adapted merely to transfer title, in execution of an agreement they do not profess to show. Deeds of land, assignments of choses in action, bills of sale, indorsements of notes, and other similar instruments, are of this character. They are very commonly used in execution of complicated and extensive agreements, which they make no attempt to show. The presumption, therefore, that the writing contains the whole contract does not prevail."

Auctioneer's Advertisement.—The auctioneer's advertisement is not considered as the written conditions and terms of the sale. Parol evidence may be received to disprove a warranty of soundness or value, implied by such an advertisement. *Limehouse v. Gray*, 3 Brev. (S. Car.) 231.

1. *Shepard v. Haas*, 14 Kan. 443; *St. Louis, etc., R. Co. v. Maddox*, 18 Kan. 551; *Treviwick v. Munford*, 31 Mich. 467; *Barker v. Bradley*, 42 N. Y. 319; 1 Am. Rep. 522. See also *Kinney v. Whiton*, 44 Conn. 262; 26 Am. Rep. 462; *Havana, etc., R. Co.*

v. Walsh, 85 Ill. 58; *Thomas v. Nelson*, 69 N. Y. 119.

Where the contract is partly in writing and partly by parol, the question should be submitted to the jury to determine as to the existence and nature of the prior parol agreement, and whether the subsequent written agreement contains the whole contract. *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539; 98 Am. Dec. 435; *Bolckow v. Seymour*, 17 C. B. N. S. 107; 112 E. C. L. 106; *Thomas v. Hammond*, 47 Tex. 42.

2. *Kalamazoo, etc., Works v. Macalister*, 40 Mich. 84.

3. *Smith v. O'Donnell*, 8 Lea (Tenn.) 468; *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539; 98 Am. Dec. 435. The writing in such a case is still competent evidence of the agreement so far as it goes. *Tomlinson v. Briles*, 101 Ind. 538.

4. **Writing Given by Third Party in Pursuance of Oral Agreement.**—*Adams v. Gray*, 8 Conn. 11; 20 Am. Dec. 82. In this case, there was a parol agreement made for the sale of a vessel by B to A for a specified price; B warranted the vessel to be sound and promised to secure a bill of sale of it for A from C, in whom the title then was, in trust for B, which he accordingly did. In an action by A against B, for a breach of the warranty, it was held that the warranty by B might be proved by parol, as the instrument given by C could not be considered as containing the whole contract.

5. *Stucley v. Baily*, 1 H. & C. 405; 10 W. R. 720.

A written warranty, gratuitously given after the sale, cannot be set up as superseding an oral and different warranty given at the time of the sale, unless it can be shown that the second one was intended by both parties to supersede and take the place of the first.¹

Where the contract is one which comes within the Statute of Frauds, then the memorandum or bill of parcels is the only part of the contract which can be relied on, and therefore, it constitutes the entire contract, so that evidence of oral warranties is not admissible.²

c. OTHER EXCEPTIONS.—The rule excluding parol evidence is a privilege merely, and if no objection is made to its introduction at the trial, the admission of it cannot be assigned as error on appeal.³ Such evidence is admissible also, although the contract may be in writing, to show that the defect complained of was obvious or that the seller disclosed it at the time of the sale.⁴

The fact that the written contract contains no mention of warranty does not exclude necessarily the warranties which arise by implication of law; express warranties ordinarily exclude implied warranties on the same or similar subjects, but where the law would imply a warranty, it may be insisted upon, notwithstanding the written contract is silent on the subject.⁵

1. *Aultman v. Kennedy*, 33 Minn. 339.

2. *Statute of Frauds*.—*Lamb v. Crafts*, 12 Met. (Mass.) 353; *Harnor v. Groves*, 15 C. B. 667; 80 E. C. L. 667; *Peltier v. Collins*, 3 Wend. (N. Y.) 459; 20 Am. Dec. 711; *Benjamin on Sales* (4th Am. ed.), § 203, and cases cited; *McC. Bride v. Silverthorne*, 11 U. C. Q. B. 545; *FRAUDS, STATUTE OF*, vol. 8, p. 726. See also *Smith v. Shell*, 82 Mo. 215; 52 Am. Rep. 365.

In *Lamb v. Crafts*, 12 Met. (Mass.) 353, it appeared that C., a dealer in tallow, made an oral agreement with L. to furnish him with a certain quantity of tallow, of good quality and color, at a certain price per pound, and to deliver it at a certain place; that he afterward furnished and delivered the quantity, and made and signed bills of parcels in which the article was denominated "tallow," without any other designation or description. L. accepted the tallow and paid the agreed price for it. It was held that the agreement was within the Statute of Frauds, and that L. could not recover for a breach of warranty, made by C. at the time of the agreement, that the tallow should be of good quality and color; also that if the delivery of the tallow by C., and the acceptance and payment by L.,

were to be regarded as constituting one entire contract of sale, yet there was no contract of warranty, because the bill of parcels, which was the only written memorandum signed by C., specified none, and contained no description or denomination from which a warranty could be inferred.

3. *McCormick v. Laughran*, 16 Neb. 87; *Hobart v. Young*, 63 Vt. 363.

4. *Parol Evidence to Show that Defect Was Obvious*.—*Fisher v. Pollard*, 2 Head (Tenn.) 315; 75 Am. Dec. 740. Compare *Daniel v. McClelland*, 7 Humph. (Tenn.) 298. This case was an action of covenant upon a written warranty, in a bill of sale of slaves, that the warrantor's title was superior to all other titles. The court held that it was not a good plea that the plaintiff was informed at the time of the sale that the defendant would not warrant against the title of a particular person named, because such a plea could be supported only by parol evidence, which was not admissible, the contract being in writing.

5. An express warranty precludes oral proof of other express warranties, but not of an implied warranty. *Merriam v. Field*, 24 Wis. 640. See also *Bigge v. Parkinson*, 7 H. & N. 955; *supra*, this title, *Express and Implied Warranties*.

Although the contract may be wholly in writing, there is no rule of law which excludes evidence of oral representations, made at the time of the sale, where such representations were fraudulent and were made by the vendor with knowledge that they were false and made with intent to deceive. But in such cases, the action is not on the warranty, but for the fraud committed.¹

Parol evidence is admissible, where the language of the written instrument regarding the warranty is obscure or ambiguous, in order to explain its meaning.²

In an action for a breach of warranty, statements and representations made by the defendant at the time of the sale as to the value of the thing sold, though not admissible to add to or vary the contract of sale, may be competent as admissions bearing on the question of damages.³

3. Presumption that Warranty Is by Parol.—Where an action is brought on a warranty, and the petition, declaration, or complaint fails to allege that it is in writing, or is silent as to how it exists, there is no presumption that it exists in parol, and the written warranty is admissible in evidence at the trial.⁴

XVI. BREACH OF WARRANTY—WHAT CONSTITUTES—1. Generally.—Any substantial failure, in the article supplied to the buyer in pursuance of the contract of sale, to come up to the quality warranted, amounts to a breach of the warranty, and proof of it establishes the buyer's right to an action therefor. This rule applies to all cases where the remedy sought is by an action on the warranty for damages, or by way of set-off in a suit for the purchase-money; in such cases the buyer is bound to prove the breach and the damages suffered by him in consequence of it, and can recover only to the extent of the damage so proved.⁵ But where

1. **Parol Evidence of Fraud.**—*DaLee v. Blackburn*, 11 Kan. 190; *Esterly v. Eppelsheimer*, 73 Iowa 260; **PAROL EVIDENCE**, vol. 17, p. 437.

2. **Parol Evidence Admissible to Explain Ambiguity.**—See **PAROL EVIDENCE**, vol. 17, pp. 450, 452. Thus, where machinery is warranted in writing, "to take care of all the pulp produced from four Scott grinders," and it is shown that such grinders are of varying capacity, it may be shown by parol that the warrantor guaranteed the machinery with reference to "Scott grinders" of a stated capacity. *Bagley v. Saranac River Pulp, etc., Co.*, 135 N. Y. 626.

3. *Fitzgerald v. Evans*, 49 Minn. 541.

4. *Watson v. Roode*, 30 Neb. 264. An exactly opposite conclusion seems to have been reached in *Indiana*. In the case of *Morgan v. Gaar Co.*, 64 Ind. 213, which was an action by a vendor to recover the contract price of an ar-

ticle, the answer set up a breach of warranty, but made no mention that such warranty was in writing. The court held that this created a presumption that the warranty was a mere parol warranty, and that the defendant could not prove a written warranty under his answer; the plaintiff's printed price list and the correspondence between the parties, amounting to a warranty, were therefore held inadmissible.

5. See *infra*, this title, *Measure of Damages*. The warranty of quality is broken where there is a failure to furnish goods of the quality agreed on, though goods of similar quality and equal or greater value are furnished. *Lovegrove v. Fisher*, 1 F. & F. 128; *Walker v. Gooch*, 48 Fed. Rep. 656. Thus an agreement for the sale and delivery of certain oil described as "foreign refined rape oil, warranted only equal to samples," is not complied

it is sought to rescind the contract, either because the doctrine of the particular jurisdiction permits it, or because it is so provided expressly in the contract, the buyer must show some actual substantial breach of the warranty in respect of a material matter, and not merely a slight variation of the article from its represented character or quality.¹ The remedy by rescission is not available in any case, except upon clear proof of the failure of the article to comply with the warranty in a material degree.²

Whether there has been a breach of the warranty is largely a matter of fact in every case, and must, therefore, be left to the determination of the jury, subject to the construction placed upon the warranty by the court.³ No rule can be formulated for the determination of such questions beyond this, that there must be a reasonable compliance with the warranty, and that an unreasonable compliance is not to be exacted.⁴

with by the tender of oil which is not "foreign refined rape oil," although it may be equal to the quality of the samples. *Nichol v. Goltz*, 10 Exch. 191; 2 C. L. R. 1468; 20 L. J. Exch. 314.

The vendor becomes liable immediately upon a breach of the warranty, although the vendee may not have suffered damage. *Muller v. Eno*, 14 N. Y. 597.

1. See *infra*, this title, *Rescission*. Where the failure to fill the warranty is proven, the presumption is that the failure arose from the fault of the seller. Thus, although there was evidence that a machine sold by the plaintiff did good work before it was shipped, and the plaintiff contended that he delivered it in good condition to the carrier, yet, in the absence of evidence that defects were caused by anything which happened to the machine after its delivery to the carrier, the plaintiff is responsible for defects found to exist by the purchaser. *Latham v. Shipley*, 86 Iowa 543.

Proof that, on complaint by the buyer, the seller's agent examined the goods, acknowledged the defects, and promised to make good the loss, and that in similar cases the seller had paid for such deficiencies before, is sufficient to show a breach of the warranty. *Conestoga Cigar Co. v. Finke*, 144 Pa. St. 159.

2. See *Bodurtha v. Phelon*, 2 Allen (Mass.) 347.

3. *Russell v. Cruttenden*, 53 Conn. 564; *Marshall v. Keefe* (Cal. 1893), 34 Pac. Rep. 89; *Eastern Ice Co. v. King*, 86 Va. 97. See also *supra*, this title, *Construction and Interpretation of Warranties*.

4. Thus, a warranty that rags sold are fit to be manufactured into paper, is broken if they cannot be made into paper at all except at the imminent risk of killing or sickening those employed in their manufacture. *Dushane v. Benedict*, 120 U. S. 630. See also *Tennessee Lumber Co. v. Garrison* (Pa. St. 1888), 13 Atl. Rep. 454; *Walker v. Gooch*, 48 Fed. Rep. 656; *Eastern Ice Co. v. King*, 86 Va. 97.

A warranty that cattle will "work evenly on the yoke," is broken if they will not work so when driven by a person of ordinary skill in the management of oxen. *Woodruff v. Weeks*, 28 Conn. 328. See also *Russell v. Cruttenden*, 53 Conn. 564.

Proof that a horse is a "good drawer" only, will not show compliance with a warranty that he is "a good drawer and pulls quietly in harness." *Coltherd v. Puncheon*, 2 D. & R. 10; 16 E. C. L. 65. And under a declaration alleging that the defendant warranted a horse to be perfectly gentle, whereas in fact he was not gentle, the plaintiff cannot recover damages on the ground that he was not well broken, or trained so as to be suitable to be used to plow out corn or potatoes, and rake hay, although the jury may think that the warranty was intended to cover these particulars. *Bodurtha v. Phelon*, 2 Allen (Mass.) 347.

Where a horse was sold under a warranty of soundness, but with a misrepresentation as to the place from which he was brought, if the horse answered the warranty at the time of the sale, such a misrepresentation would not invalidate the contract. *Geddes v. Pennington*, 5 Dow. 164. In this case

In order to sustain an action for a breach of the warranty, it must appear affirmatively that the defect complained of as a breach existed at the time the warranty was made, or had resulted as a natural and necessary consequence of a defect existing, either actually or potentially, at that time and covered by the warranty.¹

2. As Affected by Special Provisions of the Contract.—The contract of sale may provide specifically that compliance with certain prescribed tests shall be conclusive evidence of the fulfillment of the warranty,² or that the purchaser shall determine whether the

a horse was warranted to be "a thorough-broke horse for a gig," and the purchaser had no opportunity of using him in a gig for two months, but other persons had done so, and he had always acted as the warranty stated he would, but after that time the purchaser himself drove him, when he kicked and broke the gig. It being shown, however, that he was an unskillful driver, it was held that the horse answered the warranty at the time he was sold, and that his failure to do so when driven by the purchaser was owing to bad driving.

In an action by the purchaser of a steamboat built to order under an express warranty of quality of materials and workmanship, brought to recover damages for a breach of the warranty, the jury was properly instructed that if they found that the damage complained of was occasioned by a flaw in the welding of a portion of the vessel's walking beam, existing therein at the time of her delivery to the plaintiff—and that but for this flaw the damage would not have been incurred, then the plaintiff was entitled to recover, unless the locality and character of the flaw were such that it could not have been detected or prevented by the use of better materials or workmanship. *Potomac Steamboat Co. v. Harlan, etc., Co.*, 66 Md. 42.

A warranty of a reaping machine that it could be made to work well, is broken where it is shown that its draft was too heavy and that it had too much side draft, the effect of which was to make the horses' necks sore. *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa 556.

A warranty in the bill of sale of a negro that he shall be a "slave for life," is not broken by the subsequent emancipation of the negro by the act of the government abolishing slavery. *Walker v. Gatlin*, 12 Fla. 9.

1. Defect Must Be Shown to Have

Existed at Time of Sale.—*Bowman v. Clemmer*, 50 Ind. 10; *Hall v. Plasan*, 19 La. Ann. 11; *Bailey v. Forrest*, 2 C. & K. 131.

In the sale of a bull calf, but three months old at the time of the sale and apparently free from defects, and subjected to the purchaser's view, it cannot be said, as a matter of law, that the animal's sterility, which transpired two years later, existed at the time of the sale, or that there was an implied warranty that at maturity he would possess procreative powers. *White v. Steloh*, 74 Wis. 435.

2. Provision That Prescribed Tests Shall Be Conclusive.—*Aultman v. Wykle*, 36 Ill. App. 293; *Bayliss v. Hennessy*, 54 Iowa 11; *Staver v. Rogers*, 3 Wash. 603; *Potter v. Lee*, 94 Mich. 140; *Sharp v. Great Western R. Co.*, 9 M. & W. 7; 2 R. Cas. 722. In a contract with warranty for the sale of a harvester, it was provided that the cutting of five acres of grain with the machine should be conclusive evidence that the warranty was fulfilled, and more than five acres were cut by the purchaser. It was held that he could not recover upon the warranty, although such amount was cut only after two or more trials, and after the seller had been notified of the failure of the machine to comply with the terms of the warranty. *Bayliss v. Hennessy*, 54 Iowa 11.

In the case of *Potter v. Lee*, 94 Mich. 140, the defendant agreed to take a certain amount of cheese, saying: "If in the course of ten days we find this cheese as you have represented it, we will pay." He received the cheese, and after twenty-six days, notified the plaintiff that the cheese was not as represented, and refused payment. It was held that having failed to return it within ten days, he must be considered as having accepted it, and could not be heard to set up the defense of breach of warranty.

article complies with the warranty within a certain length of time, and that a retention by him beyond that time shall be conclusive as to compliance with the warranty;¹ and where such provisions exist, the purchaser cannot insist upon what otherwise might be a reasonable time.² But the retention cannot be given such an effect where it is at the instance of the seller, and is due to his assurances that the defect will be remedied.³

3. In the Sale of Horses—What Is Unsoundness.—Generally speaking, the term "sound," when used in the warranty of a horse, implies that at the time there is an absence of disease which, or the progress of which, would diminish the usefulness and worth of the animal.⁴ A slight disorder in the horse at the time of the sale, not calculated permanently to diminish his usefulness, which is temporary merely, and from which he ultimately recovers, is not

1. Limited Time in Which to Determine Sufficiency of the Article.—*Sharp v. Great Western R. Co.*, 9 M. & W. 7; 2 R. Cas. 722.

In an action for the price of a furnace sold with a warranty, the contract providing that the buyer should determine its sufficiency before the first day of a fixed year, evidence is admissible to show that there was no weather prior to that date sufficiently cold to test it, and that after that time, when the test was made, it failed to work as warranted. *Richardson v. Hampton Ind. Dist.*, 70 Iowa 573.

The supreme court of *Illinois* holds, however, that even in such a case the buyer's right to an action on the contract of warranty is not waived by the fact that no complaint is made within the prescribed time. *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40.

Animal Injured During Such Time.—In the case of *Head v. Tattersall*, 20 W. R. 115; 25 L. T. N. S. 631, which was an action for the price of a mare, it appeared that on the sale of the mare to the defendant, the plaintiff warranted her to have been hunted with certain packs of hounds. According to the terms of the sale, the mare, if objected to, was to be returned within a specified time. The plaintiff paid for the mare, but before removing her from the defendant's establishment he was informed by some person that the warranty was incorrect. The mare, while she was being taken away by the plaintiff's groom, became restive, and received serious injury. The plaintiff returned her to the defendant within the specified time. The warranty being shown to have been in fact untrue, it

was held that the defendant could not recover, since nothing that had happened took away the plaintiff's right to return the mare.

Where the animal is returned the day after the sale, because it is not as warranted, and it dies two days afterward, the breach of warranty being shown, the burden of proof is on the seller to show that its death resulted from injuries received while in the buyer's possession. *McKnight v. Nichols*, 147 Pa. St. 158. See also, in this connection, *Ross v. Hannan*, 19 Can. Supreme Ct. 227.

2. Aultman v. Wykle, 36 Ill. App. 293.

3. Springfield Engine, etc., Co. v. Kennedy, 7 Ind. App. 502; *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183; *Snody v. Shier*, 88 Mich. 304.

4. General Rule.—*Shewalter v. Ford*, 34 Miss. 417; *Kornegay v. White*, 10 Ala. 255; *Holiday v. Morgan*, 1 El. & El. 1; 102 E. C. L. 1. In *Kiddell v. Burnard*, 9 M. & W. 668; 1 Car. & M. 291; 6 Jur. 327, the rule was clearly stated by Parke, B., thus: "I adhere to the doctrine laid down in *Coates v. Stevens*, 2 M. & R. 137. I have always considered that a man who buys a horse warranted sound, must be taken as buying him for immediate use, and he has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is that if at the time of the sale the horse has any disease, which, either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if

an unsoundness.¹ But there is a breach of warranty of soundness where, at the time of the sale, the animal is suffering with a disease which is not then fully developed, but of which he afterward dies, or which conduces to, or results in, a disease which afterwards proves fatal.² Except in such cases as those just mentioned, however, the evidence of unsoundness must relate to the date of the warranty, and not to a subsequent time.³

The particular diseases or vices which constitute a breach of a warranty in horses, have been enumerated in a prior article, and what is said here is merely supplemental to the treatment there given.⁴

the horse has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such a horse is unsound." See this language quoted with approval in *Kenner v. Harding*, 85 Ill. 269; 28 Am. Rep. 617.

Any defect in the structure of a horse, whether congenital or arising from subsequent disease or accident, that diminishes his natural usefulness, and renders him less than reasonably fit for present use, is unsoundness. *Holiday v. Morgan*, 1 El. & El. 1; 5 Jur. N. S. 69; 102 E. C. L. 1.

The soundness or unsoundness of a horse is a question for the consideration of a jury, and the court will not set aside a verdict for a preponderance of contrary evidence. *Lewis v. Peake*, 7 Taunt. 153; 2 Marsh. 431.

1. *Bolden v. Brogden*, 2 M. & R. 113.

Thus, a warranty of soundness is not false because the horse labors under a temporary injury from an accident. *Garment v. Barrs*, 2 Esp. 673. *Compare Elton v. Brogden*, 4 Campb. 281, holding that a temporary lameness, rendering a horse less fit for service, is a breach of a warranty of soundness.

2. *Incipient Disease*.—*Fondren v. Durfee*, 39 Miss. 324; *Shewalter v. Ford*, 34 Miss. 417; *Thompson v. Bertrand*, 23 Ark. 730. Thus an allegation that a horse had the glanders at the time of the sale is sustained by proof that at such time he had the seeds of that disease, which afterward developed into the perfect disease. *Woodbury v. Robbins*, 10 Cush. (Mass.) 520.

To constitute a breach of warranty of the soundness of an animal, the disease must have existed in a formed state at the time of the sale and been of a permanent character, calculated

materially to affect the value of the animal. *Wade v. DeWitt*, 20 Tex. 398.

3. *Evidence of Unsoundness Must Refer to Date of Warranty*.—*Postel v. Oard*, 1 Ind. App. 252; *Brown v. Jones*, 24 Ala. 463; *Miller v. McDonald*, 13 Wis. 673; *Buford v. Gould*, 35 Ala. 265.

Thus, proof that the horse balked seven weeks after the time it was sold with a warranty that it was true to harness, relates to a time too remote to be admissible to show a breach of warranty existing at the time of the sale. *Smith v. Swarthout*, 15 Wis. 550. *Compare Daniells v. Aldrich*, 42 Mich. 58; *Finley v. Quirk*, 9 Minn. 194; 86 Am. Dec. 93.

Evidence of unsoundness is not sufficient to entitle the defendant to a verdict in an action for the price of a horse, unless the unsoundness be shown to have existed, either actually or potentially, at the time the warranty was made. *Myers v. McFarlane*, 3 Brev. (S. Car.) 513.

Proof of unsoundness at the time of the sale and warranty, is proof of a breach thereof, without showing that the disease under which the animal afterward labored was the same as that existing at the time of the warranty. *Buford v. Gould*, 35 Ala. 265.

4. *Particular Disorders—In Horses*.—See *Horses*, vol. 9, p. 762 *et seq.*

Age.—A warranty that a horse is "sound and kind" does not extend to his age. *Willard v. Stevens*, 24 N. H. 271. A representation at the time of the sale that a horse is fourteen years old is a warranty that he is no older. *Burge v. Stroberg*, 42 Ga. 89.

Blindness, whether total or partial, is an unsoundness, though, in many cases, total blindness is not included in the warranty, since it is usually considered an obvious defect. See *supra*, this title, *As to Known or Obvious Defects*.

The want of sight in an eye is a breach of a warranty of soundness. But it is said that the mere statement that the horse's eyes are "as good as any horse's eyes in the country," does not of itself amount to a warranty. *House v. Fort*, 4 Blackf. (Ind.) 293.

A warranty that a horse is "all right except that he will sometimes shy" amounts to a warranty of soundness; and such warranty is broken where the horse proves to be partially blind. *Kingsley v. Johnson*, 49 Conn. 462.

Convexity in the formation of the cornea of a horse's eye, making him shortsighted and so inducing the habit of shying, is an unsoundness. *Holliday v. Morgan*, 1 El. & El. 1; 102 E. C. L. 1; 5 Jur. N. S. 69.

Bone Spavin.—Bone spavin in the hock is unsoundness in a horse, whether it produces lameness apparent at the time of the warranty or not, and though it may not produce lameness for years after. *Watson v. Denton*, 7 C. & P. 85; 32 E. C. L. 446.

Castration.—The want of castration in a male mule does not constitute a breach of warranty of his soundness. *Duckworth v. Walker*, 1 Jones (N. Car.) 507.

Cough.—See the views stated in the article, *Horses*, vol. 9, p. 763. See, in addition, *Shillitoe v. Claridge*, 2 Chit. Rep. 425; 18 E. C. L. 386, holding that a cough, unless proved to be of a temporary nature, is an unsoundness, and a verdict for the vendor was set aside, although on the day after the warranty was made the vendee had ridden the horse hunting. See also *King v. Price*, 2 Chit. Rep. 416; 18 E. C. L. 383.

Defective Formation.—Defective formation or badness of shape, which has not produced lameness at the time of the sale of a horse, although it may render him more liable to become lame at some future time (*e. g.*, "curby hocks"), is not an unsoundness. *Brown v. Elkington*, 8 M. & W. 132.

Where a horse is warranted sound, the buyer cannot recover for a breach of the warranty unless he shows that the horse was unsound at the time of the sale; and mere defective formation, not producing lameness at that time, is not an unsoundness within the meaning of the warranty. *Bailey v. Forrest*, 2 C. & K. 131; 61 E. C. L. 129; *Dickenson v. Follett*, 1 M. & R. 299.

Foal.—The fact that a mare is with foal is no breach of a general warranty

of her soundness. *Whitney v. Tayler*, 54 Barb. (N. Y.) 536.

Lameness.—See *Horses*, vol. 9, p. 764.

Some splints cause lameness, others do not; a splint, therefore, is not one of those patent defects against which a warranty is inoperative. The defendant, therefore, having warranted a horse sound at the time of the contract, and the horse having afterward become lame from the effects of a splint visible when the defendant sold him, is liable on his warranty. *Margetson v. Wright*, 8 Bing. 454; 1 M. & Scott 622; 21 E. C. L. 342; *Smith v. Bryant*, 10 Jur. N. S. 1107; 13 W. R. 79; 11 L. T. N. S. 346.

A bill of sale acknowledging the sale of "one horse, sound and kind," is a warranty of soundness, upon which the vendor is liable if the horse proves to be incurably lame, although the purchaser saw the horse and knew that he was lame before the sale, and the vendor being spoken to on the subject refused to give a warranty. *Brown v. Bigelow*, 10 Allen (Mass.) 242.

Where a horse is warranted sound, except as to a specified defect, and it appears that he was sound at the time of the sale, except so far as this defect made him unsound, there is no breach of the warranty even though this defect may make him lame. *Morrill v. Bemis*, 37 Vt. 155.

Roaring.—Roaring constitutes an unsoundness in a horse if it renders him less serviceable for a permanency. *Onslow v. Eames*, 2 Stark. 81. But it is said not to be an unsoundness unless it is shown to proceed from some disease or organic defect. *Bassett v. Collis*, 2 Campb. 523. See also *Quintard v. Newton*, 5 Robt. (N. Y.) 72.

Shortsightedness.—A warranty of soundness on the sale of a horse is broken by a congenital malformation rendering him, at the time of sale, less fit for reasonable use. An extraordinary convexity of the cornea of the eye, producing shortsightedness and a liability to shy, is a malformation within this rule, and is not such a patent defect that a purchaser with express warranty is bound to notice it. *Holliday v. Morgan*, 1 El. & El. 1; 102 E. C. L. 1.

Stumbling, Shying, Plunging.—A warranty that a horse is sure footed and all right in every respect, except only his stumbling from temporary causes, is broken if he has such an organic defect that his stumbling can only be

4. Of Warranty of Title.—In order that an action may be maintained for a breach of warranty of title to personal property, the buyer is not obliged to wait until he has been dispossessed actually; it is enough to show that he could not have withheld the property without becoming a wrongdoer.¹ And where the seller, although he has no title, expressly covenants to warrant and defend the title against the claims of all persons, and the owner sues and recovers judgment against the buyer for converting the

avoided by a peculiar method of shoeing, which the vendee, though using reasonable diligence, is unable to discover. *Morse v. Pitman*, 64 N. H. 11.

A warranty that a pair of horses are "sound and kind in every respect," is broken if one of the horses is in the habit of making sudden plunges without cause. *Hall v. Colyer* (Supreme Ct.), 8 N. Y. Supp. 801.

Whistling is generally considered unsoundness. *Onslow v. Eames*, 2 Stark. 72. See also *Moore v. Haviland*, 61 Vt. 58, holding that while expert testimony as to what "whistling" in horses is, and how it affects them, is competent, it cannot be shown thereby that it is universally regarded by those familiar with horses as unsoundness, it being for the jury to say whether the alleged unsoundness exists. But it is proper to allow the expert, a veterinary surgeon, who had opportunities for observing the horse's condition, to testify that he saw no indications that the horse was a "whistler," and that he would have noticed such indications if they had existed.

1. What Constitutes a Breach of Warranty of Title.—*Cahill v. Smith*, 101 N. Y. 355; *Dent v. McGrath*, 3 Bush (Ky.) 174; *Dryden v. Kellogg*, 2 Mo. App. 87. Compare *Tipton v. Triplett*, 1 Metc. (Ky.) 570. See also *Murrell v. Graham*, 1 Brev. (S. Car.) 490; *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 201; 39 Am. Dec. 499; *Boyd v. Day*, 3 Bush (Ky.) 617; *Strong v. Barnes*, 11 Vt. 221; 34 Am. Dec. 684; *Crutchfield v. Danilly*, 16 Ga. 432; *Jamison v. Harbert* (Iowa, 1893), 54 N. W. Rep. 75.

Where the vendee is deprived of his title by the enforcement of a mortgage which the vendor had agreed to satisfy, and regains possession only by paying the mortgage debt, he is entitled to redress without eviction. *Cahill v. Smith*, 101 N. Y. 355. So, in an action on a warranty of title in the sale of a horse, evidence that a third person held a mortgage on the horse at the time of the

sale, and since the sale, has taken possession of him under a warrant in a pending claim and delivery proceeding against the plaintiff, is sufficient to show a breach of the warranty. *Hodges v. Wilkinson*, 111 N. Car. 56. It was held also in this case that the mortgage by which a third person claims paramount title is admissible to prove such title; and the record of a pending claim and delivery proceeding, instituted by the third person, is admissible to prove his possession.

The vendee is entitled to recover against his vendor for a breach of an express warranty of title to a slave, upon proving the recovery of a judgment against his vendee by one having an adverse title, and of another judgment by his vendee against himself, and that the defendant was notified of the pendency of both suits. In such a case, if the vendee, on being informed that an adverse title to the property was set up, examines that title, and expresses himself satisfied with his own, it does not deprive him of his right of action against his vendor, on the warranty. *Harris v. Rowland*, 23 Ala. 644.

In *Close v. Crossland*, 47 Minn. 500, it is held that where property is exchanged as upon a sale, with a warranty of title, though a third person may afterward show a paramount title, the warranty is not broken until an ouster, or a surrender. And the same view is taken as to express warranties in *Brown v. Smith*, 5 How. (Miss.) 387. This latter case goes on to make a distinction in this regard between express and implied warranties of title, holding that where the warranty is implied, it amounts to an undertaking by the vendor that he has full power to sell, etc., and is broken if the title is not as represented. *Citing* 2 Kent's Com. 47; *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519; *Vanderkarr v. Vanderkarr*, 11 Johns. (N. Y.) 122; 7 Am. Dec. 554; *Municipality v. Cordevielle*, 19 La. 235; *Scott v. Scott*, 2 A. K.

property, the latter may recover on the covenant of warranty without paying the judgment.¹ But the lien of a judgment recovered against the buyer does not, it seems, operate as a breach of the warranty of title, unless such judgment was had in a proceeding in which the warrantor undertook to be concerned or in which he was properly notified to appear and defend.²

A warranty of title embraces any after-acquired right of the seller, and causes it to enure to the benefit of the person in whose favor the warranty was made. The seller cannot, therefore, assign, for example, his right to a patent, and then buy or secure control of an older patent, and by means of it dispossess his assignee of the full benefit of his purchase.³

Where the buyer resells the article sold to him with a warranty of title, he cannot recover on the warranty without showing an eviction of his vendee by a superior title, and also that he had been compelled to compensate his vendee for the eviction.⁴

XVII. WAIVER OF WARRANTY—1. By Express Agreement.—All warranties, whether express or implied, may be waived by an express agreement on the part of the seller;⁵ and where such an

Marsh. (Ky.) 218; *Payne v. Rodden*, 4 Bibb (Ky.) 304; 7 Am. Dec. 739. See also *Cheatham v. Wilber*, 1 Dakota 235.

1. *Hersey v. Long*, 30 Minn. 114. See *Blasdale v. Babcock*, 1 Johns. (N. Y.) 517.

2. *De Witt v. Prescott*, 51 Mich. 298; *Buchanan v. Kauffman*, 65 Tex. 235. Therefore, the purchaser of a steamer, who alleges that he has been evicted, by order of a court of competent jurisdiction, for debts secured by lien and privilege contracted by his vendor previous to the sale, cannot claim restitution of the portion of the price paid by him, nor retain the balance, where he has at his disposal adequate proof to repel the claims on which the alleged eviction was effected, but which was not heard, solely because the only judge present who had authority to grant an injunction applied for by the purchaser, had been counsel for one of the parties, and would not act on the application, and where the vendor was not a party to the proceedings, nor notified of them. A vendor is not liable under his warranty for a failure of justice resulting from such an accident. *Cockerell v. Smith*, 1 La. Ann. 1.

As to the measure of damages for a breach of warranty of title, see *infra*, this title, *Measure of Damages*.

3. *Curran v. Burdsall*, 20 Fed. Rep. 835.

4. **Where Buyer Resells.**—In the case of *Boyd v. Day*, 3 Bush (Ky.) 617, one

B. sold D. a horse with general warranty of title, and a special guaranty that D. would not be disturbed in his possession by the *United States* military authorities, because of a shoulder brand. D. sold the horse to one from whom some soldiers took it, and the officer retaining the horse, D. refunded to his purchaser the purchase-money paid by him. It was held that D. could not recover of B. on the warranty, without showing eviction by a superior title; and that D. could not recover of B. on the special guaranty, without showing that the refunding was upon a special guaranty by him (D.) to his vendee. *Myers v. Bowen*, 3 Colo. App. 537.

5. *Wooldridge v. Royer*, 69 Md. 115. In the case of *Osborne v. McQueen*, 67 Wis. 392, the purchaser of a harvesting machine paid one-third of the purchase-money in cash and gave two notes for the remainder, to each of which was appended a waiver "of all relief from valuation, relief, appraisement, stay, exemption, and homestead laws and all defenses hereto." In an action on these notes, the court held that, notwithstanding the written waiver of all defenses, the vendee might set up in defense the damages suffered by him in consequence of a breach of the warranty. *Citing Osborne v. Marks*, 33 Minn. 56; *Tunell v. Osborne*, 31 Minn. 343.

Effect of Written Acknowledgment of Receipt of the Article.—In the case of *Fairbanks v. DeLissa*, 36 Mo. App.

agreement is in writing, neither party can be allowed to show any other understanding by parol, unless the written agreement was secured by fraud.¹

2. Effect of Vendee's Acceptance and Retention of the Article.—The general rule has been stated that a mere breach of warranty is not sufficient ground for a rescission of the contract of sale; the buyer's remedy in such a case is to retain the property, and either bring an action on the warranty for damages, or wait until he is sued for the purchase-money, and set up the breach of warranty in defense.² It follows, therefore, that the buyer's acceptance and retention of the article sold, cannot be considered as an implied waiver of his right to claim damages for a breach of the warranty; except where the warranty is fraudulent, he has no option but to retain the property.³ The numerous cases which

711, which was an action for the price of a windmill, tank, and apparatus, it appeared that upon the machinery being put in place by a carpenter employed by the plaintiff, and set in operation, the defendant objected to the tank, and expressed doubts as to its sufficiency, but being assured that it would tighten by use, signed a receipt in which he acknowledged receiving the windmill and its appurtenances "in good order, as per contract," etc. It was held that such a receipt could not operate to bar the defendant's right to show the truth in the controversy, since to constitute a waiver of such a right, there must be both knowledge of the defect and an acquiescence; also that such a receipt could not operate as an estoppel, because the plaintiff had never acted upon it, and had never parted with anything, or any right, upon the faith of it.

On a contract for the sale of cotton, although that delivered is not of the quality contracted for, if other cotton which is satisfactory is, by mutual agreement, substituted therefor, and is accepted and paid for by the buyer, he cannot afterward maintain an action for breach of the warranty. *Gage Mfg. Co. v. Woodward*, 17 R. I. 464.

Where, after an engine purchased by the defendant was tested, the seller and buyer agreed that the former should make certain repairs, there was a complete settlement of the original contract of sale and warranty. *Aultman v. McKinney* (Tex. Civ. App. 1894), 26 S.W. Rep. 267.

1. *Wooldridge v. Royer*, 69 Md. 115. In this case, the purchaser of certain fertilizers gave the vendor his note for the price of them, in which it was pro-

vided that "it is agreed that the fertilizer, which is the consideration of this note, is bought without any guarantee on the part of the importers or their agents as to results from its use." In an action on this note, the defendant testified in his own behalf that at the time of making the sale to him, and prior to the signing of the note, the plaintiff's agent said that he "would warrant the fertilizer to produce as good crops as any other manipulated fertilizer that can be bought on the market for the same price, and if it does not do so, you need not pay for the same," and that it was upon this understanding that he agreed to take the fertilizer; he testified also as to the failure of the fertilizer to be as represented. The court, in holding that even if the representation alleged was the moving cause which induced the purchase, it was waived by the buyer's giving such a note, said: "The written contract was the final and completed agreement of the parties respectively, and unless it appeared that the waiver was fraudulently procured or interpolated, the appellee is certainly estopped by his own written statement of the contract, from setting up any warranty."

2. See *infra*, this title, *Remedies for a Breach of Warranty*; *Lyon v. Bertram*, 20 How. (U. S.) 149.

3. **Retention of Article Not a Waiver of the Warranty.**—*Weed v. Dyer*, 53 Ark. 155; *Poland v. Miller*, 95 Ind. 387; 48 Am. Rep. 730; *Ferguson v. Hosier*, 58 Ind. 438; *Aultman v. Wheeler*, 49 Iowa 647; *Morse v. Moore*, 83 Me. 473; 23 Am. St. Rep. 783; *Roebbing Sons Co. v. Winthrop Hematite Co.*, 70 Mich. 346; *Kimball, etc.*, *Mfg. Co. v.*

Vroman, 35 Mich. 310; Osborne v. Carpenter, 37 Minn. 331; Osborne v. Marks, 33 Minn. 56; Fadley v. Smith, 23 Mo. App. 387; Long v. Armsby, 43 Mo. App. 253; Kent v. Friedman, 101 N. Y. 616; Fairbanks Canning Co. v. Metzger, 118 N. Y. 261; 16 Am. St. Rep. 753; Zabriskie v. Central Vt. R. Co., 131 N. Y. 72; Spedding v. Townsend (City Ct.), 2 N. Y. Supp. 657; Rust v. Eckler, 41 N. Y. 488; Cox v. Long, 69 N. Car. 7; Chase v. Evarts (Super. Ct.), 19 N. Y. Supp. 987; Bonham Cotton Press Co. v. McKellar, 86 Tex. 694; Minnesota Thresher Mfg. Co. v. Hanson (N. Dak. 1892), 54 N. W. Rep. 311; Hayden v. Houghton (Tex. Civ. App. 1894), 24 S. W. Rep. 803; Lewis v. Rountree, 78 N. Car. 323; McGill v. Hall (Tex. Civ. App. 1894), 26 S. W. Rep. 132. In Tacoma Coal Co. v. Bradley, 2 Wash. 603, it was held that retaining goods, after the knowledge of defects and without notice to the seller, is no waiver of warranty. Morehouse v. Comstock, 42 Wis. 626; Osborne v. McQueen, 67 Wis. 392; Park v. Richardson, 81 Wis. 399; Reynolds v. Palmer, 21 Fed. Rep. 433; Walker v. Gooch, 48 Fed. Rep. 656. See also Harrisburgh Car Mfg. Co. v. Sloan, 120 Ind. 156; McCormick Harvesting Mach. Co. v. Cochran, 64 Mich. 636; Evans v. Goggan, 5 Tex. Civ. App. 129; Weston v. Card, 56 Mich. 373; Springfield Engine, etc., Co. v. Kennedy, 7 Ind. App. 502.

The fact that a purchaser of stock, under a warranty as to value, accepts it, and remains in the employ of the company several months in an attempt to make it valuable, does not affect his right to an action for a breach of the warranty. Maxted v. Fowler, 94 Mich. 106. See also Wyckoff v. Artley, 142 Pa. St. 467.

The rule applicable to executory sales, that a purchaser who accepts and retains the property delivered, waives his right to insist that the article is inferior in quality to that which the contract calls for, does not apply to a present executed sale with warranty. And if the contract proves to be unperformed, the right of the buyer to maintain an action upon it, for the recovery of the damages sustained by the breach, is not affected by the circumstance that he may have received and retained the article sold. Rust v. Eckler, 41 N. Y. 488; Gilson v. Bingham, 43 Vt. 410. Compare Pomeroy v. Shaw,

2 Daly (N. Y.) 267; Smith v. Servis, 58 Hun (N. Y.) 601.

Where there is an express warranty in the sale of whisky barrels that they are suitable for holding whisky, the vendee may recover for a breach thereof, even though, after some of the barrels had proved leaky, they used the others. Poland v. Miller, 95 Ind. 387; 48 Am. Rep. 730.

Where the manufacturer of pianos was liable for a breach of warranty given by him on the sale of an instrument, the mere fact that the purchaser afterward bought two other pianos from him without insisting on payment for the breach, cannot operate as a waiver of the warranty, and the purchaser is entitled to set off the damages resulting from such breach in an action by the seller for the price of the two pianos subsequently bought. Snow v. Schomaker Mfg. Co., 69 Ala. 111; 44 Am. Rep. 507.

In McCormick Harvesting Mach. Co. v. Hays, 89 Ind. 582, a vendor sold a reaper, warranting it to work well, and it was agreed that if it failed to work well the buyer should notify the seller and allow him an opportunity to put it in order. It did not work well, and notice was given as required, but no attention was paid to it. The buyer used the reaper for a week and then returned it. It was held that there was a breach of the warranty, and that the seller could not recover the price.

The rule of the text is true whether the contract is executory or executed. Gould v. Stein, 149 Mass. 577; 14 Am. St. Rep. 455; Underwood v. Wolf, 131 Ill. 425; 19 Am. St. Rep. 140; Weed v. Dyer, 53 Ark. 155; Weber v. Demuth (City Ct.), 3 N. Y. Supp. 658; Lesser v. Perkins (Supreme Ct.), 4 N. Y. Supp. 53. Compare Studer v. Bleistein, 115 N. Y. 317.

In the case of Morehouse v. Comstock, 42 Wis. 630, the court, by Lyon, J., said: "It was held in Locke v. Williamson, 40 Wis. 377, that in respect to an executory contract for the sale and purchase of goods, 'when the defects in the goods are patent and obvious to the senses, when the purchaser has full opportunity for examination, and knows of such defects, he must, either when he receives the goods, or within what, under the circumstances, is a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty; otherwise the

appear to hold that such retention is a waiver of a buyer's right to complain of defects, are cases in which there was no warranty, and in which the contract of sale was executory merely, so that the buyer's only remedy was for the fraud, by rescinding the contract.¹ The principle is well settled that a buyer who has used the article sold, or any part of it, longer than is reasonably necessary to determine its sufficiency, cannot claim the right to

defects will be deemed waived.' Subject to this rule, it is the settled law in this state that, 'in case of a warranty, express or implied, where the article purchased proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages, or, if sued for the price, may set up and have such damages allowed to him, by way of recoupment, from the sum stipulated to be paid.' "

A manufacturer who sells an engine not made by himself, with a warranty that it is in good condition, and, if not found to be so, shall be placed in such condition, puts himself in a position analogous to that of one who contracts to build and furnish an engine; and an acceptance by the purchaser is conditional, and does not bind him to keep it unless it answers the warranty. *Kimball, etc., Mfg. Co. v. Vroman*, 35 Mich. 310.

If a person agrees to purchase articles to be delivered by a certain time, and which are promised to be of a certain good quality, and after payment for them, and when it is too late to return them without prejudice to himself, he finds out that they are of inferior quality, he may sustain an action to recover damages on account of the inferior quality of the articles, although he has accepted and used them. *Cox v. Long*, 69 N. Car. 7.

In the case of a fraudulent sale of goods, the vendee may retain them and sue for damages on account of the fraud; and the receipt of some of the goods, and the completion of the contract after the discovery of the fraud, will not constitute a waiver of his rights, or defeat his action. *Haven v. Neal*, 43 Minn. 315.

Warranty that Machine Will Do Satisfactory Work.—In some instances, conspicuously in the sale of harvesters, mowers, and reapers, the warranty is to the effect that the machine, besides being well made, durable, etc., will do satisfactory work. In such cases, as in others, the retention of the machine by

the vendee does not operate as a waiver of the warranty, but it may be shown as strong presumptive evidence that the machine has done satisfactory work. *Skeen v. Springfield, etc., Co.*, 34 Mo. App. 485; *Russell v. Murdock*, 79 Iowa 101; 18 Am. St. Rep. 348; *supra*, this title, *Sales on Approval*. Therefore, it is held that the purchaser cannot, after using the machine for two years, defend an action for the purchase-money, on the ground that the machine failed to do satisfactory work. *McCormick Harvesting Mach. Co. v. Martin*, 32 Neb. 723; *Osborne v. Marks*, 33 Minn. 56.

1. Cases apparently holding that an acceptance and retention of the article constitute a waiver of the warranty, are all explainable on the grounds stated in the text. The greater number of them are cases in which the contract of sale was executory and the sole question involved was the vendee's right to rescind the contract. See *Lyon v. Bertram*, 20 How. (U. S.) 149; *Hazlehurst Compress, etc., Co. v. Boomer, etc., Compress Co.*, 48 Fed. Rep. 803; *English v. Spokane Commission Co.*, 48 Fed. Rep. 196; *Bullock v. Consumers' Lumber Co.* (Cal. 1892), 31 Pac. Rep. 367; *Wolf v. Dietzsch*, 75 Ill. 205; *Woodward v. Libby*, 58 Me. 42; *Rutter v. Blake*, 2 Har. & J. (Md.) 353; 3 Am. Dec. 550; *Chase's Patent Elevator Co. v. Boston Towboat Co.*, 155 Mass. 211; *Haase v. Nonnemacher*, 21 Minn. 486; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Cahen v. Platt*, 40 N. Y. Super. Ct. 483; *Dounce v. Dow*, 64 N. Y. 411; *Sparks v. Messick*, 65 N. Car. 440; *Miller v. Greenleaf* (Tex. App. 1891), 18 S. W. Rep. 89; *Gilson v. Bingham*, 43 Vt. 410; *Cole v. Champlain Transp. Co.*, 26 Vt. 87; *Harrison v. Crocker*, 39 Wis. 68; *Locke v. Williamson*, 40 Wis. 377; *Bonnell v. Jacobs*, 36 Wis. 59. See also *Nye v. Iowa City, etc., Works*, 51 Iowa 129; 33 Am. Rep. 121; *Casidy v. LeFevre*, 57 Barb. (N. Y.) 313; *Youngs v. Kent*, 2 Sweeney (N. Y.) 248; *Parks v. O'Connor*, 70 Tex. 377.

rescind the contract by returning the article, and recover the whole purchase-money paid; in such a case he is left to his remedy on the warranty.¹ The only effect the buyer's retention of the article sold can have is to destroy the remedy by rescission, or to supply some evidence that there was no breach of the warranty.²

After the acceptance of the goods by the vendee, the presumption is that they were of the quality called for by the contract, and the burden is on the vendee objecting to the quality, to prove by a preponderance of the evidence that there is a breach of the warranty.³

3. Payment of the Price.—The fact that the buyer, after having used the article for some time, pays the purchase-money due, or gives his notes therefor, does not operate as a waiver of his right of action on the warranty.⁴ This is true, particularly where, at the time of executing the notes, or paying the price, the buyer expressly announces his intention of claiming damages for a breach

1. *Harnor v. Groves*, 15 C. B. 667; 80 E. C. L. 667; *Prosser v. Hooper*, 1 Moore 106. Compare *Canham v. Piano Mfg. Co.* (N. Dak. 1893), 55 N. W. Rep. 583; *Hercules Iron Works Co. v. Dodsorth*, 57 Fed. Rep. 556.

It is only in the absence of fraud or latent defects, or a warranty of quality, that the acceptance of an article sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and conforms to the contract, and bars all claim for compensation on account of any defects that may exist in the article. *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Ricketts v. Hays*, 13 Ind. 181.

Where furniture manufactured under a contract that it should be "finished in a good workmanlike manner," is accepted and paid for by the vendee with knowledge that it was not finished in a proper manner, he cannot afterward bring an action on account of the defective finishing; in such a case there is no such warranty as would survive the acceptance of the article. *Smith v. Servis* (Supreme Ct.), 11 N. Y. Supp. 301.

In the case of *Gage Mfg. Co. v. Woodward*, 17 R. I. 464, which was an action for a breach of warranty given on an executory contract for the sale and delivery of cotton, it appeared that cotton inferior in grade to that contracted for was delivered, but the vendee accepted it, because if he rejected it his mills would have to be closed for want of raw material. It was held that a verdict for the defendant, the seller,

should be set aside, the vendee's acceptance having been made under protest.

Breach of Warranty of Title.—When personal property is sold with a warranty of title, the vendee cannot take advantage of a breach of the warranty to have the contract rescinded and refuse payment of the price, when he has kept the property for many years, and had the benefit thereof until it was destroyed. *Sparks v. Messick*, 65 N. Car. 440.

2. *Weed v. Dyer*, 53 Ark. 155.

3. *Atkins v. Cobb*, 56 Ga. 86.

4. *Toledo Sav. Bank v. Rathmann*, 78 Iowa 288; *Osborne v. Carpenter*, 37 Minn. 331; *Osborne v. Marks*, 33 Minn. 56; *Courtney v. Boswell*, 65 Mo. 196; *Hayner v. Churchill*, 29 Mo. App. 676; *Fadley v. Smith*, 23 Mo. App. 87; *Nauman v. Oberle*, 90 Mo. 666; *Aultman v. Hefner*, 67 Tex. 54; *Park v. Richardson, etc., Co.*, 81 Wis. 399; *Walker v. Gooch*, 48 Fed. Rep. 656; *Ottawa Bottle, etc., Co. v. Gunther*, 31 Fed. Rep. 208. Compare *McCormick Harvesting Mach. Co. v. Martin*, 32 Neb. 723; *Bretz v. Fawcett*, 29 Ill. App. 319.

Giving collateral security with notes for the purchase price of an article, no more defeats the right of the purchaser to rely on the warranty than does the execution of the notes. *Aultman v. Hefner*, 67 Tex. 54. Nor does the renewal of the notes, after the discovery of a breach of the warranty, affect the vendee's right to an action for such breach. *Osborne v. Marks*, 33 Minn. 56.

of the warranty,¹ or where the payment is induced by the seller's promise to remedy the defect or return a part of the price.²

And where a buyer makes demands for repairs for which he pays when furnished, he does not thereby waive his rights under the warranty.³

These principles apply as well where the contract of sale containing the warranty is executory, as where it is executed.⁴

4. In Executory Contracts of Sale.—The rule that an acceptance and retention of the article contracted for is not a waiver of the vendee's right to an action on the warranty, applies as well to executory contracts of sale as to executed contracts. The fact that in such cases the vendee may rescind the contract and reject the article for a failure to comply with the warranty, does not alter the rule; he has his election whether to rescind the contract, or, by accepting the article, confine himself to his remedy on the warranty.⁵

1. *Aultman v. Wheeler*, 49 Iowa 647.

2. *Courtney v. Boswell*, 65 Mo. 196; *Osborne v. Carpenter*, 37 Minn. 331; *Aultman v. Hefner*, 67 Tex. 54. The same is true where the seller, or his agent, induces the buyer to execute the notes by assuring him that it will not affect his own liability or his rights. *Harrison v. Crocker*, 39 Wis. 68.

The case of *Wooldridge v. Royer*, 69 Md. 113, which is sometimes cited as opposing the rule of the text, was one in which the notes given by the buyer expressly waived any claim of warranty.

3. *Latham v. Shiply*, 86 Iowa 543. In this case it appeared that, some parts of the machinery purchased being defective, the buyer wrote to the seller asking to have the defects remedied, and, on this being done, paid the purchase-money. It was held that this action constituted no waiver.

4. *Kent v. Friedman*, 101 N. Y. 616; *Fairbanks Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753; *Zabriskie v. Central Vt. R. Co.*, 131 N. Y. 72; *Parks v. Morris Axe, etc., Co.*, 54 N. Y. 586; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600; *Morehouse v. Comstock*, 42 Wis. 626; *English v. Spokane Commission Co.*, 48 Fed. Rep. 197; 2 Benjamin on Sales (6th Am. ed.), § 477.

An agreement to sell a quantity of coal, warranted to be of the same quality and kind as that furnished the buyer during the preceding year, is practically a sale by sample, and an acceptance of the coal does not preclude the purchaser from recovering damages for a

breach of the warranty. *Zabriskie v. Central Vt. R. Co.*, 131 N. Y. 72, *affirming* 13 N. Y. Supp. 735.

Where a seller contracts to deliver good, clear, merchantable ice, it is a warranty, or a condition precedent of the nature and effect of a warranty, that the ice afterward delivered will be of that quality, and the buyer, by accepting the ice delivered, is not precluded from setting up a breach of the warranty in defense of the seller's action for the price. *Morse v. Moore*, 83 Me. 473; 23 Am. St. Rep. 783.

5. *Day v. Pool*, 52 N. Y. 420; 11 Am. Rep. 719 (where the authorities are reviewed); *Zabriskie v. Central Vt. R. Co.*, 131 N. Y. 72; *Weber v. Demuth (City Ct.)*, 3 N. Y. Supp. 658; *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40; *Poland v. Miller*, 95 Ind. 387; 48 Am. Rep. 730; *Weed v. Dyer*, 53 Ark. 155; *Bushman v. Taylor*, 2 Ind. App. 12; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600; *Halley v. Folsom*, 1 N. Dak. 325. Compare, however, *Studer v. Bleistein*, 115 N. Y. 317; *Lesser v. Perkins (Supreme Ct.)*, 4 N. Y. Supp. 53; *Smith v. Servis*, 58 Hun (N. Y.) 601.

The early case of *Hopkins v. Appleby*, 1 Stark. 477, tried before Lord Ellenborough, opposes the rule of the text. That was an action for goods sold and delivered, warranted to be of the best quality of Spanish barilla. The defendant had accepted the article on delivery and consumed it in manufacturing, without giving notice of any defects, or offering to return it. He attempted to show that the true quality of the article was not ascertainable

But, although the buyer, even in executory contracts of sale and delivery, is not bound to give notice of any defects, or to refuse to accept the goods, it is generally held that his failure to make complaint may be given in evidence as tending to show that there had been no breach of the warranty.¹

XVIII. REMEDIES FOR A BREACH OF WARRANTY.—If there is a breach of the warranty of title, the vendee may sue for a return of the purchase-money paid, or may maintain an action on the warranty to recover damages; and this latter is the proper remedy where the breach of warranty has occasioned the purchaser other damage in addition to the mere loss of the article. If the price has not been paid, the breach of the warranty of title will, of course, be a complete defense to an action by the vendor for the price.²

If the warranty is one relating to the quality of the goods sold, the vendee may pursue any one of three remedies:³ If the title has not passed to him, or if the warranty was made fraudulently, he may rescind the contract and refuse to accept the goods, or if he has received them already, he may return them or notify the

except by actual use and experiment; but on this point the evidence was conflicting. It was held that he should have given notice of the defects at an early stage, in order that the vendor might have had an opportunity to remedy them. He was, therefore, held liable for the whole price. This case has not been followed, however, and was distinctly overruled in *Poulton v. Lattimore*, 9 B. & C. 259; 17 E. C. L. 373. In that case, the buyer neither returned the seed which had been delivered under the contract, nor gave any notice of defects, but as there was an express warranty of quality which had been broken, he was allowed to set up the breach to defeat an action by the seller for the price. Other English and American cases set up the doctrine as stated in the text. See *Fielder v. Starkin*, 1 H. Bl. 17, and cases cited above.

The cases of *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305; *McCormick v. Sarson*, 45 N. Y. 265; 6 Am. Rep. 80; *Neaffie v. Hart*, 4 Lans. (N. Y.) 4, were all cases in which there was no warranty, and the vendee's only remedy was in a rescission of the contract which he had waived by accepting the goods. Other cases are explainable in the same way. See *Story on Sales* (4th ed.), §§ 405, 422; *Day v. Pool*, 52 N. Y. 420; 11 Am. Rep. 719. In this case, *Peckham, J.*, observed: "In my opinion, where there is an express warranty, the purchaser, whether in an executed or

an executory sale, is not bound to return the property upon discovering the breach, even when he has the right to do so."

1. **Notice of Defects or of Non-Acceptance.**—*Fearl v. Hanna*, 129 Pa. St. 589; *Weed v. Dyer*, 53 Ark. 155. In *Eastern Ice Co. v. King*, 86 Va. 102, the court said: "The true rule is that where goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer may bring an action for the breach of the warranty immediately, without returning the goods or giving any notice to the seller; though it has been held that the failure, either to return the goods, or to notify the vendor of the defect in quality, raises a presumption that the complaint of defective quality is not well founded. *Vincent v. Leland*, 100 Mass. 432; *Fisk v. Tank*, 12 Wis. 276; *Day v. Pool*, 52 N. Y. 416; 2 Benjamin on Sales (6th Am. ed.), § 1354."

2. *Harper v. Dotson*, 43 Iowa 232. See also *Clayton v. Scott*, 43 Vt. 553. The buyer of personal property, with covenant of warranty, may discharge an existing lien upon the property purchased, and deduct the amount from the unpaid balance of the purchase-money. *Harper v. Dotson*, 43 Iowa 232.

3. *Lyon v. Bertram*, 20 How. (U. S.) 149; *Cook v. Gray*, 2 Bush (Ky.) 121; *Cutter v. Powell*, 6 T. R. 320; 2 Smith's L. Cas. 1, and note; *Street v. Blay*, 2 B. & Ad. 456; 22 E. C. L. 122; *Poulton v. Lattimore*, 9 B. & C. 259; 17 E. C. L.

vendor that he holds them subject to his order;¹ if the title has passed to him, he may bring his action for damages caused by the breach of warranty;² or he may set up such damages by way of set-off or counterclaim to the vendor's action for the price.³

The remedies of the buyer where there is no warranty, for a failure to deliver goods of the quality and character contracted for, are examined in a previous article.⁴ There is no remedy in equity for a mere breach of warranty, except in peculiar cases of fraud.⁵

1. **Rescission**—*a. RIGHT TO RESCIND.*—While there is some conflict in the authorities, the better rule appears to be that, in the absence of fraud on the part of the seller, a mere breach of warranty does not authorize a rescission of the contract of sale by the buyer, after the contract has become executed; the buyer's remedy is confined to his action on the warranty, unless he can prove fraud or the previous consent of the seller to a rescission.⁶

373; *Fisk v. Tank*, 12 Wis. 27. See also *English v. Spokane Commission Co.*, 57 Fed. Rep. 451.

1. *Bryant v. Isburgh*, 13 Gray (Mass.) 607; 74 Am. Dec. 655; *Pennock v. Stygles*, 54 Vt. 226; *Thornton v. Wynn*, 12 Wheat. (U. S.) 183; *Withers v. Greene*, 9 How. (U. S.) 213.

2. See *infra*, this title, *Action on the Warranty for Damages*. See also *Dawson v. Pennaman*, 65 Ga. 698.

In Exchange of Chattels.—In the case of an exchange of personal property, where there is a breach of warranty unmixed with fraud, the remedy is by suit on the warranty; but where there has been actual fraud mixed with deceit, the party defrauded has his election to bring an action on the warranty, or trover for the property sold by him. *Dawson v. Pennaman*, 65 Ga. 698.

In an action for a breach of warranty of a jack, given as part payment on a sale of land wherein the plaintiff had given bond for title, taking for the balance of the purchase-money a note which he had assigned before bringing the action, it appearing that the jack was "hipped" and comparatively worthless at the time of the sale, and that the defendant had declined the plaintiff's offer to rescind the contract, it was held that the plaintiff was not restricted in his remedy to a suit for rescission, and that he was not bound, in order to maintain his action on the warranty, either to return the animal or to tender a conveyance of title to the land. *Smith v. Oldham*, 26 Tex. 533.

3. *Henkel v. Burke* (Me. 1887), 10 Atl. Rep. 249; *Trimmier v. Thomson*,

10 S. Car. 164. See *infra*, this title *Right to Set Off Damages in an Action for the Price*.

4. See *SALES*, vol. 21, p. 612. Where an article inferior to the one contracted and paid for, is delivered, and the seller is notified that it must be taken away, but neglects to do so, the buyer may dispose of it and claim the difference between what it was worth and what he was obliged to pay for a good article to supply its place. *Youghioghny Iron, etc., Co. v. Smith*, 66 Pa. St. 340.

5. **No Relief in Equity.**—*Linn v. Gunn*, 56 Mich. 447; *Lawrence v. Vick*, 10 Humph. (Tenn.) 285. In this latter case, after an action at law by the vendee for a breach of warranty of soundness made on the sale of a slave, the vendor filed a bill seeking to have her restored to him on the ground that the full value of the slave was recovered in the action, and that one of the plaintiff's attorneys had argued the case before the jury as if the slave was worthless, and had asserted that the defendant (the complainant in equity) might come and take her. It was held that the complainant had no ground for equitable relief, that his only remedy was in an application for a new trial.

6. *Street v. Blay*, 2 B. & Ad. 456; 22 E. C. L. 122; *Lyon v. Bertram*, 20 How. (U. S.) 149; *Dawson v. Pennaman*, 65 Ga. 698; *Crabtree v. Kile*, 21 Ill. 180; *Hoover v. Sidener*, 98 Ind. 290; *Prentiss v. Russ*, 16 Me. 30; *Merrick v. Wiltse*, 37 Minn. 41; *Kimball, etc., Mfg. Co. v. Vroman*, 35 Mich. 310; 24 Am. Rep. 558; *Bunce v. Beck*, 43 Mo. 279; *Voorhees v. Earl*, 2 Hill (N. Y.)

Where, however, it is a part of the original agreement that the buyer shall have the right to return the article and to receive back

288; 38 Am. Dec. 588; *McCormick v. Sarson*, 45 N. Y. 265; 6 Am. Rep. 80; *Day v. Pool*, 52 N. Y. 416; 11 Am. Rep. 719; *Kase v. John*, 10 Watts (Pa.) 107; 36 Am. Dec. 148; *Houston v. Cook*, 153 Pa. St. 43; *Kauffman Milling Co. v. Stuckey*, 37 S. Car. 7; *Allen v. Anderson*, 3 Humph. (Tenn.) 581; 39 Am. Dec. 553; *Wright v. Davenport*, 44 Tex. 164; *Blythe v. Speak*, 23 Tex. 429; *West v. Cutting*, 19 Vt. 536; *Pierce v. Carey*, 37 Wis. 232; *Thornton v. Wynn*, 12 Wheat. (U. S.) 183. See also *Lightburn v. Cooper*, 1 Dana (Ky.) 273. In *Merrick v. Wiltse*, 37 Minn. 41, the court said: "Under the rule as established in this state, the vendee cannot rescind and return the property for a breach of warranty merely, there being no fraud. Minneapolis Harvester Works v. Bonnellie, 29 Minn. 373. The title to the property passes, and if the warranty is false, a cause of action accrues immediately, and compensation in damages is due at once. *Muller v. Eno*, 14 N. Y. 597."

It must be conceded, however, that there are a number of cases of high authority, in which it has been held constantly that the vendee may rescind the contract for a breach of warranty. This appears always to have been the rule in *Massachusetts*. See *Bradford v. Manly*, 13 Mass. 139; 7 Am. Dec. 122; *Conner v. Henderson*, 15 Mass. 319; 8 Am. Dec. 103; *Perley v. Balch*, 23 Pick. (Mass.) 283; 34 Am. Dec. 56; *Bryant v. Isburgh*, 13 Gray (Mass.) 607; 74 Am. Dec. 655; *Morse v. Brackett*, 98 Mass. 209. In *Dorr v. Fisher*, 1 Cush. (Mass.) 271, Shaw, C. J., speaking for the court, said: "A warranty is not strictly a condition. . . . But to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase-money as in case of fraud." See also *Dill v. O'Ferrell*, 45 Ind. 268; *Jack v. Des Moines, etc.*, R. Co., 53 Iowa 399; *Gale Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606; 23 Am. St. Rep. 739; *Marshall v. Perry*, 67 Me. 78; *Horn v. Buck*, 48 Md. 358; *Jagers v. Griffin*, 43 Miss. 134; *Youghiogheny Iron, etc., Co. v. Smith*, 66 Pa. St. 340; *Martin v. Howil*,

2 Tread. Const. (S. Car.) 750; *Merrill v. Nightingale*, 39 Wis. 247. Compare, as to the rule in *Massachusetts*, *Dickinson v. Lane*, 107 Mass. 548, in which the vendee was not allowed to recover in an action against the vendor for money had and received; such money having been paid as the purchase price of a horse, although the vendee claimed to have rescinded the contract of sale for a breach of a warranty and had returned the horse.

In the case of *Lawton v. Keil*, 61 Barb. (N. Y.) 558, it is said that where the sale is of a specific article in possession of the seller, the representations may amount to a warranty; but if there is merely an agreement to sell a quantity of goods which are sound in quality, the remedy of the purchaser is to refuse to accept on delivery, or if he discovers the defect afterward, to rescind the contract and return the goods.

In the case of *Rogers v. Hanson*, 35 Iowa 283, the court conceded that the weight of authority was in favor of the rule as stated in the text, but considered that the doctrine of the *Massachusetts* courts was more in accord with principle.

In 1 *Parsons on Contracts* (7th ed.), pp. 592, 593, the author states the rule to be that the purchaser may, upon a breach of the warranty, "return the goods forthwith, and if he does so without unreasonable delay, this will be a rescission of the sale and he may sue for the price if he paid it, or defend against an action for the price if one be brought by the seller." He admits, however, that "some authorities of great weight limit his right to return the goods for a breach of warranty, to cases of fraud or where there was an express agreement between the parties." See also, as the view expressed by Mr. Parsons, *Hyatt v. Boyle*, 5 Gill & J. (Md.) 121; 25 Am. Dec. 276; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Marston v. Knight*, 29 Me. 341; *Scranton v. Tilley*, 16 Tex. 183; *Kuntzman v. Weaver*, 20 Pa. St. 422; 59 Am. Dec. 740.

The warranty, however, is only a collateral undertaking on the part of the vendor; it is not an essential part of the contract, and it is difficult to see how the breach of such an undertaking can justify a rescission and repudiation

the purchase-money paid, in case the article fails to satisfy the warranty, he may, of course, rescind the contract.¹ And where the representations constituting the warranty were fraudulently made, and with intent to defraud the buyer, the contract may be rescinded at the will of the buyer; the rule is well recognized that fraud will vitiate any contract into which it has entered, or which was induced by means of it.² The fraud may consist of false representations as to some positive quality of the article, or of the fraudulent concealment of defects known to the seller.³ Only positive misrepresentations, however, are considered in this connection, the general subject of fraud having been dealt with in a previous article.⁴

The rule that a mere breach of warranty does not authorize the vendee to rescind the contract, does not apply to cases in which the contract is executory merely, but is confined to contracts executed.⁵ Thus, where an article is ordered from a manufacturer, who engages that it shall be of a certain quality, or fit for certain purposes, and the article sent as such is never completely accepted

of the entire contract. The view expressed in the text has the indorsement of Mr. Story (*Story on Sales* (4th ed.), § 421), and is in accord with principle and the great weight of authority.

1. *Smith's Mer. Law* (3d Am. ed.), p. 634. But in such cases the vendee, where he has sustained injury in consequence of the breach of warranty, cannot be compelled to elect between a return of the property and damages, but may be entitled to both. The recovery of the purchase price may, in many cases, not be sufficient to make good all his losses; and the return of property which is unfit for use may be onerous and ruinous. See *Kimball, etc., Mfg. Co. v. Vroman*, 35 Mich. 325; 24 Am. Rep. 558.

But a provision in the contract that, on the failure of the article to comply with the warranty, the vendee may return it, does not compel him to choose that remedy; he may still elect to retain the article and sue on the warranty. *Mandel v. Buttles*, 21 Minn. 391; *Douglas Axe Mfg. Co. v. Gardner*, 10 Cush. (Mass.) 88.

2. See *RESCISSON*, vol. 21, p. 49; *FRAUD*, vol. 8, p. 650; *Slaughter v. Gerson*, 13 Wall. (U. S.) 379; *Norton v. Young*, 3 Me. 30; *Sibley v. Hurlbert*, 15 Gray (Mass.) 509; *Kimball v. Cunningham*, 4 Mass. 502; 3 Am. Dec. 330; *Miller v. Barber*, 66 N. Y. 558; *Paetz v. Stoppelman*, 75 Wis. 510; *Sparling v. Marks*, 86 Ill. 125.

Upon a fraudulent sale of diseased

sheep, under a warranty of soundness, the buyer may either rescind the contract and then, on returning the property, recover back the price paid, or he may affirm the contract and recover damages in an action on the warranty. *Marsh v. Webber*, 16 Minn. 375.

An action, by the purchaser of a warranted machine, brought, after he had returned it, against the vendor and his guarantor, claiming a recovery of a greater amount than the selling price, is an action for the rescission of the contract, and not for damages merely. *Clarke v. McGetchie*, 49 Iowa 437.

The law requires good faith and fair dealing between the parties to a contract; and it is well settled that the sale of a chattel may be avoided for a fraudulent concealment of a defect known to the vendor, and not discoverable on ordinary inspection by the vendee. *Turner v. Huggins*, 14 Ark. 21.

3. *Montgomery v. Bucyrus Mach. Works*, 92 U. S. 257; *Potter v. Taggart*, 54 Wis. 395; *Alexander v. Dennis*, 9 Port. (Ala.) 74; 33 Am. Dec. 309; *Bridge v. Penniman*, 105 N. Y. 642.

4. See *RESCISSON*, vol. 21, p. 49.

5. *Smith's Mer. Law* (3d Am. ed.), p. 635; *Okell v. Smith*, 1 Stark. 107; *Cook v. Gray*, 2 Bush (Ky.) 121; *Norton v. Dreyfuss*, 106 N. Y. 90. See also *Field v. Kinneer*, 4 Kan. 409, where, in an executory contract of sale by sample, it was held that the vendee might return the goods if they did not correspond with the implied warranty.

by the party ordering it, the latter may return it as soon as he discovers the defect in it, provided he has done nothing more in the meantime than was necessary to give it a fair trial.¹ Nor would the purchaser of a commodity to be delivered afterward, according to a sample, be precluded from returning the bulk, if it proves to be not in accordance with the sample, within a reasonable time for examination and comparison.²

Another exception to the general rule has been made in cases where the breach of warranty is such as to amount to a total failure of consideration, as where the article delivered proves to be absolutely worthless, or entirely different from what the contract calls for; in such cases the vendee may return the article, and recover the purchase-money paid.³ It seems, however, that this exception is but an extension of the rule stated above, which allows a rescission on the ground of fraud, the fraud being presumed from the entire worthlessness of the article.

A mere offer to return the property sold because it fails to comply with the warranty, does not, of itself, constitute a rescission of the contract, and the vendee may, after such offer has been made and refused, still elect to sue upon the warranty, thereby affirming the contract.⁴

The right to rescind the contract for a breach of warranty is,

1. Smith's Mer. Law (3d Am. ed.), p. 635; *Street v. Blay*, 2 B. & Ad. 456; 22 E. C. L. 122; *Cooper v. Hall*, 22 Neb. 168; *Brigg v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Norton v. Dreyfuss*, 106 N. Y. 90; *Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547.

The vendee, in such cases, notwithstanding the failure to meet the warranty, may retain it and bring an action on the warranty; he has a choice of remedies, and may demand a rescission or may proceed on the contract of warranty; but he cannot pursue more than one of such remedies. *Norton v. Dreyfuss*, 106 N. Y. 90; *Brigg v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547. But he may refuse to accept the article if it is defective, even though it has some value. *Cooper v. Hall*, 22 Neb. 168.

2. Smith's Mer. Law (3d Am. ed.), p. 635; *Mansfield v. Trigg*, 113 Mass. 350; *Morgan v. McKee*, 77 Pa. St. 228.

If a party buys a specific cargo of goods expected to arrive by a particular ship, and which are to be of a particular quality, he has a right, on the arrival of the ship, to inspect such cargo before it is delivered to him, in order to ascer-

tain whether the warranty has been complied with; and if it has not, he may reject the cargo altogether. But if the cargo is once delivered to him, he has no right to return it, on the ground that it does not correspond with the warranty. *Toulmin v. Hedley*, 2 C. & K. 157; 61 E. C. L. 157. The right to return a chattel sold with a warranty which proves incorrect, is not taken away by the fact that the buyer, before removing the chattel, might have found out that the warranty was untrue, or by the fact that the chattel, while it was in the buyer's possession, was injured, without fault on his part, by an accident arising from a defect inherent in the chattel. *Head v. Tattersall*, 20 W. R. 115; 25 L. T. N. S. 631.

3. *Young v. Cole*, 3 Bing. N. Cas. 724; 32 E. C. L. 303. The correct rule is that the buyer has no right to rescind the contract of sale, unless first, the contract itself confers the right, or second, there is fraud, or third, there is an entire failure of consideration. *Kauffman Milling Co. v. Stuckey*, 37 S. Car. 7; *Carter v. Walker*, 2 Rich. (S. Car.) 40.

4. *Graham v. Bardin*, 1 Patt. & H. (Va.) 206. See generally RESCISSION, vol. 21, p. 25.

when it exists, a mere privilege of the buyer's; he is not confined to it, but may waive it, and bring his action on the warranty.¹

b. VENDEE'S DUTY IN RESCINDING THE CONTRACT.—The general rules governing the duty, in the premises, of a party seeking to rescind a contract, have been reviewed in a previous article, to which reference is made.² The first duty of the vendee who seeks to rescind a contract of sale, is to return the article which was the subject of the sale; in no case can he retain it and have the contract rescinded, unless the article has no actual value; a rescission contemplates that both parties shall be placed *in statu quo*.³ The vendee must act with vigor and promptness in making the rescission, and in returning the article sold; if he retains the article for a longer time than is actually necessary for the purposes of examination and inspection, his right to rescind is waived, and he will be confined to his remedy by action on the warranty.⁴

1. Right to Rescind Is a Mere Privilege.—Taylor v. Saxe, 134 N. Y. 67; Underwood v. Wolf, 131 Ill. 425; 19 Am. St. Rep. 40.

In Benjamin on Sales (4th Am. ed.), pt. II, § 901, the author says: "The buyer will also loose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership, as by offering to resell them, all of which acts show an agreement to accept the goods, but do not constitute an abandonment of his remedy by cross-action, or now by a counterclaim in the vendor's action for the price."

2. See RESCISSION, vol. 21, p. 84 *et seq.*

3. Chandler v. Thompson, 30 Fed. Rep. 38; Himes v. Kiehl, 154 Pa. St. 190; Poor v. Woodburn, 25 Vt. 234; Wharton v. O'Hara, 2 Nott & M. (S. Car.) 65; Warner v. Wheeler, 1 D. Chip. (Vt.) 159; 6 Am. Dec. 717.

The article must be returned to the vendor and not to another person not his authorized agent. Thus, one who purchases a manufactured article from a dealer, taking at the same time a collateral contract of guaranty from the manufacturer, cannot, by tendering the property to the manufacturer, recover from him the money paid to the dealer for the article. Johnson v. Whitman Agricultural Co., 20 Mo. App. 100.

Worthless Goods.—Where the goods sold are absolutely worthless they need

not be returned. See authorities collected in RESCISSION, vol. 21, p. 89, note. See also Pacific Guano Co. v. Mullen, 66 Ala. 582; Trippe v. McLain, 87 Ga. 536.

4. Dill v. Camp, 22 Ala. 249; Davis v. Dickey, 23 Ala. 848; McCulloch v. Scott, 13 B. Mon. (Ky.) 172; 56 Am. Dec. 561; Roebeling's Sons Co. v. Winthrop Hematite Co., 70 Mich. 346; Okell v. Smith, 1 Stark. 107; Oxendale v. Wetherell, 9 B. & C. 386; 17 E. C. L. 401; Jordan v. Norton, 4 M. & W. 155; Smith's Mer. Law (3d Am. ed.), p. 653.

A party who seeks the rescission of a contract, on the ground of fraud, must act with vigor and promptness on the discovery of it, by an offer to return the property within a reasonable time, if the parties live at a distance from each other; or by an actual redelivery, if they reside near each other, and the property is susceptible of easy transportation. If the vendee retains possession of the property after an offer to return, or a tender with a view of redelivery, he is merely the bailee of the vendor, and must avoid the use or the employment of the property in any manner inconsistent with the vendor's rights. Dill v. Camp, 22 Ala. 249.

Where a machine is purchased under a warranty for a year, the purchaser may, upon discovering that it does not work as it was warranted to do, either rescind the contract by returning the machine, or sue on the warranty for the recovery of damages. But if he elects to rescind, he must do so, and return the machine within a reasonable time after he discovers the breach; and he

He cannot return the article where he has done with it anything more than is consistent with a fair trial.¹ But he is entitled to retain it long enough to make a fair test of its merits, and if his retention is no longer than is reasonably necessary for such a purpose, it cannot be considered as an acceptance and a waiver of his right to rescind.²

The whole of the commodity purchased must be returned; the vendee cannot select from the bulk such part of it as he may suppose corresponds with the warranty, and rescind the contract as to the remainder; the rescission must be of the entire contract or not at all.³ But where the goods sold are to be delivered by installments, made from time to time, the fact that the vendee receives and accepts some of the installments, which answer the warranty, will not oblige him to accept subsequent installments; he may rescind the contract as to subsequent installments, although he may have used and appropriated those previously delivered, so as to be unable to return them.⁴

It seems that it is sufficient if the vendee, after giving notice of the rescission, tenders a return of the article or goods; he is not bound to make an actual redelivery to the vendor, except where the contract specifically provides therefor.⁵ He must, however,

has not the whole year for which the machine is warranted, in which to exercise his election. *Upton Mfg. Co. v. Huiske*, 69 Iowa 557.

The delay in making the return is immaterial, however, if the seller accepts the article back without objection. *Aultman v. Miller*, 52 Kan. 60.

1. *Jessop v. Ivory*, 158 Pa. St. 71. Thus, where the vendee has resold the article at a profit, and delayed his offer to return it until it has come a second time into his possession, he cannot be allowed to claim a rescission of the original contract. *Street v. Blay*, 2 B. & Ad. 456; 22 E. C. L. 122. See also *Shipton v. Casson*, 5 B. & C. 378; 11 E. C. L. 254; *Coleman v. Gibson*, 1 M. & R. 169; *Campbell v. Fleming*, 1 Ad. & El. 40; 28 E. C. L. 29.

So, also, a vendee, who has purchased a wagon, will have no right to return it as not complying with the warranty, after having misused and greatly damaged it; and where he alleges a return, the vendor may plead and prove such misuse, as an excuse for not accepting it. Such a use of the article amounts to an acceptance of it, and the vendee must be confined to his remedy on the warranty. *Bradley v. Palen*, 78 Iowa 126.

2. *Keystone Implement Co. v. Leonard*, 40 Mo. App. 477. See also *Norton*

v. Dreyfuss, 106 N. Y. 90; *McCormick Harvesting Mach. Co. v. Cochran*, 64 Mich. 636. Thus, where the vendee is unable to determine the real quality of the goods furnished under the contract, except by using a part of them, the fact that he uses a part of them to make a test, does not preclude him from rescinding the contract as to the remainder. *Cooper v. Hall*, 22 Neb. 170. See also *Blackwood v. Cutting*, etc., Co., 76 Cal. 212; 9 Am. St. Rep. 199.

3. *Sigerson v. Harker*, 15 Mo. 101; *Morse v. Brackett*, 98 Mass. 205; *Young Mfg. Co. v. Wakefield*, 121 Mass. 91; *Carpenter v. Minturn*, 65 Barb. (N. Y.) 297; *Weston v. Chamberlain*, 56 Barb. (N. Y.) 415; *Morgan v. McKee*, 77 Pa. St. 228; *Costigan v. Hawkins*, 22 Wis. 74; 94 Am. Dec. 583; *Lyon v. Bertram*, 20 How. (U. S.) 149. See numerous authorities, on the general proposition of the text, in *Rescission*, vol. 21, pp. 91, 92 notes.

4. *Sigerson v. Harker*, 15 Mo. 101; *Mansfield v. Trigg*, 113 Mass. 350. See also *Bornum v. Garland*, 9 Ala. 452.

5. *Offer to Return Equivalent to a Return*.—*Thornton v. Wynn*, 12 Wheat. (U. S.) 183; *Barnett v. Stanton*, 2 Ala. 181; *Beecher v. Mayall*, 16 Gray (Mass.) 376; *Osborne v. Ehrhard*, 37 Kan. 414; *Thayer v. Turner*, 8 Met. (Mass.) 550; *Sycamore*, etc., *Marsh Harvester Co.*

not only tender a return, but stand ready, at any time, to make it, and if he afterward uses the property, his conduct is equivalent to an acceptance, which will bar his right to insist upon a rescission.¹

Notice of the rescission must be given to the vendor, and within a reasonable time.²

Where the property is sold on conditions, and it is stipulated expressly that the notes given for the purchase price are to be returned in case the property is not as it is warranted, the warranty having failed, a return of the property may be a sufficient demand for the notes.³

2. Action on the Warranty for Damages.—The warranty, being an undertaking or contract on the part of the vendor, the vendee is entitled to recover such damages as are sustained by him as a direct consequence of the breach of such contract. In this respect the warranty may be regarded as an undertaking separate and distinct from the contract of sale.⁴ The law relating to such action is not peculiar, the same rules prevail as in ordinary actions for breach of contract, and the measure of damages recoverable in such cases is examined further on.⁵

v. Grundrad, 16 Neb. 529, a case where the vendor refused to accept a return when it was tendered; *Lewis v. Cosgrave*, 2 Taunt. 2; *Champion Mach. Co. v. Mann*, 42 Kan. 372. See also *Walls v. Gates*, 6 Mo. App. 242; *Carter v. Walker*, 2 Rich. (S. Car.) 40. And see *Campbell v. Wray*, 5 Ind. App. 155, where a mere notice of defects was held equivalent to a return or tender. And see *Paulson v. Osborne*, 37 Minn. 19, as to what is a sufficient return.

For the purposes of rescission of a sale of personal property for a breach of warranty, it is sufficient if the vendee has notified the vendor of his intention to rescind, and has returned, or offered to return, the property. *Close v. Crossland*, 47 Minn. 500. The rule is otherwise where the contract of sale specifically provides for an actual return of the property. Thus, where a harvester was bought upon a warranty that if it were not as good as another kind of machine specified, the buyer could "bring it back, and get his money back," it was held that the buyer could not rescind the sale without proving a breach of the warranty, and that he had actually returned the machine; it is not sufficient for him to prove merely that he had tendered it subject to the vendor's order. *Edgerly v. Gardner*, 9 Neb. 130; *Pitt's Sons Mfg. Co. v. Spitznogle*, 54 Iowa 36.

1. *Logan v. Berkshire Apartment Assoc.*, 22 N. Y. Supp. 776.

2. *Rescission*, vol. 21, p. 84; *Parmlee v. Adolph*, 28 Ohio St. 10; *Lyon v. Pollard*, 20 Wall. (U. S.) 403.

In the case of *Foulk v. Eckert*, 61 Ill. 318, it was held, however, that where the vendee did not see the article purchased, but took it upon the faith of the vendor's representations which proved to be untrue, he was not bound to give notice of rescission in order to defend an action for the price. Nor where a machine was bought "on approval" was the vendee bound to give notice of his dissatisfaction, nor opportunity to the vendor to remedy the defects, before maintaining an action for the return of the purchase-money. *Aiken v. Hyde*, 99 Mass. 183.

3. *Fuller v. Schroeder*, 20 Neb. 631.

4. See *Walker v. Hoisington*, 43 Vt. 608; *Plant v. Condit*, 22 Ark. 454; *Lyon v. Bertram*, 20 How. (U. S.) 149; *Cutter v. Powell*, 6 T. R. 320; 2 *Smith's L. Cas.* 1, and note; *Allen v. Hooker*, 25 Vt. 137; *Gatling v. Newell*, 9 Ind. 572; *House v. Fort*, 4 Blackf. (Ind.) 293. See *supra*, this title, *Is a Collateral Undertaking*.

5. See *infra*, this title, *Measure of Damages*.

To recover for the breach of a warranty, the action must be founded expressly on the warranty. *Thompson v. Ashton*, 14 Johns. (N. Y.) 316;

It is not necessary, in such an action, to show that the vendor made the misrepresentations knowing that they were untrue.¹ Such proof is necessary only where the action is based upon fraud. Nor is the vendee bound to show that he offered to return the property, or gave notice of the defects, unless required by the terms of the contract.² And if the article purchased fails to comply with the warranty, it is no defense that the failure was not due to the defendant's negligence.³

The vendee, by bringing his action on the warranty, thereby affirms the contract, and admits his liability for the price, less the damages sustained by him in consequence of the breach of the warranty.⁴

a. FORM OF THE ACTION.—The original remedy, where the warranty proved to be untrue, was an action on the case sounding in tort. The distinction between actions in assumpsit and on the case has, however, been largely done away with, and the present doctrine is that the buyer may have his remedy

Carter v. Walker, 2 Rich. (S. Car.) 40. See also *Trice v. Cochran*, 8 Gratt. (Va.) 442; 56 Am. Dec. 151; *Tyre v. Causey*, 4 Harr. (Del.) 425; *Kimball v. Cunningham*, 4 Mass. 502; 3 Am. Dec. 330; *Evertson v. Miles*, 6 Johns. (N. Y.) 138; *Cutler v. Cox*, 2 Blackf. (Ind.) 178; 18 Am. Dec. 152; *Moyer v. Shoemaker*, 5 Barb. (N. Y.) 319; *Vail v. Strong*, 10 Vt. 457. As to the remedy in *Louisiana*, see *Richardson v. Johnson*, 1 La. Ann. 389.

The buyer must allege a promise or undertaking on the part of the seller, and not merely that the seller induced the purchase by a false representation of the quality of the article. *Cooper v. Landon*, 102 Mass. 58.

Remedy on Warranty in Exchange of Property.—If money and a horse are given in exchange for another horse which was warranted sound, but which was unsound at the time, an action for money had and received is not a proper action to try the warranty; nor will trover lie for the horse given in exchange, because the property is altered. *Power v. Wells*, Cowp. 818; 1 Dougl. 24, n. And see *Cooke v. Munstone*, 1 N. R. 151; *Emanuel v. Dane*, 3 Campb. 299.

1. Proof of Scienter Unnecessary.—*Shippen v. Bowen*, 122 U. S. 575; *Schuchardt v. Allens*, 1 Wall. (U. S.) 368; *Vail v. Strong*, 10 Vt. 457; *Williamson v. Allison*, 2 East 446; *Gresham v. Postan*, 2 C. & P. 540; *Dowding v. Mortimer*, 2 East 450.

In an action for a breach of an ex-

press warranty that a horse was quiet, if the declaration alleges that the defendant well knew him to be unquiet, this is an unnecessary averment, and need not be proved. *Gresham v. Postan*, 2 C. & P. 540; 12 E. C. L. 250.

But where the property is warranted to be sound to the extent of the warrantor's knowledge and belief, then in order to prove a breach of the warranty, it must be shown that the warrantor knew, or had reason to believe, the property was unsound. *Hubby v. Stokes*, 22 Tex. 217.

2. *Lewis v. Rountree*, 78 N. Car. 323; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129; *Ross v. Barker*, 30 Mo. 385.

3. In *Randall v. Newson*, 2 Q. B. Div. 102; 46 L. J. Q. B. Div. 259, reversing 34 L. T. N. S. 527, it appeared that the plaintiff ordered and bought of the defendant, a coach builder, a pole for the plaintiff's carriage. The pole broke in use, and the horses became frightened and were injured. In an action to recover for the damage, the jury found that the pole was not reasonably fit for the carriage, but the defendant had been guilty of no negligence. It was held that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury, on a second trial, should be of opinion that the injury to the horses was the natural consequence of the defect in the pole.

4. *Weybrich v. Harris*, 31 Kan. 92. See also *Rutter v. Blake*, 2 Har. & J. (Md.) 353; 3 Am. Dec. 550.

by an action on the warranty sounding either in tort or in contract.¹

6. PARTIES TO THE ACTION.—It seems that no one can be properly a party to the action, either as plaintiff or defendant, except the buyer and the seller; and where an article has been resold by the first purchaser, the remedy of the second purchaser is against his immediate seller, and not against the original one.² A vendor who sells an article warranted to be sound, and which he believes to be sound, though it is not so, cannot be held liable for an injury sustained by a third person, not a party to the contract, in consequence of the unsoundness of the article.³

1. *Stuart v. Wilkins*, 1 Dougl. 18; *Williamson v. Allison*, 2 East 447. In the case of *Schuchardt v. Allens*, 1 Wall. (U. S.) 359, it was said: "The remedy by assumpsit is comparatively of modern introduction. In *Williamson v. Allison*, 2 East 447, Lord Ellenborough said it had 'not prevailed generally above forty years.' In *Stuart v. Wilkins*, 1 Dougl. 18, Lord Mansfield regarded it as a novelty and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. Whether the declaration be in assumpsit or tort, it need not aver a *scienter*. And if the averment be made it need not be proved. *Gresham v. Postan*, 2 C. & P. 540; 12 E. C. L. 250; *Holman v. Dord*, 12 Barb. (N. Y.) 336; *Lassiter v. Ward*, 11 Ired. (N. Car.) 443. . . . One of the considerations which led to the practice of declaring in assumpsit, was that the money counts might be added to the special counts upon the warranty. *Williamson v. Allison*, 2 East 441. If the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action. *Vail v. Strong*, 10 Vt. 457; *Brown v. Edgington*, 2 M. & G. 279." See also, as sustaining the rule of the text, *House v. Fort*, 4 Blackf. (Ind.) 293; *Trice v. Cochran*, 8 Gratt. (Va.) 449; 56 Am. Dec. 151; *Vanleer v. Earle*, 26 Pa. St. 277; *Dushane v. Benedict*, 120 U. S. 630; 1 Chitty's Plead. 137.

2. See *Lyon v. Bertram*, 20 How. (U. S.) 149; PARTIES TO ACTIONS, vol. 17, p. 518. In the case of *Weston v. Card*, 96 Mich. 373, the purchaser of a machine was sued for the purchase-money by an agent of the seller. It appeared that he had ordered the ma-

chine from the agent, agreeing to give in payment therefor his notes, made payable to the company for which the plaintiff was agent, and in return received a warranty of the machine by the company. It was held that in order for the plaintiff, the agent, to recover in his own name, he must aver and prove an assignment of the notes or contract to himself. See, in this connection, *Musselman v. Wise*, 84 Ind. 248.

Where a false representation as to the value of a certain business, which had been made by A to B, was communicated by B to C, with notice to A, and C acted upon it in purchasing the business, an action may be brought by C against A, for the false representation. *Pilmore v. Hood*, 5 Bing. N. Cas. 97; 6 Scott 927; 35 E. C. L. 43.

When the purchaser of personal property, sold with warranty of title, is sued therefor by a third party, the seller has the right to intervene and defend the suit. *Parker v. Nolan*, 37 Tex. 85.

Joint Owners.—One of two joint owners of certain personal property is not liable to a purchaser of such property, for the false representations of his co-owner, on the faith of which the purchase was made, unless the representations were expressly authorized by him. *Holmes v. Wood*, 32 Ind. 201.

Husband and Wife.—A husband who, while building a house for himself and family, purchased lumber, taking a warranty of quality therefor, may set up such warranty in an action for the price, and counterclaim damages for its breach, though he was building on his wife's land. *Driggs v. Schuyler* (Supreme Ct.), 1 N. Y. Supp. 493. See also *Longmeid v. Holliday*, 6 Exch. 761; 20 L. J. Exch. 430, examined in the note immediately following.

3. Third Parties.—*Longmeid v. Holliday*, 6 Exch. 761; 20 L. J. Exch. 430.

3. Right to Set Off Damages in an Action for the Price.—The vendee may waive his right to proceed on the warranty where the purchase price has not been paid, and may set up the breach of it in defense to an action by the vendor to recover the price. The damages resulting from the breach of warranty may go in reduction of the amount to be recovered by the vendor, to the extent to which the article has been diminished in value by non-compliance with the warranty.¹ In such cases there need not be

In this case the declaration, filed by a husband and wife, alleged that the defendant, who was a maker of and dealer in a certain kind of lamps, sold to the husband one of these lamps to be used by his wife and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that in consequence of the insufficient materials with which it was constructed it exploded, and burned her. At the trial the jury found that the accident had been caused by the defective nature of the lamp, but that the defendant was ignorant of this unsoundness, and had sold the article in good faith. It was held that the fraud on the part of the defendant having been negatived, the action was not maintainable by the wife, who was not a party to the contract. *Compare* *George v. Skivington*, L. R., 5 Exch. 1; 39 L. J. Exch. 8; *Levy v. Langridge*, 2 M. & W. 519; *affirmed* 4 M. & W. 337; 1 H. & H. 325. In this latter case, the buyer's son having been injured in consequence of the inferior make of a gun, warranted to be sound and of a certain fine make, the court held, in an action by the injured son, that his action was maintainable, the damage being a consequence of the representation while the instrument was in the possession of a party to whom the defendant's representation was either directly or indirectly communicated, and for whose use he knew the instrument was purchased.

1. *Davis v. Dickey*, 23 Ala. 848; *Taylor v. Griswold*, 32 Ga. 569; *Gibbs, etc., Mfg. Co. v. Kaszezyki*, 18 Ill. App. 623; *Mears v. Nichols*, 41 Ill. 207; 89 Am. Dec. 381; *Wright v. Findley*, 21 Ga. 59; *Steel v. Blay*, 2 B. & Ad. 456; *Allen v. Cameron*, 1 C. & M. 832. In *Hillenbrand v. Stockman*, 123 Ind. 598, it was held that no offer to return the property was necessary. *Lewellen v. Crane*, 113 Ind. 289; *Henkel v. Burke* (Me. 1889), 10 Atl. Rep. 249; *Roeb-*

ling's Sons Co. v. Winthrop Hematite Co., 70 Mich. 346; *Wilson v. Hughes*, 94 N. Car. 182; *Trimmier v. Thomson*, 10 S. Car. 164; *Buffalo Barb Ware Co. v. Phillips*, 67 Wis. 129; *Poulton v. Lattimore*, 9 B. & C. 259; 4 M. & R. 208; *Lewis v. Cosgrave*, 2 Taunt. 2. *Compare* *Smith v. Pettie*, 70 N. Y. 13.

In some cases the recoupment may entirely defeat the plaintiff's claim. See *Mears v. Nichols*, 41 Ill. 207; 89 Am. Dec. 381. In the case of *Smith v. Steinkamper*, 16 Mo. 150, A let B have a horse in exchange for a yoke of oxen and ten dollars. A warranted the horse to be sound and good to work, and, if he was not, agreed to take him back and give up the oxen. B did not pay the ten dollars and the horse proving unsound, B, as soon as he found him to be so, offered to return him and demanded his oxen. A refused to give them up, and sued B for the ten dollars. It was held that B might set off and recover the value of the oxen.

When there is an agreement to furnish a cord binder "guaranteed to work satisfactorily," and at the trial it fails to work so, it is a sufficient defense, in an action for the price, for the vendee to show that within a reasonable time he notified the vendor of the failure of the machine to work satisfactorily, and that he declined to accept it. *McCormick Harvesting Mach. Co. v. Chesson*, 33 Minn. 32.

In such cases, all evidence tending to show what it would cost to supply the defect complained of in the article sold, is admissible. *Wheeler, etc., Mfg. Co. v. Thompson*, 33 Kan. 491.

In the case of *Barrett v. Wheeler*, 71 Iowa 663, it appeared that the defendant had ordered from the plaintiff a large quantity of cider for the purpose of bottling it up for resale; in the same order they requested the plaintiff to have printed for them some show cards and labels to be used in selling the cider. The cards and labels were sent as ordered, being paid for by

a return, or offer to return the property, nor is the vendee or defendant bound to prove the warranty fraudulent. If the breach of warranty is proved, the vendor, or plaintiff, can recover only the actual value of the article.¹ And even where the vendee gives his note in renewal of a prior note given for the purchase price, he may set up a breach of warranty in an action on the renewal note, though such note was given after knowledge that the warranty had been broken.²

The right of the defendant or vendee to set up a breach of warranty of the quality of an article sold to him, by way of defense, either by set-off, recoupment, or counterclaim, in an action upon the contract of sale, to recover the price, does not rest upon a failure of the consideration of such contract, but such plea is the setting up of one distinct claim against another. The vendee

the plaintiff, but were useless on account of the cider proving to be unfit for sale, it not being as warranted. It was held that the breach of warranty of the cider could not be set up in defense to an action by the seller for the cost of the cards and labels.

Under the *Pennsylvania* statute, in an action by the seller for the price of goods sold, the buyer can avail himself only of a claim sounding in contract, in the nature of assumpsit on the alleged warranty; the statute does not extend to claims sounding only in tort. *Dushane v. Benedict*, 120 U. S. 630. In this case the vendee, having been sued for the price of rags bought by him, was allowed to set off the damages caused to the mill and his business, from the rags having been infected with disease germs, causing sickness among his employees. The court, after reviewing the general doctrine at some length, said: "By way of recoupment or equitable defense, which is limited to defeating the plaintiff's action in whole or in part, the defendants may avail themselves of any evidence tending to show that by reason, either of a breach of warranty, or of a fraudulent representation, the goods are worth less than they would have been if they had been such as they were warranted or represented to be; as well as of any evidence tending to show that the defendants suffered damages, which, in the contemplation of the parties, or according to the natural or usual course of things, were the consequences of the breach of warranty or the fraudulent representation."

1. *Trimmier v. Thomson*, 10 S. Car. 164; *Adler v. Robert Portner Brew-*

ing Co., 65 Md. 27; *McKinnon v. McIntosh*, 98 N. Car. 89.

Where the defendants have bought and paid for belting with a warranty of quality, and it proves worthless, they can set off its price in an action for the price of belting afterward purchased from the plaintiff and it is error to instruct the jury that if the warranted belting had any value they should deduct that from the defendant's claim of set off. *Gutta Percha, etc., Mfg. Co. v. Wood*, 84 Mich. 452. *Compare Barrett v. Wheeler*, 71 Iowa 662.

2. *Wheelock v. Berkeley*, 138 Ill. 153; *McClure v. Williams*, 65 Ill. 390. See *supra*, this title, *Waiver of Warranty*.

The right to set off a breach of warranty against an action for the price exists only as against the vendor. Thus, in the case of *Adler v. Robert Portner Brewing Co.*, 65 Md. 27, it appeared that P. sold to A. a refrigerating machine, which was duly delivered. After having had possession of the machine for about eight months, A. sought to obtain a further credit by giving his notes to P. for the purchase-money. The claim against A. and his notes were assigned by P. to a brewing company. In an action by the company against A., to recover on the notes, for the purchase-money of the machine, the court held that the defense of an alleged breach of warranty of the machine could not be set up in bar of a recovery.

The unsoundness or worthlessness of an article purchased, is no defense to an action for the price, where no warranty is shown, and there is no false representation, or fraudulent concealment. *Preston v. Dunham*, 52 Ala. 217; *Boit v. Maybin*, 52 Ala. 252.

is entitled to such damages as result to him from the breach of the warranty, and has the right to set off these against the amount due him, for the price.¹ The vendor is entitled to recover, however, the real value of the article, less the damage actually sustained, although it may prove to be totally unfit for the uses for which it was purchased.²

4. Where Contract Provides a Special Remedy.—In the sale of certain classes of articles, the contract of sale frequently specifies the buyer's remedy in case the warranty is not complied with. The buyer is not concluded by such a provision, however, but may waive the special remedy and proceed as if the contract had been silent in that particular.³ The special remedy usually allowed

1. Rosebrook v. Runals, 25 Wis. 415. Warranty on an Exchange of Property.—It has been held in *North Carolina*, that in an action for deceit in a warranty on the exchange of horses, it is not competent for the defendant to give in evidence the defects of the property which he received from the plaintiff. *Odom v. Harrison, 1 Jones (N. Car.) 402.*

2. Unfitness of the Article as a Defense.—In the case of *Warder v. Fisher, 48 Wis. 338*, which was an action for the price of a machine, the trial court instructed that "if the machine was wholly unfit for the uses for which it was purchased, there was an entire failure of consideration," and the vendor could recover nothing. The supreme court, in holding this to be error, said, by Taylor, J.: "The true rule is that in the case of the sale of chattels with a warranty, expressed or implied, in the absence of fraud on the part of the vendor, if the thing purchased does not answer the terms of the warranty, the purchaser may return, or offer to return, the property within a reasonable time, and thereby defeat the right, on the part of the vendor, to recover any part of the purchase price agreed upon; or he may keep the property, and, when sued by the vendor for the price, may set up the breach of the warranty in recoupment of the plaintiff's damages; but in such actions the vendor, notwithstanding the breach of warranty, may recover the value of the chattel, if it has any value, notwithstanding its unfitness for the uses for which it was purchased. 2 Schouler on Pers. Prop. 610, 611; *Perley v. Balch, 23 Pick. (Mass.) 284; 34 Am. Dec. 56.* . . . It does not follow, because a machine or other personal chattel is wholly useless for the purposes for

which it was made, that it is wholly valueless; and the vendee who retains the chattel purchased, without offer to return the same, can only have a full and perfect defense to the vendor's action for the price, when he is able to show that the article so purchased does not answer the purpose for which it was purchased, and that it is entirely valueless. If the article is of any value, either to himself or to the vendor, he must return, or offer to return it, in order to make a full defense to the action for the price."

3. Mandel v. Buttles, 21 Minn. 391; Fitzpatrick v. Osborne, 50 Minn. 261; Shupe v. Collender, 56 Conn. 489; Cook v. Tavener, 41 Ill. App. 642; Kemp v. Freeman, 42 Ill. App. 500; McCormick v. Dunville, 36 Iowa 645; Hefner v. Haynes (Iowa, 1894), 57 N. W. Rep. 421; Love v. Ross (Iowa, 1893), 56 N. W. Rep. 528; Douglas Axe Mfg. Co. v. Gardner, 10 Cush. (Mass.) 88; Perrine v. Serrell, 30 N. J. L. 454; Osborne v. McQueen, 67 Wis. 392.

Thus, in the case of *Park v. Richardson, 81 Wis. 399*, the vendee sold a furnace on a written contract, and guaranteed it "to work satisfactorily if properly used; otherwise, we will substitute a size that will do the work, or we will remove said furnace and refund the amount paid for same, as may be agreed." The court held that in case the furnace proved substantially defective, the vendee might pursue either of two remedies: First, he might avail himself of the contractual provision by notifying the vendor and demanding its removal, and, in case of the failure to furnish a new furnace, bring an action to recover the price paid; or, second, he might waive the benefit of the special provision and bring an action on the warranty for damages.

in such contracts is the privilege of returning the article, if it proves not to be as warranted, and receiving back the price paid. A failure to exercise the privilege within the time limited, or within a time reasonably sufficient for the discovery of defects, operates as a waiver of the special remedy and limits the vendee to his ordinary remedy at law,¹ unless the retention was at the vendor's

But both of these remedies cannot be pursued, and in an action in which the complaint is broad enough to cover both causes of action, it is error to instruct the jury that the plaintiff, the vendee, might recover the purchase price, and also other damages for a breach of the warranty. In such a case, the vendee must be required to elect beforehand upon which cause of action he will rely.

In *Douglas Axe Mfg. Co. v. Gardner*, 10 Cush. (Mass.) 88, Metcalfe, J., speaking for the court, said: "The buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for a breach of the warranty."

In *McCormick v. Dunville*, 36 Iowa 645, the whole evidence of the warranty of the machine was the testimony of the vendee that "he agreed that I should take it home and give it a trial, and if it did not work as represented and warranted, he would take it back." The court, in holding that the vendee had a good cause of action on the warranty, said: "The plaintiff, through his agent, agreed to take the machine back if it did not work as warranted; but it does not seem that it was made a condition of the defendant's right of recovery for a breach of warranty that he should return, or offer to return, the machine. In this respect the warranty differs from that construed in *Bomberger v. Griener*, 18 Iowa 477, in which there was an express agreement that the machine should be returned if it failed to work as warranted. This case differs also from *Gammar v. Borgain*, 27 Iowa 369, in which it was sought to defeat the recovery entirely by simply showing a breach of warranty, without any offer to return to the place stipulated, the order for the machine stating that if it did not answer the warranty it was to be returned to Cedar Falls free of charge. This case is also distinguishable from *Williams v. Donaldson*, 8 Iowa 108, in which the condi-

tion of the sale was that if the machine did not work as warranted, the vendee was to store and safely deliver it to the vendors or their agent. It falls more nearly within the principles of *Aultman v. Theimer*, 34 Iowa 272."

1. *Birdsall v. Carter*, 12 Neb. 146; *Hercules Iron Works v. Dodsworth*, 57 Fed. Rep. 556; *Harrisburgh Car Mfg. Co. v. Sloan*, 120 Ind. 156; *Brown v. Russell*, 105 Ind. 46.

Thus, where the purchasers of warranted machinery under a special contract, do not return it at the expiration of the time given for trial, but notify the vendor that unless he puts the machinery into "satisfactory working condition" they will have it done at his expense, they elect to keep it, and are liable for the price, less the amount required to put it into satisfactory working order. *Stutz v. Loyal-Hanna Coal, etc., Co.*, 131 Pa. St. 267.

In the case of *Phelps, etc., Windmill Co. v. Piercy*, 41 Kan. 763, the vendee bought a windmill under an agreement that he should notify the vendor of any defect within thirty days after its erection. He complained of one defect within that time, which was promptly remedied. It was held that he could not refuse to keep the mill for the sole reason that it was defective in a part about which he had made no complaint until after the thirty days had elapsed.

The vendor may waive the forfeiture of the special remedy by extending the time for return. *Kansas Mfg. Co. v. Lumry*, 36 Neb. 123. And where the vendor announces that he will not accept the machine, the vendee is not bound to return it, or to offer to return it. *Champion Mach. Co. v. Mann*, 42 Kan. 372.

Reasonable Time—Question for the Jury.—In *Skeen v. Springfield, etc., Co.*, 34 Mo. App. 485, the warranty provided that if the machine failed to come up to the warranty, a written notice should be given to the vendor stating wherein it was defective, and that if, "after a reasonable time," it was not made to fill the warranty, it might be returned to the

instance, or otherwise consented to by him.¹ Such retention does not, however, affect the buyer's remedy at law.²

Where the vendor reserves the right on a breach of warranty to have the article sold returned to him and the contract rescinded, or to replace it with a new one, he must exercise his right promptly upon complaint and proof of the breach, and if he delays an unreasonable length of time his right of election is waived.³

vendor. In an action on the warranty, it appeared that there was a defect in the machine which the vendor undertook to remedy, and that the vendee, believing that it had been remedied, stored it until the next season. It was held that it was for the jury to determine the reasonableness of the time within which the vendee might return the machine as provided. *Compare Allen v. Todd*, 6 Lans. (N. Y.) 222. See also *Seiberling v. Brauer*, 24 Neb. 510.

A harvesting machine was sold under a warranty which provided that "if it could not be made to work well it would be taken back, if returned immediately to the agent of whom purchased, and the cash payment refunded, and the notes given therefor returned." It was held that after the purchaser had used the machine for a part of two harvests, he could not rescind the contract, even though the machine failed to comply with the warranty, and set up such rescission in defense of an action for the price. *Clark v. Deering*, 29 Neb. 293. In this case the defendant set up in his answer, as a counterclaim, damages in the sum of \$125, on account of being deprived of the use of the harvester during a part of two seasons, in consequence of the plaintiff's not putting it in good order and supplying missing parts. As to this the court in effect said: It is obvious that these matters cannot be set up as counter-claim; such elements of damage were not contemplated when the contract was made.

Implied Extension of Time for Return.

—The vendee's right to return a machine under the special provisions of the contract, is not lost by his failure to return it within the time limited, where his failure is due to the request of the vendor who assures him that the defects will be remedied. *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183.

Where a machine warranted to work well fails to do so and is repaired by the vendor, the vendee is entitled to a reasonable time thereafter in which

to test the machine again, without being charged with its final acceptance. *Osborne v. McQueen*, 67 Wis. 392.

1. *Snody v. Shier*, 88 Mich. 304; *Skeen v. Springfield, etc., Co.*, 34 Mo. App. 485.

Rule Where Return Is Impossible.—See *Snody v. Shier*, 88 Mich. 304.

2. *Brown v. Russell*, 105 Ind. 46. But the contract may provide that there shall be no remedy on the warranty or otherwise, unless notice of defects is given within a prescribed time. See *Peerless Reaper Co. v. Conway*, 79 Wis. 622. See *supra*, this title, *Warranty Distinguished from Mere Stipulations*.

3. *Davis v. Butrick*, 68 Iowa 94. In *Turnbull v. Seymour*, 31 Minn. 196, the defendants sold a machine to the plaintiff with a warranty as to its capability, and with the express agreement that if it could not be made to work as guaranteed, it should be returned and a new machine given in its place, or the notes given for the price should be refunded. The machine could not be made to work as represented, and was returned to the defendants. It was held that the obligation rested upon the defendants to perform their agreement in one of the modes specified; that by neglecting to exercise their right of election as to the mode of performance, it was at an end, and the plaintiff might, without previous demand, recover the notes.

The fact that the purchaser of a warranted machine, after having notified the vendor to repair it or take it back, and while waiting for him to do so, mortgaged it to a third person, does not bind the purchaser to keep the machine, where the vendor did not repair it according to the warranty, and the purchaser again notified him to take it back, the mortgage being released about the same time. *Osborne v. McQueen*, 67 Wis. 392. See also *Weston v. Card*, 96 Mich. 373; *Swann v. Lowe* (Tex. App. 1892), 18 S. W. Rep. 789.

5. Conditions Precedent to Vendee's Right of Action—*a*. GENERALLY.—The terms of the express contract of sale are to govern in all cases, and the vendee's right of action for a breach of the warranty does not exist until he has discharged the conditions precedent imposed by such contract.¹ A condition commonly imposed is that upon the vendee's discovery of any defect he shall give notice thereof to the vendor within a specified time.²

The failure to comply with reasonable conditions imposed by the contract of sale is fatal to the vendee's remedy for a breach of the warranty, whether he attempts to exercise it by an action on the warranty, or by setting up the breach of warranty in defense of an action for the price by the seller.³

But while the vendor may attach any reasonable conditions to his warranty,⁴ the discharge of which shall be a condition precedent to the vendee's right of action, such conditions cannot be insisted upon when they are not reasonable. Thus, he cannot require that claims for damages for a breach of the warranty shall be presented immediately; in such a case the vendee's right of action would not be affected if he presented his claim within a reasonable time.⁵

1. *Nichols v. Hail*, 4 Neb. 210; *Reynolds v. Roberts*, 57 Vt. 392; *Himes v. Kiehl*, 154 Pa. St. 190.

In *Hills v. Bannister*, 8 Cow. (N. Y.) 31, a manufacturer sold a church bell with a warranty that it should not crack within a year, and that if it should crack within that time he would recast it. It was held that he was not liable on the warranty except upon proof that notice of the cracking of the bell was given him, and that after such notice he failed to recast it.

Upon the sale of a combined reaper and mower, with warranty to put it in order on notice that upon one day's trial it did not work well, the buyer is not bound to give notice until he has tried it for use both as a reaper and a mower. *McCormick v. Basal*, 50 Iowa 523. Notice of defects is not necessary, however, except where expressly stipulated for. *McCeney v. Duvall*, 21 Md. 166.

2. *Brown v. Russell*, 105 Ind. 46; *Furneaux v. Esterly*, 36 Kan. 539. See *infra*, this title, *Notice of Defects*.

3. *Nichols v. Wyman*, 71 Iowa 160; *Russell v. Murdock*, 79 Iowa 101; 18 Am. St. Rep. 348; *Furneaux v. Esterly*, 36 Kan. 539; *Swann v. Lowe* (Tex. App. 1892), 18 S. W. Rep. 789; *Staver v. Rogers*, 3 Wash. 603. But a failure to discharge conditions imposed by the contract does not annul the warranty, where it appears that such failure was

in an immaterial particular, or where the warranty was not conditioned upon a compliance with such provisions. Thus, where in the sale of a machine, it was provided that the vendee should be satisfied with it, and that if it did not suit him he could return it, and that the vendor was to furnish a man to set the machine up, an instruction that the act of the vendee in setting the machine up before the arrival of the agent was a violation of the contract, and that he was then bound to accept it, is error, it not being shown that any injury resulted to the machine from the buyer's act. *Platt v. Broderick*, 70 Mich. 577.

When, by the terms of the contract of sale, the buyer is required to give written notice, as therein specified, of the failure of the machine to satisfy the warranty, and he neglects to do so, he cannot set up a breach of warranty as a defense to an action for the price. *Nichols v. Wyman*, 71 Iowa 160.

Stipulation as to Time of Asserting Breach.—A stipulation in a contract of sale, that no action for breach of warranty should be made after the year of the sale, cannot deprive the purchaser of his defense on the warranty, in an action on the purchase price notes. *Ohio Thresher, etc., Co. v. Hensel* (Ind. App. 1894), 36 N. E. Rep. 716.

4. *Furneaux v. Esterly*, 36 Kan. 539; *Staver v. Rogers*, 3 Wash. 603.

5. *Beane v. Tinkham*, 14 R. I. 197.

The payment of the purchase-money is not a condition precedent to a right of action on the warranty.¹

Where an executory contract for the sale of material, to be manufactured into articles of merchandise, is with a warranty of its fitness for the purpose intended, the vendee, upon receipt of it, is bound to apply tests before using; but if defects, not open and visible, are discovered afterward, which amount to a breach of the warranty, his remedy by an action on the warranty is not affected.²

b. SPECIAL PROVISIONS IN THE CONTRACT OF SALE—(1) Notice of Defects.—A condition frequently exacted in special contracts is, that upon the vendee's discovery of any defect in the article covered by the warranty, he shall give notice thereof to the vendor within a specified time; where such a condition is a part of the contract, the vendee can maintain no action on the warranty, except upon proof that the condition has been complied with,³ or that it is an agreement distinct from and independent

1. Payment of Price Not a Condition Precedent.—Thoreson v. Minneapolis Harvester Works, 29 Minn. 341; Fitzpatrick v. Osborne, 50 Minn. 261; Atkins v. Cobb, 56 Ga. 86; Wiggins v. Hunter, Harp. (S. Car.) 80.

Thus, the vendee of a chattel paid for by a negotiable note, which has been transferred to a third party, may recover on a warranty, although the note has gone to judgment at law, which judgment remains unpaid. Voland v. Baker, 32 Neb. 391; Parker v. Roberts, 63 N. H. 431. See also Case Threshing Mach. Co. v. Smith, 16 Oregon 381. But payment of the price may be made a condition precedent by contract. English v. Hanford, 75 Hun (N. Y.) 428.

Payment of the price within a certain time, may be made a condition precedent to the existence of any warranty, but only by special provision in the contract. See Case Threshing Mach. Co. v. Smith, 16 Oregon 382.

2. Dounce v. Dow, 57 N. Y. 16; Gurney v. Atlantic, etc., R. Co., 58 N. Y. 358.

3. Brown v. Russell, 105 Ind. 46; Furneaux v. Esterly, 36 Kan. 539; Lewis v. Hubbard, 1 Lea (Tenn.) 436; 27 Am. Rep. 775; Aultman v. York, 1 Tex. Civ. App. 484; Nichols v. Wyman, 71 Iowa 160; Russell v. Murdock, 79 Iowa 101; 18 Am. St. Rep. 348; Havana Press Drill Co. v. Scurlock, 23 Ill. App. 426; Staver v. Rogers, 3 Wash. 603; Fahey v. Esterley Harvesting Mach. Co. (N. Dak. 1893),

55 N. W. Rep. 580. See also Himes v. Kiehl, 154 Pa. St. 190; Aultman v. McKinney (Tex. Civ. App.), 26 S. W. Rep. 267; Beasley v. Hayett, etc., Co. (Ga. 1894), 18 S. E. Rep. 420.

Where Notice Is Premature.—Where the warranty of a machine provides that "if upon one day's trial" it does not work well, the vendee shall give immediate notice to the vendors, or their agent, a notice that it did not work well, given by the vendee to the agent after about one-half day's trial, is premature and not in compliance with the contract. McCormick Harvesting Mach. Co. v. Bromer (Iowa, 1893), 55 N. W. Rep. 537.

Where notice as required is not given, it is error to allow evidence of the warranty in an action for the price. Deere v. Hucht, 27 Mo. App. 1.

When Compliance Is Unnecessary.—Where it appears that compliance with the conditions imposed is impossible or absolutely useless, it may be dispensed with. Thus, in the case of Waters Patent Heater Co. v. Smith, 120 Mass. 444, it appeared that the defendant, S., ordered a machine on an agreement to try it within sixty days from receipt according to certain directions, and to pay for it, unless it should fail to work as represented by the vendor. It was held that if it had been ascertained by actual trial, that machines exactly similar were necessarily incapable, from their construction, of doing what was promised for them, S. was not bound to put the one sold to him to the test

of the contract of warranty,¹ or that it has been waived by the vendor.

The notice is not necessary where the seller's agent is present at the trial of the machine, and sees its failure to work as warranted, or where he otherwise impliedly waives notice, as by attempting to remedy defects.² And the general rule that notice to the agent is notice to the principal, applies in this connection, except where it is provided expressly that notice to the agent shall not be sufficient.³

of actual experiment. See also *Aultman v. Stichler*, 21 Neb. 79.

Where Buyer Cannot Read or Write.—Where there is a complete failure of the machine sold to comply with the warranty, notwithstanding repeated efforts by the seller to remedy defects, and the buyer, after full trial with the seller's agent to assist him, gives verbal notice to such agent, being unable either to read or write, and then leaves the machine with him, the seller cannot recover the price, although the contract of sale provided for a written notice. *Aultman v. Trout*, 27 Neb. 199.

1. In *Perrine v. Serrell*, 30 N. J. L. 454, it appeared that a horse had been sold with a warranty of soundness, and that there was an agreement that if it did not suit, the vendor should take it back and send another one. The court held that the warranty of soundness was independent of the agreement, although both were contained in the same letter, and that the vendee could recover for a breach thereof, the horse having died of a disease contracted before the sale, although he did not ask the vendor for another horse. Compare, however, *Himes v. Kiehl*, 154 Pa. St. 190; *Lewis v. Hubbard*, 1 Lea (Tenn.) 436; 27 Am. Rep. 775.

2. **Vendor's Waiver of Notice.**—*Sandwich Mfg. Co. v. Trindle*, 71 Iowa 600; *Champion Mach. Co. v. Mann*, 42 Kan. 372; *Warder v. Robertson*, 75 Iowa 585.

Where a machine was sold under a warranty providing that the purchaser should have one day in which to give it a fair trial, and, if it did not work, written notice to that effect should be given, and where the agent making the sale was on the ground and saw the failure of the machine to work correctly, and encouraged the purchaser to keep it until another day, when he would be present, the purchaser's rights under the warranty were not forfeited by a failure to give notice, or by his attempt to use the machine a few days

longer, if he returned it within a week, that being a reasonable time. *Sandwich Mfg. Co. v. Trindle*, 71 Iowa 600.

On a sale of a harvesting machine, the requirement of a written notice of failure of the machine to work, is waived by the agreement of the agent to send some one to make it work. *Sandwich Mfg. Co. v. Feary* (Neb. 1894), 58 N. W. Rep. 713.

So, also, where the contract for the sale of a machine provides that if, within three days after the machine is set up and started, it shall not work as warranted, the buyer shall at once discontinue its use and notify the seller in writing, and wait for the seller to send a man "to right it," and within that time an agent representing the seller, and authorized to make the necessary repairs or changes, appears and undertakes to make them, the required notice is waived. *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183.

A provision in a contract of sale, requiring the buyer to notify the seller of defects in the machine at once, after giving the same a trial of ten days, is not waived by an attempt on the part of the seller to remedy defects pursuant to a notice given long after the stipulated period, where there is an express provision in the contract that such attempt shall not have this effect. *Boyer v. Neel*, 50 Mo. App. 26.

3. **Notice to an Agent Sufficient.**—*Nichols v. Root*, 35 Minn. 363; *Davis v. Butrick*, 68 Iowa 94; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Acker v. Kimmie*, 37 Kan. 276; *Campbell v. Wray*, 5 Ind. App. 155. See also the cases cited in the note immediately preceding.

The requirement that the vendee shall give prompt notice of any defect in the article sold, is sufficiently met where the vendor's agent makes a voluntary examination and attempts to remedy the defect. *Flatt v. Osborne*, 33 Minn. 98. So, also, such a requirement is fully met

(2) *Opportunity to Remedy Defects.*—Special contracts in the sale of machinery, reapers, and similar articles, often provide that in case of any defect, notice thereof shall be given within a limited time, and that the vendor shall have an opportunity to remedy it. If the vendor acts with reasonable promptness, after notice, in sending an agent to remedy the defects complained of, the vendee waives all rights under the warranty if he refuses to allow the repairs to be made.¹

c. **VENDEE'S DUTY TO RETURN THE ARTICLE PURCHASED.**—In an action upon a warranty for a breach of it, the vendee is not bound to return the article purchased,² and his retention of it is

where it is shown that the machine broke down the first day of its use in the presence of the vendor's agent, who agreed to come back and repair it. *McCormick Harvester Co. v. Embree*, 94 Ind. 85.

The buyer may give notice by his agent, who is also an agent of the seller. *Nichols v. Root*, 35 Minn. 363. And although a notice in writing may be required by the contract, yet if the seller responds to an oral notice given to an agent, he thereby waives his right to a notice in writing. *Davis v. Butrick*, 68 Iowa 94. Or, if oral notice be given to the agent, who puts it in writing and forwards it to the principal, there is a sufficient compliance. *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502.

When Notice to Agent Not Sufficient.—Notice to the agent is not sufficient where the contract provides that written notice shall be given to the agent of the seller and also to the seller at a named place. *Weise v. Birdsall*, 35 Mo. App. 229.

Where the contract of sale containing the warranty is executed in duplicate, one copy of which is retained by each party, and provides specifically that no agent has authority to change the warranty, it is a notice to the purchaser of a limitation on the authority of the seller's agents, and they cannot waive or dispense with any express condition of the contract. *Furneaux v. Esterly*, 36 Kan. 539. See also *Nichols v. Larkin*, 79 Mo. 264; *Nichols v. Hail*, 4 Neb. 210; *Miller v. Nichols*, 5 Neb. 478; *Bomberger v. Griener*, 18 Iowa 477; *Dewey v. Erie*, 14 Pa. St. 211; 53 Am. Dec. 533.

The condition in a warranty of a threshing machine that, on discovery of any defect, written notice should be given to the vendor, cannot be waived

by an agreement, made by a sub-agent of the vendor, to give the notice. *Nichols v. Larkin*, 79 Mo. 264.

1. *Sandwich Mfg. Co. v. Feary*, 22 Neb. 53; 34 Neb. 411; *Staver v. Rogers*, 3 Wash. 603; *Nichols v. Wyman*, 71 Iowa 160; *Lewis v. Hubbard*, 1 Lea (Tenn.) 436; 27 Am. Rep. 775; *Hills v. Bannister*, 8 Cow. (N.Y.) 31. See also, in this connection, *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa 556; *Minnesota, etc., Mfg. Co. v. Hanson* (N. Dak. 1892), 54 N. W. Rep. 311; *supra*, this title, *Notice of Defects*.

2. **Vendee Not Bound to Return for Mere Breach of Warranty.**—*Milton v. Rowland*, 11 Ala. 732; *Kornegay v. White*, 10 Ala. 255; *Plant v. Condit*, 22 Ark. 454; *Woodruff v. Graddy* (Ga. 1893), 17 S. E. Rep. 264; *Mears v. Nichols*, 41 Ill. 207; *Brown v. Reinholdt*, 41 Ill. App. 599; 89 Am. Dec. 381; *Short v. Matteson*, 81 Iowa 638; *Storrs v. Emerson*, 72 Iowa 390; *Carter v. Stennet*, 10 B. Mon. (Ky.) 250; *Cook v. Gray*, 2 Bush (Ky.) 121; *Lane v. Lantz*, 27 Md. 211; *Clark v. Baker*, 5 Met. (Mass.) 452; *Martin v. Roberts*, 5 Cush. (Mass.) 126; *Hull v. Belknap*, 37 Mich. 179; *Thompson v. Botts*, 8 Mo. 710; *Ross v. Barker*, 30 Mo. 385; *Martin v. Maxwell*, 18 Mo. App. 176; *Boorman v. Jenkins*, 12 Wend. (N.Y.) 566; 27 Am. Dec. 158; *Waring v. Mason*, 18 Wend. (N.Y.) 425; *Messenger v. Pratt*, 3 Lans. (N.Y.) 234; *Brigg v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Chase v. Evarts* (Supreme Ct.), 19 N. Y. Supp. 987; *Borrekins v. Bevan*, 3 Rawle (Pa.) 23; *Parker v. Pringle*, 2 Strobb. (S. Car.) 242; *Houchins v. Williams* (Tex. Civ. App. 1894), 25 S. W. Rep. 730; *Hayden v. Houghton* (Tex. Civ. App. 1894), 24 S. W. Rep. 803; *Houghton v. Carpenter*, 40 Vt. 588; *Getty v. Rountree*, 2 Chand.

material only as affecting the measure of damages recoverable.¹ The only cases in which a return of the property is necessary, are cases where the vendee rescinds the contract of sale, or where the contract specifically provides for such a return, if the property proves to be not as represented.² In the first of these cases, the contract is repudiated and the action is not on the warranty, since that is a part of the repudiated contract, but is for the fraudulent misrepresentations, and a return of the property is always a condition precedent to the validity of a rescission,³ unless the article is of no value.⁴ In the other class of cases, where the contract provides for a return, the vendee sues upon the contract, and of course, can assert no rights under it except after compliance with its provisions.⁵

d. WHAT IS SUFFICIENT COMPLIANCE WITH CONDITIONS.—A substantial compliance with the conditions imposed, either by law, or by the special contract, is all that is required, and the jury should be instructed so.⁶

(Wis.) 128; 54 Am. Dec. 138; *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737; *Terry v. Allis*, 16 Wis. 478.

If the warranty is broken, the vendee may bring an action for the breach, or recoup the damages in an action by the vendor for the price, and in neither case is a return or offer to return necessary. *Murray v. Smith*, 4 Daly (N. Y.) 277; *Parker v. Pringle*, 2 Strobb. (S. Car.) 242.

As to the vendee's duty to return, where the contract expressly provides for a return, see *supra*, this title, *Vendee's Duty in Rescinding the Contract*.

1. *Hull v. Belknap*, 37 Mich. 179; *Richardson v. Grandy*, 49 Vt. 22; *Aultman v. Johnson*, 45 Ill. App. 313. See *infra*, this title, *Measure of Damages*.

2. *Ferguson v. Oliver*, 8 Smed. & M. (Miss.) 332; *Cozzins v. Whitaker*, 3 Stew. & P. (Ala.) 322; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Parks v. Morris Axe, etc., Co.*, 54 N. Y. 586; *RESCISSION*, vol. 21, p. 84. The rule of the text is true even where the property is bought on inspection. *Houghton v. Carpenter*, 40 Vt. 588.

3. See *RESCISSION*, vol. 21, p. 84; *supra*, this title, *Vendee's Duty in Rescinding the Contract*; *Gale Sulky Harrow Co. v. Moore*, 46 Kan. 324; *Cookingham v. Dusa*, 41 Kan. 229.

4. *Smeltzer v. White*, 92 U. S. 390; *Dill v. O'Ferrell*, 45 Ind. 268.

5. *Hoover v. Doetsch*, 45 Ill. App. 631; *McCormick, etc., Co. v. Hartman*, 35 Neb. 629; *Gammar v. Borgain*, 27 Iowa 369; *Dewey v. Erie*, 14 Pa. St.

211; 53 Am. Dec. 533. In *Walls v. Gates*, 6 Mo. App. 242, there was an express agreement to rescind. *Fleetwood v. Dorsey Mach. Co.*, 95 Ind. 491. Compare *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Merchants', etc., Sav. Bank v. Frazee* (Ind. App. 1894), 36 N. E. Rep. 378.

A change in the place of delivery after the contract of sale has been made, does not release the vendee from his obligation to return in such cases. *Gammar v. Borgain*, 27 Iowa 369. Compare *Osborne v. Rawson*, 47 Mich. 206.

But even in such a class of cases, the vendee may waive his right to a return, and may thus keep the article and sue on the warranty; the right to return is a mere privilege, and a failure to make use of it cannot affect the vendee's legal remedy. *Mandel v. Buttles*, 21 Minn. 391; *Park v. Richardson*, 81 Wis. 399; *Warder v. Fisher*, 48 Wis. 338; *McCormick v. Dunville*, 36 Iowa 645; *Thornton v. Wynn*, 12 Wheat. (U. S.) 183; *supra*, this title, *Where Contract Provides a Special Remedy*.

6. *Sandwich Mfg. Co. v. Trindle*, 71 Iowa 600. Thus, where it is required that the vendee shall give notice "by registered letter," a notice sent by mail is not invalidated by the fact that it was sent in a letter not registered. *Badgett v. Frick*, 28 S. Car. 176.

A reaping machine was sold on condition that if it failed to work as warranted, the buyer might return it, and thereupon be entitled to receive back

XIX. DEFENSES TO ACTION ON WARRANTY.—The only defenses admissible in an action for a breach of warranty are, that there was no warranty, or that there has been no breach of it, or that, although the warranty and a breach of it had existed, the plaintiff had waived his rights under it.¹ The seller cannot defend on the ground that when the sale was made he was ignorant of the defects complained of; such knowledge is immaterial except in actions based on fraud or willful deceit.² Nor can he set up in defense the impossibility of a compliance with the warranty, unless the impossibility was brought about by the act of the buyer.³

It is no bar to an action for damages for a breach of warranty that the plaintiff did not insist upon his claim in diminution of the recovery against him in an action for the price of the article, and that fact cannot be set up as a defense.⁴

A warranty is a guaranty of soundness or good quality, and not of indemnity against loss on a resale; for this reason the seller is liable immediately on a breach of it, and cannot defeat the action by showing that the buyer has suffered no loss,⁵ though such fact may be shown to prevent the recovery of more than nominal damages.

The seller may show by way of defense that no valid warranty existed, as where there is a want or failure of consideration;⁶ and in such cases, where a partial as well as a total failure of consideration is set up, the court must allow the jury to consider both defenses.⁷ He may defend also on the ground that the breach of

the consideration. It so failed, and on return to the seller, he refused to receive it, but agreed to test it further. The buyer took it back, and on such further test by the seller's agent, it still failed to work, whereupon the buyer drove it into his yard, left it there, and notified the seller to take it away. It was held that this was a sufficient return to entitle the buyer to recover back the purchase-money paid by him. *Hall v. Aetna Mfg. Co.*, 30 Iowa 215.

1. In a suit for a breach of warranty in the sale of clover seed, the special damage laid being for injury to the crops merely, it is not competent for the defendant to inquire what was the plaintiff's interest in the freehold. *Vannoy v. Givens*, 23 N. J. L. 201. And in an action for deceit in a false warranty on the exchange of horses, it is not competent for the defendant to give in evidence the defects of the property which he received from the plaintiff. *Odom v. Harrison*, 1 Jones (N. Car.) 402.

The fact that the goods furnished are more valuable than those ordered,

is no defense, where they were ordered for a resale and the buyer's business was injured by selling the wrong articles. *Lovegrove v. Fisher*, 2 F. & F. 128.

2. Page *v. Ford*, 12 Ind. 46; *Williams v. Harris*, 2 How. (Miss.) 627.

3. See *Gilpin v. Consequa*, 1 Pet. (C. C.) 85.

4. *Cook v. Moseley*, 13 Wend. (N. Y.) 277.

5. *Muller v. Eno*, 14 N. Y. 597.

6. *Foster v. Calhoun*, *Dudley* (S. Car.) 75; *Skipper v. Johnson*, 21 Ga. 310; *Brewster v. Countryman*, 12 Wend. (N. Y.) 446; *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *supra*, this title, *Consideration for Warranty*.

The seller of an article, who has inserted a warranty of its quality in a receipted bill therefor, cannot, in an action against him on the warranty, give evidence of a prior bargain for a sale of the thing at the same price without a warranty, for the purpose of showing that the warranty was without consideration. *Davis v. Ball*, 6 Cush. (Mass.) 505; 53 Am. Dec. 53.

7. *Skipper v. Johnson*, 21 Ga. 310.

the warranty was caused by the buyer's negligence, as where notes are sold and warranted as collectible, and the buyer fails to make proper effort to collect them until the maker becomes insolvent.¹

The defense of infancy is available as in the case of other contracts, and the same rules govern such defense in this connection as in other cases.²

Where, as in the case of the sale of wood, there is an issue of fact as to the quality of the wood furnished, and the buyer's testimony is to the effect that it was unsound and of poor quality, the seller may show that the standing timber from which the wood was cut was a good lot of timber.³ The same rules prevail as to similar evidence offered by the buyer.⁴

An offer by the seller to return the price paid, and rescind the contract, which is refused, does not affect the buyer's right of action on the warranty.⁵

XX. MEASURE OF DAMAGES—1. The General Doctrine.—Where the vendor makes the warranty in good faith and not fraudulently, or with a knowledge that it is untrue or likely to prove so, the measure of damages recoverable by the vendee is governed by the rule applying in other cases which involve nothing more than a mere breach of contract. This rule, as laid down in a leading case, and steadily adhered to ever since, is that "when two parties have made a contract which either of them has broken, the damages which the other ought to recover, in respect to such breach of contract, should be either such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of a breach of it."⁶ The effect of this rule is to exclude

1. Breach of Warranty Due to Buyer's Negligence.—Thus, where a party is sued on a warranty of a note as being "collectible," he may defend by showing that at its maturity the maker had sufficient attachable property. *Meeker v. Denson, Brayt. (Vt.) 237.*

If the plaintiff, the holder of certain town coupon bonds, could, by due diligence, have collected them before they had been decided invalid in a *quo warranto* proceeding, he was bound to do so. But after such proceeding he was not bound to try to collect or to return them before bringing suit on a warranty. *Figge v. Hill, 61 Iowa 430.*

2. Morrill v. Aden, 19 Vt. 505; INFANTS, vol. 10, p. 628. But the infant must either affirm or avoid the entire contract; and if he chooses to affirm it after he becomes of age, by bringing an action upon the notes given in consid-

eration of the sale, he cannot, upon his plea of infancy, preclude the defendant from taking advantage of a breach of warranty in any proper manner as a defense. *Morrill v. Aden, 19 Vt. 505.*

3. Green v. Donaldson, 16 Vt. 162.

4. Thus, where one of the questions of fact arising in an action for the price was as to the germinating quality of cotton seed, sold by the plaintiff to the defendant, evidence which tends to show that some of the plaintiff's cotton seed sold at the same time, and kept in the same manner as that sold to the defendant, would not germinate, is admissible for the defendant. *Buchanan v. Collins, 42 Ala. 419.*

5. Riley v. Hicks, 81 Ga. 265.

6. The General Doctrine.—*Hadley v. Baxendale, 9 Exch. 341; 26 Eng. L. & Eq. 398.* See this case quoted from, and its doctrine applied in, *Sycamore*

the consideration of all remote and speculative damages, or those depending upon mere contingencies.¹ It embraces two distinct classes of damages: First, those which are a natural and necessary result of the breach, and second, those which the parties may be supposed reasonably to have had in contemplation, when the sale was made, as a probable result of a breach.²

Under the first branch of the rule, the exact measure of damages recoverable for a breach of a warranty of quality, where the vendee retains the article sold, is the difference between the actual value of the article at the time of the sale, and what its value would have been if it had been as warranted.³ The price agreed

Marsh Harvester Mfg. Co. v. Sturm, 13 Neb. 211, where the case is set out at length; *Aultman v. Stout*, 15 Neb. 586; *Huyett, etc., Mfg. Co. v. Gray*, 111 N. Car. 87; *Manning v. Fitch*, 138 Mass. 273; *Hammer v. Schoenfelder*, 47 Wis. 455; *Paine v. Sherwood*, 21 Minn. 225; *Wilson v. Reedy*, 33 Minn. 503 (damages referred to date of sale); *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718; *Beresford v. McClure*, 1 Cinc. Super. Ct. (Ohio) 50; 2 Benjamin on Sales (Corbin's ed.), §§ 1307, 1356; DAMAGES, vol. 5, p. 13; TELEGRAPHS AND TELEPHONES, vol. 25, p. 745; SALES, vol. 21, p. 613.

In an action for the price, where the defendant's plea of breach of warranty is not sustained, the court may properly refuse to instruct the jury as to the measure of damages for a breach of warranty. *Whitney Iron Wks. Co. v. Reuss*, 40 La. Ann. 112.

1. See *Jones v. George*, 56 Tex. 149; 42 Am. Rep. 689; *Herring v. Skaggs*, 62 Ala. 180; 34 Am. Rep. 4; *Henning v. Withers*, 3 Brev. (S. Car.) 458; 6 Am. Dec. 589; *Case v. Stevens*, 137 Mass. 551; *Connoble v. Clark*, 38 Mo. App. 476. Compare *George v. Skivington, L. R.*, 5 Exch. 1; 39 L. J. Exch. 8.

2. The whole doctrine is set out in the opinion of the court, by Berry, J., in the case of *Frohreich v. Gammon*, 28 Minn. 480. After stating the rule of the text, the court said: "Under the first branch of this rule fall the damages arising from the fact that a thing sold and warranted is of less value than it would have been if the warranty were true. These damages arise, in the usual course of things, from the breach itself; that is to say, from the breach purely, and irrespective of consequential damages. Their measure is the difference in values before indicat-

ed. An instance falling under the second branch of the rule is where one sells and warrants a thing for a particular use upon reasonable ground for believing that, if put to such a use, a certain loss to the buyer will be the probable result if the warranty is untrue. In such circumstances the seller is, under the warranty, chargeable with the loss, as one which may reasonably be supposed to have been in contemplation of the parties when making the contract. The case where one sold and warranted a ship's cable, to be used for holding an anchor, and, in consequence of defects in it (which were warranted against), the buyer lost the anchor attached to it, and the seller was charged with the loss, falls within this second branch of the rule. *Borradaile v. Brunton*, 8 Taunt. 535." See also *Edwards v. Collson*, 5 Lans. (N. Y.) 324; *Passinger v. Thorburn*, 34 N. Y. 633; 90 Am. Dec. 753.

3. **Measure of Damages Ordinarily Is Difference Between the Actual and the Warranted Values.**—*Foster v. Rodgers*, 27 Ala. 602; *Worthy v. Patterson*, 20 Ala. 173; *Marshall v. Wood*, 16 Ala. 806; *Herring v. Skaggs*, 62 Ala. 180; 34 Am. Rep. 4; *Murry v. Meredith*, 25 Ark. 164; *McLennan v. Ohmen*, 75 Cal. 559; *Hook v. Stovall*, 30 Ga. 418; *Clark v. Neufville*, 46 Ga. 261; *McClure v. Williams*, 65 Ill. 390 (warranty that sheep sold were free from disease); *Thorne v. McVeagh*, 75 Ill. 81; *Wheeler v. Berkeley*, 138 Ill. 153; *Miller v. Law*, 44 Ill. App. 630; *Blacker v. Slown*, 114 Ind. 322; *Aultman, etc., Co. v. Shelton* (Iowa, 1894), 57 N. W. Rep. 857; *Nye v. Iowa City, etc., Works*, 51 Iowa 129; 33 Am. Rep. 121; *Short v. Matteson*, 81 Iowa 638; *Douglass v. Moses* (Iowa, 1893), 56 N. W. Rep. 271; *New York Central Trust Co. v. Arctic Ice Mach. Mfg. Co.*, 77 Md.

202; *Horn v. Buck*, 48 Md. 358; *Maxted v. Fowler*, 94 Mich. 106 (sale of shares of stock); *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373; *Merrick v. Wiltse*, 37 Minn. 41; *Hambrick v. Wilkins*, 65 Miss. 19; 7 Am. St. Rep. 631; *Thoms v. Dingley*, 70 Me. 100; 35 Am. Rep. 310; *Sterns v. McCullough*, 18 Mo. 411; *Layson v. Wilson*, 37 Mo. App. 636; *Hayner v. Churchill*, 29 Mo. App. 676; *Hogan v. Stuart*, 11 Mont. 498; *Birdsall v. Carter*, 11 Neb. 143; *Young v. Filley*, 19 Neb. 545; *Brown v. Rogers*, 20 Neb. 547; *Lyon v. Moore*, 35 Neb. 636; *Fisk v. Hicks*, 31 N. H. 535; *Perrine v. Serrell*, 30 N. J. L. 454; *Edwards v. Collson*, 5 Lans. (N. Y.) 324; *Comstock v. Hutchinson*, 10 Barb. (N. Y.) 211; *Sharon v. Mosher*, 17 Barb. (N. Y.) 518; *Wells v. Selwood*, 61 Barb. (N. Y.) 238; *Fox v. Everson*, 27 Hun (N. Y.) 355; *Hunt v. Van Deusen* (Supreme Ct.), 3 N. Y. Supp. 75; *Mix v. Staples* (Supreme Ct.), 17 N. Y. Supp. 775; *Aherin v. O'Brien* (Supreme Ct.), 18 N. Y. Supp. 821; *Cary v. Gruman*, 4 Hill (N. Y.) 625; 40 Am. Dec. 299; *Milburn v. Belloni*, 39 N. Y. 53; 100 Am. Dec. 403; *Aultman v. Ginn*, 1 N. Dak. 402; *Bump v. Cooper*, 20 Oregon 527; *Cothers v. Keever*, 4 Pa. St. 168; *Seigworth v. Leffel*, 76 Pa. St. 476; *Himes v. Kiehl*, 154 Pa. St. 190; *McGavock v. Wood*, 1 Sneed (Tenn.) 187 (see this case as to consequential damages); *Miller v. Greenleaf* (Tex. App. 1891), 18 S. W. Rep. 89. In *Thornton v. Thompson*, 4 Gratt. (Va.) 121, the rule was held to apply whether vendee returned the article purchased or not. *Brock v. Clark*, 60 Vt. 551; *Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200; *Bulkley v. Honold*, 19 How. (U. S.) 390. In *Marsh v. McPherson*, 105 (U. S.) 709, it was held that if the articles were defective, the measure of damages was what it would cost to supply the deficiency. *Reynolds v. Palmer*, 21 Fed. Rep. 433; *Jones v. Just*, L. R., 3 Q. B. 197; 9 B. & S. 141; 16 W. R. 643; *Bridge v. Wain*, 1 Stark. 504; *Loder v. Kekule*, 3 C. B. N. S. 128; 91 E. C. L. 126; 4 Jur. N. S. 93; *Dingle v. Hare*, 7 C. B. N. S. 145; 97 E. C. L. 144; 6 Jur. N. S. 679; 2 *Sutherland on Dam.*, p. 425; 2 *Benjamin on Sales* (Corbin's ed.), § 1359, and notes.

Thus, in an action upon the warranty of a note assigned, where it appears that the note was invalid as to one of

the signers, by reason of his insanity at the time he signed it, and that an action upon the note had been successfully defended by him upon that ground, and that the other signer had removed from the state, it was held that the plaintiff was entitled to recover of the assignor the difference between the actual value of the note, and the amount appearing to be due upon it. *Thrall v. Newell*, 19 Vt. 202; 47 Am. Dec. 682; *Bicknall v. Waterman*, 5 R. I. 43.

But only actual damages are recoverable; therefore, in an action on a warranty, where it appears that the goods sold are worth much less than their warranted value, but that the purchaser has paid on account of the price nothing more than the admitted value of the goods received and retained, and there is no evidence that their value as warranted exceeded the price, the purchaser cannot recover anything more than mere nominal damages. *Cleveland v. Nellis* (C. Pl.), 18 N. Y. Supp. 448; *Aherin v. O'Brien* (Supreme Ct.), 18 N. Y. Supp. 821; *Thompson v. Martin*, 84 Ga. 11. In this last case there was a breach of warranty, but no evidence of the value of the animal sold was given at any time, and no recovery was allowed.

The actual value of the article at the place of sale must be the basis for estimating the damages. So held in an action for the breach of warranty of a slave. See also *McDaniel v. Crabtree*, 21 Ark. 431; *Thompson v. Bertrand*, 23 Ark. 730.

Where Article Purchased Is Part of a Plant.—In *Wood v. Carleton* (Supreme Ct.), 6 N. Y. Supp. 865, the vendee of a water-wheel, which was warranted to be of a certain power, brought an action on the warranty, and sought to recover as damages the difference between the rental value of his mill with the wheel as it was, and the rental value with the wheel as it was warranted to be. It appeared, however, that the vendee used and occupied the mill during the entire time, and also used the wheel. It was held that this circumstance would defeat his claim for the difference in rental values. It was held also that as the vendee continued to use the wheel, and made no effort to return it, because of the defect, the cost of setting it up should not be allowed. See also *Osborne v. Carpenter*, 37 Minn. 331, where a combined reaper and binder was sold, and there was no complaint except as to the binder.

upon at the sale is strong evidence of the latter of these values,¹ but it is not conclusive; either party has the right to show that such value is greater or less than the price paid.² So, also, evidence of what the article was afterward sold for in its unsound state is good, but not conclusive, evidence of its real value.³ But

1. Price as Evidence of Represented Value.—*Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Fisk v. Hicks*, 31 N. H. 535; *Page v. Parker*, 40 N. H. 48; *Hook v. Stovall*, 30 Ga. 418; *Sullivan v. Goldman*, 19 La. Ann. 12; *Hayner v. Churchill*, 29 Mo. App. 676; *Layson v. Wilson*, 37 Mo. App. 636; *Williamson v. Canaday*, 3 Ired. (N. Car.) 349; *Tatum v. Mohr*, 21 Ark. 349; *Texada v. Camp*, 1 Walker (Miss.) 150 (interest allowed from date of sale); *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373; *Bump v. Cooper*, 20 Oregon 527; *Woody v. Bennett*, 88 Cal. 241.

The price paid at the sale, though not conclusive of the value of the article if it were as the vendor represented it, "is, however, quite persuasive evidence of such value. The price paid is regarded as strong evidence of the value of the animal at the time and place of purchase, if sound and of the quality represented by the vendor." *Cary v. Gruman*, 4 Hill (N. Y.) 625; 40 Am. Dec. 299. Thus, where a horse, warranted as sound, had, at the time of the sale, a disease of which he died a few days later, the measure of damages for the breach of warranty is the price paid, that being the true criterion as to his value as represented by the vendor. *Lane v. Lantz*, 27 Md. 211.

Where it appears that if the animal had been as warranted it would have been worth the agreed price, it is no error to charge that the measure of damages is the difference between the actual value of the animal, and the agreed price. *Beard v. Miller* (Tex. App. 1890), 16 S. W. Rep. 655.

In determining the damages recoverable for a breach of a warranty made in an exchange, evidence of the value of the goods given in exchange for the warranted chattel is admissible as tending to show what would have been its value, if as warranted, where it does not appear that the money value of either the warranted article or the property given in exchange, was settled by the parties at the time of the exchange. *Chaplin v. Warner*, 23 Wis. 448.

The contract price, however, cannot

enter into the question, except in so far as it assists in ascertaining the represented value. *Seigworth v. Leffel*, 76 Pa. St. 476.

2. Thus the vendee may show that the value of the article, if it were as represented by the vendor, would be greater than the price he agreed to pay for it. *Willis v. Dudley*, 10 Ala. 933.

"The trial court was right in holding that the amount which the plaintiff is entitled to recover for the breach of warranty, is not limited by the price which he paid or agreed to pay for the harvester. Whether he paid or agreed to pay one price or another, he is still entitled to recover the difference in value before indicated [*i. e.*, the difference between the value of the harvester as it was, and as it was warranted]. 2 *Greenleaf on Ev.* (14th ed.), § 261; *Field on Dam.*, §§ 281, 283; 1 *Sedgwick on Dam.*, p. 287." *Berry, J.*, in *Frohreich v. Gammon*, 28 Minn. 476.

Although the article may be entirely inefficient in its present state, and unfit for the purpose intended, yet if it can be put into proper fix by the expenditure of a small sum, it cannot be considered as worthless, so as to relieve the purchaser entirely from liability for the price. *Frippe v. McLain*, 87 Ga. 536. See also *Osborne v. Huntington*, 37 Minn. 275.

In an action for a breach of warranty, a question put to the plaintiff as to whether the machine, if in good order, was worth the price paid for it, is without prejudice where such question is answered in the affirmative. *Blackmore v. Fairbanks*, 79 Iowa 282.

3. Evidence of What Article Afterward Sold for, as Proof of Its Real Value.—The plaintiff, in an action for a breach of warranty, may show what the article sold for, as evidence of its value in its unsound state. *Houston v. Starnes*, 12 Ired. (N. Car.) 313; *Brock v. Clark*, 60 Vt. 551. See also *Stone v. Watson*, 37 Ala. 279. This, however, like the other, is not an absolute criterion, and it is error to instruct the jury unqualifiedly that if there was a breach of warranty, the plaintiff was entitled to recover the difference between the price

since the jury may, and in many cases should, award interest on the difference between the actual value of the article and its warranted value, the court may properly refuse an instruction that the difference between these values is the sole measure of the damages recoverable, even where there is no claim made of other damages.¹

This difference between the actual and represented values of the article sold, together with interest on the same, while applied in the greater number of cases as the correct measure of damages, does not embrace the entire damages recoverable by the injured vendee. Under the second class of cases provided by the rule stated above, he is entitled, in addition to such difference in values, to remuneration for expenses suffered and losses sustained as an approximate consequence of the vendor's breach of warranty, that is, for all such damages as reasonably may be presumed to have been in contemplation of the parties at the time the sale was made.² But in this connection, special circumstances as

he paid and the amount he realized on a resale thereof. *Comstock v. Hutchinson*, 10 Barb. (N. Y.) 211. And in *Wheelock v. Berkeley*, 138 Ill. 153, it is said that evidence of the price obtained by the vendee at a subsequent sale of the article is inadmissible. *Hogan v. Shuart*, 11 Mont. 498.

In the case of *Roe v. Hanson*, 5 Lans. (N. Y.) 304, the rule is laid down very clearly that, in an action for a breach of warranty, the price for which the vendee resold the article is not admissible as an evidence of its real value. The price realized by such a sale might be fixed by fraud and connivance between the parties to it, and would furnish means of manufacturing testimony in the suit for the breach of warranty. It would be, in fact, so the court urged, an act of the party in his own favor, which is never admissible in evidence. But notwithstanding these cases, it is believed that the doctrine of the text is well founded in principle, and is certainly better supported by authority.

Evidence of What Vendee Was Offered for the Article.—Evidence of the fact that since the commencement of the action, a "good and responsible party" offered the vendee a certain sum for the article sold, which offer was refused, is not admissible to prove the actual value of the article. *Finley v. Quirk*, 9 Minn. 194; *Johnson v. Hillstrom*, 37 Minn. 122; 86 Am. Dec. 93; *Keller v. Paine*, 34 Hun (N. Y.) 177; *Hine v. Manhattan R. Co.*, 132 N. Y.

480; *STREET RAILWAYS*, vol. 23, p. 1067, note 4.

1. Jury May Award Interest.—*Foster v. Rodgers*, 27 Ala. 602; *Hook v. Stovall*, 30 Ga. 418; *Texada v. Camp*, 1 Walker (Miss.) 150; *Merrick v. Wiltse*, 37 Minn. 41; *Anderson v. Duffield*, 8 Tex. 237.

Where there is any evidence that the article sold has a value, the question as to what such value is, is for the jury. *Maxted v. Fowler*, 94 Mich. 106.

2. All Damages Recoverable Which Result as Approximate Consequence of the Breach.—*Snow v. Schomacker Mfg. Co.*, 69 Ala. 112; 44 Am. Rep. 509; *McLennan v. Ohmen*, 75 Cal. 559; *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299; *McKay v. Lane*, 5 Fla. 268; *Thoms v. Dingley*, 70 Me. 100; 35 Am. Rep. 310 (provided they were declared for in the pleadings); *McGavock v. Wood*, 1 Sneed (Tenn.) 181. Thus, where an engine boiler, warranted to be sound, is not so, and explodes, owing to a defect in it, not only the value of the boiler, but also of all the property injured by its explosion, is recoverable in an action for a breach of the warranty. *Page v. Ford*, 12 Ind. 46; *Sinker v. Kidder*, 123 Ind. 528.

A lot of hams were sold in Chicago, warranted to be first class, the purchaser not seeing them, the vendor knowing, however, that they were bought for a customer of the purchaser in S., under a contract already entered into. The vendor shipped them to S. for the purchaser, the latter paying the

affecting the measure of damages cannot be considered, unless it can be shown by the party offering them that they were known to both parties when the contract was entered into.¹

freight; but the hams proving not to be of the quality represented, but of a very inferior quality, the customer refused to take them, so that the purchaser lost the benefit of the resale. In an action on the warranty, the purchaser was allowed to recover, in addition to the difference between the price paid at Chicago and the actual value of the hams, the freight from Chicago to S. and the profits which he reasonably might have expected from the resale at S. *Thorne v. McVeagh*, 75 Ill. 81. Compare *English v. Spokane, etc., Co.*, 57 Fed. Rep. 451.

Where the defense, in an action for the contract price of a piece of machinery, which cannot be bought in the market, is breach of warranty, evidence showing the loss, by reason of such breach, of an actual contract by the purchaser with a third person, and the difference between what it would have cost to execute the contract, and the price agreed to be paid for so doing, is admissible. *Carroll-Porter Boiler, etc., Co. v. Columbus Mach. Co.*, 55 Fed. Rep. 451. See also *McHose v. Fulmer*, 73 Pa. St. 365.

Where a retail dealer is obliged to refund the price and remove coal sold to his customers, relying upon his selling warranty, because the coal did not correspond therewith, he may recover the cost of delivering and removing such coal, and the loss of profits. *Hodgman v. State Line, etc., R. Co.*, 45 Ill. App. 395.

Where cotton is sold by sample, with warranty of quality, and an inferior grade is delivered which makes it necessary to resell and purchase other cotton to replace it, the purchaser may recover as damages the cost of such reselling and replacing. *Hudmon v. Cuyas*, 57 Fed. Rep. 385.

So, also, in *Milburn v. Belloni*, 39 N. Y. 53; 100 Am. Dec. 403, in an action on a warranty, it appeared that the defendant sold coal dust to be used in making bricks, warranting it to be free from soft coal dust, knowing that such dust would destroy the value of the bricks. It was held that he was liable for damage to the bricks caused by the presence of soft coal dust in the bricks sold by him, and not merely for the dif-

ference between the value of the dust sold by him, and the value it would have had if it had been pure as warranted.

Expense incurred by the vendee in doctoring a horse, may be recovered in an action for a breach of a warranty of soundness, and this, in addition to the difference between the actual, and the represented value of the animal. *Perrine v. Serrell*, 30 N. J. L. 454.

In *Dushane v. Benedict*, 120 U.S. 630, Gray, J., speaking for the court, said: "The damages recoverable for a breach of warranty, or for a false representation, include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act. For instance, if a man sells hay or grain for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. *French v. Vining*, 102 Mass. 132; 3 Am. Rep. 440; *Wilson v. Dunville*, L. R., 4 Ir. 249; L. R., 6 Ir. 210. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible either in an action of tort for the false representation, for the damages resulting from a communication of the disease to the buyer's other animals, *Mullett v. Mason*, L. R., 1 C. P. 559; *Jeffrey v. Bigelow*, 13 Wend. (N.Y.) 518; 28 Am. Dec. 476; *Faris v. Lewis*, 2 B. Mon. (Ky.) 375; *Sherrod v. Langdon*, 21 Iowa 518; *Marsh v. Webber*, 16 Minn. 418; or in an action on the warranty either in tort, *Packard v. Slack*, 32 Vt. 9; *Smith v. Green*, 1 C. P. Div. 92; or even in contract. *Black v. Elliot*, 1 F. & F. 595. See also *Randall v. Newton*, 2 Q. B. Div. 102."

1. Special Circumstances as Affecting the Measure of Damages.—See DAMAGES, vol. 5, p. 14. "But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at most could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such breach

Applying these rules, it is held that where an animal is sold, warranted free from disease, and it turns out to have an infectious disease, which it communicates to other of the vendee's animals with which he placed it, the vendee may recover for the loss of such animals, occasioned by a communication of the disease, provided he can show that the vendor knew, or ought to have known, that the animal would probably be put with the vendee's flock.¹ So where a horse is sold for breeding purposes, and is warranted, and he proves to be worthless for such purposes, the vendee, in an action on the warranty, may recover not only the difference between his actual value and that as represented, but also expenses incurred while acting on the faith of the warranty, as, for example, the expense of advertising the horse, and of keeping and standing him.² But the vendee may not recover for loss of pros-

of contract. For, had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be unjust to deprive them." *Hadley v. Baxendale*, 9 Exch. 341; 26 Eng. L. & Eq. 398. See *Goodkind v. Rogan*, 8 Ill. App. 413; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128.

1. Where Animal Warranted Sound Communicates Disease to Vendee's Flock.—*Broquet v. Tripp*, 36 Kan. 700. In *McKee v. Jones*, 67 Miss. 405, it was held that the vendor could not defend on the ground that he did not know that the animal was afflicted with the disease. *Marsh v. Webber*, 16 Minn. 418 (a case of fraudulent warranty); *Bradley v. Rea*, 14 Allen (Mass.) 20; *Long v. Clapp*, 15 Neb. 419; *Wintz v. Morrison*, 17 Tex. 372; 67 Am. Dec. 658; *Dushane v. Benedict*, 120 U. S. 637; 2 Benjamin on Sales (Corbin's ed.), § 1362.

In the case of *Smith v. Green*, 1 C. P. Div. 92; 16 Moak's Rep. 441, the defendant, A, sold a cow to B, a farmer, warranting her to be free from foot and mouth disease. B placed the cow (which really had the disease) with other cows of his, and some of these became infected with the disease and died, as also did the cow in question. It was held that A was liable in damages for the entire loss, if when he sold the cow he knew, or had reason to believe, that B was a farmer, and that he would, therefore, or probably might, place the infected cow with the others of his herd. See also *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; 28 Am. Dec. 476; *McClure v. Williams*, 65

Ill. 390; *Randall v. Newson*, 2 Q. B. Div. 102; *Hill v. Balls*, 2 H. & N. 299; *Knowles v. Mums*, 14 L. T. N. S. 592. The case of *Mullett v. Mason*, L. R., 1 C. P. 559; 1 H. & R. 779; 12 Jur. N. S. 547, is an exactly similar one to that just stated.

2. Horse Warranted to Be a Good Breeder.—*Short v. Matteson*, 81 Iowa 638; *Love v. Ross* (Iowa, 1893), 56 N. W. Rep. 528; *Woody v. Bennett*, 88 Cal. 241; *Newberry v. Bennett*, 38 Fed. Rep. 308. But loss of profits which would have been secured from standing the horse, is too remote and contingent to constitute an element of damage. *Connoble v. Clark*, 38 Mo. App. 476.

In *Hambrick v. Wilkins*, 65 Miss. 19; 7 Am. St. Rep. 631, the plaintiff, W., having been defrauded in the purchase of a jack, warranted to be a "sure foal getter," rescinded the sale, and offered to return him to the defendant, who refused to accept him. W. then left him with a stable keeper, and afterward gave him to the keeper to pay for his board. In an action on the warranty, it was held that the damages to be recovered by W. were the difference between the actual and the represented value of the jack (in this instance the price paid), less the cost of keeping him.

Where a horse is sold for breeding purposes, evidence of his unfitness for that purpose is admissible on the question of damages, as is also evidence of the nature and probable duration of his blemishes. *Woody v. Bennett*, 88 Cal. 241. See also *Fitzgerald v. Evans*, 49 Minn. 541. In this latter case, which was an action on a warranty of

pective profits, which he might have realized had the warranty proved true.¹

Where seed is sold with a warranty that it is of a particular kind, in an action for a breach of the warranty, the vendee may recover the price paid for the seed if it proves worthless, and his expenses in preparing his land for planting, together with the loss sustained from having his land lying idle for the year, or for such time as the use of it was lost.² Where material sold for manufacturing purposes is warranted to be of a certain quality,

a horse, the court held that statements and representations of the vendor, made at the time of the sale, as to the value of the horse, were competent evidence, as being admissions bearing on the question of damages; also, that the defect complained of being a spavin, evidence that the horse, if sound, would have been especially valuable for breeding purposes is admissible.

1. Such loss is too remote, contingent, and speculative, to constitute an element of damage. *Connoble v. Clark*, 38 Mo. App. 476; *Love v. Ross* (Iowa, 1893), 56 N. W. Rep. 528.

2. **Sale of Seed—Breach of Warranty.**—*Butler v. Moore*, 68 Ga. 780; 45 Am. Rep. 508. But loss of prospective profits, to be secured from a sale of crops expected to be raised from seed, cannot be considered as an element of damage. *Butler v. Moore*, 68 Ga. 780; 45 Am. Rep. 508; *Randall v. Raper*, 1 El. Bl. & El. 84; 96 E. C. L. 82; 4 Jur. N. S. 662; *Page v. Pavey*, 8 C. & P. 769; 34 E. C. L. 628. See the same measure of damages allowed for breach of warranty of a seeder, or machine for sowing. *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 325.

In *Fox v. Everson*, 27 Hun (N. Y.) 355, the seed sold was plantain seed, though it was warranted to be clover seed. It was held that, in addition to the items already stated as recoverable, the vendee could recover also for the damage to his land, caused by the plantain seed sowed on it.

A sold some hop roots to B, and, knowing that B purchased them for cultivation, warranted them to be female or productive roots, when, in fact, very many of them were male or unproductive roots. B's crop proved to be a failure, and he sued A for a breach of the warranty. It was held that he was entitled to recover for all the damage sustained, including the difference between the value of the crop actually

raised, and of that which he would have raised had all the roots been female or productive roots as represented. *Schutt v. Baker*, 9 Hun (N. Y.) 556; *Randall v. Raper*, 1 El. Bl. & El. 84; 96 E. C. L. 82; 4 Jur. N. S. 662. Compare *Brooks v. McDonnell*, 41 Wis. 139.

In an action upon the warranty that certain seed would produce Bristol cabbages, it was held that the damages recoverable would be the value of a crop of Bristol cabbages, such as ordinarily would have been produced that year, less the expense of raising, and the value of the crop actually raised from the seed sold. *Passinger v. Thorburn*, 34 N. Y. 634; 90 Am. Dec. 753.

In the case of *Walcott v. Mount*, 38 N. J. L. 501; 20 Am. Rep. 425, *affirming* 36 N. J. L. 262; 13 Am. Rep. 438, there was a sale of seed warranted to be turnip seed of a certain variety, but which turned out to be of a different variety from that represented. In an action on the warranty, the court held that the purchaser might recover the value of the crop which would have been raised had the seed been as warranted, less the value of the crop actually produced. *Beasley, J.*, delivering the opinion of the court of appeals, said: "The defendant at the time of the sale was possessed of all the facts. He knew the business of the plaintiff, and the use to be made of the thing sold. He was in a situation to foresee, with entire certainty, the loss that would fall upon the plaintiff if the warranty should be broken. Nor are the gains which have been lost subject to any uncertainty. The seed sold was planted and came to maturity; the seed stipulated for would have done the same, only the value of the product would have been, to a definite amount, greater. In such an injury there is nothing speculative or contingent. There are a number of authorities which sanction the recovery of profits of a much more uncertain character

and it proves to be of an inferior quality, the measure of damages is the difference between the value of the manufactured article made from the defective material, and the value which the article would have had if made from the material as represented;¹ it seems, however, that this rule cannot be applied where the purchaser discovers the defect in the material before he has used it.²

Where the article was sold by sample, with a warranty of quality, and, an inferior quality having been delivered, the vendee is obliged to resell it, and purchase other material to replace it, he is entitled to recover the cost of the reselling and replacing.³

In the case of the sale of machines, the purchaser, in an action on the warranty, may recover the difference between the actual and the represented value of the machine, together with expenses incurred in a proper effort to make it available, and also losses sustained from having acted on the faith of the warranty.⁴ If the

than these. *Davis v. Talcott*, 14 Barb. (N. Y.) 611." See also *Van Wyck v. Allen*, 6 Daly (N. Y.) 376.

1. **Warranty of Material Used in Manufacturing.**—*Greene v. Witte*, 5 Ind. App. 343; *Park v. Morris Axe, etc., Co.*, 41 How. Pr. (N. Y. Supreme Ct.), 18; *Milburn v. Belloni*, 39 N. Y. 53; 100 Am. Dec. 403; *Wait v. Borne*, 123 N. Y. 592, *reversing* 5 N. Y. Supp. 168; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600.

In *Moore v. King*, 134 N. Y. 596, *affirming* (Supreme Ct.) 10 N. Y. Supp. 651, varnish was sold, warranted to be of a certain quality. It was shown that the mouldings on which the varnish was used would have been worth ten cents per foot if it had been as warranted, but the varnish being faulty they were worth only five cents, and that this difference of five cents would be equal to the expense of taking off the old varnish and putting on the new. The vendor knew that the varnish was to be used for mouldings, and it was shown that the defect was not discoverable until after application. It was held that a verdict in favor of the vendee, awarding five cents per foot as damages, was proper.

In the case of *Hammar Paint Co. v. Glover*, 47 Kan. 15, there was a sale of paint warranted to be good. The court, after stating the rule that possible or future contingent damages were not recoverable in an action on the warranty, went on to hold that if the breach of warranty involved the vendee in a legal liability to pay money, or in expenses due to other parties for whom he did work with the paint, in order to

relieve himself against the bad quality of the paint, such liability or expenses, if certain, fixed, or liquidated, whether paid or not, constitutes an element of damage for which he may recover. Applying this rule, it was held in *Thoms v. Dingley*, 70 Me. 100; 35 Am. Rep. 310, that where the purchaser, a carriage manufacturer, was obliged to replace defective springs in carriages which he had sold, he could recover of his vendor for the expense of taking out and replacing the springs, which had been warranted by the vendor.

2. The warrantee owes it to his warrantor to make the damages, resulting from the breach of warranty, as light as possible, and it does not seem that he would have any right, after discovering the defect, to continue using the defective material, and thus increase the amount of damages. See *infra*, this title, *Vendee's Duty to Render Damages as Light as Possible*; *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 325. Compare, however, the case of *Wait v. Borne*, 123 N. Y. 592, *reversing* (Supreme Ct.) 5 N. Y. Supp. 168, which held that where the vendee retains the material, after discovering the defects, the measure of damages is the difference between the value of the carpets made from the defective material and their value had they been made with good materials.

3. *Hudman v. Cuyas*, 57 Fed. Rep. 355.

4. **Warranty in the Sale of Machinery—Damages.**—*Whitehead, etc., Mach. Co. v. Ryder*, 139 Mass. 366; *McLennan v. Ohmen*, 75 Cal. 559; *Melby v. Osborne*, 33 Minn. 492; *Page v. Ford*,

warranty is a special one, and embraces a guaranty that the machinery is suited for a particular purpose, the measure of damages is not the expense incurred in changing it, so as to make it conform to the warranty, but is the loss sustained by the purchaser from having defective or worthless machinery, including loss of the profits of his business for which the machinery was purchased.¹

12 Ind. 46; *Smeed v. Foord*, 1 El. & El. 602; 102 E. C. L. 600; *Huyett, etc., Mfg. Co. v. Saile*, 45 Ill. App. 562.

Thus, in an action for a breach of warranty in the construction and sale of two steam boilers, the necessary expense of repairing them, the purchaser's loss of time while so engaged, and the increased quantity of fuel necessarily consumed in order to generate steam, are recoverable as the natural and proximate results of the breach of the warranty. *Phelan v. Andrews*, 52 Ill. 486. And in such a case, if the boiler explodes, and on account of the explosion the purchaser's mill is compelled to remain idle for some time, the rental value of the mill for that time is to be considered in addition to other elements of damage; in ascertaining such rental value, it is proper to call witnesses who were acquainted with the capacity of the mill and its work, from day to day down to the time when the boiler exploded. *Sinker v. Kidder*, 123 Ind. 528. But as to this last case, see *Nye v. Iowa City, etc., Works*, 51 Iowa 129; 33 Am. Rep. 12.

Where a machine for planting seed turns out not to be as warranted, in that it failed to cover the seed sown, in consequence of which there was a loss to the purchaser, not only of the seed sown but also of the use of the land on which they were sown, the purchaser may recover so much of such loss as occurs while he is making a reasonable test of the fitness of the machine for the work for which it was purchased. But for such damages as accrued after he had discovered its uselessness there can be no recovery. *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 325.

Where a machine is purchased from an English manufacturer, under a warranty that it will do certain work in *America*, the measure of damages for a breach of the warranty is the difference between the contract price of the machine and its value in *America* to the purchaser, including expenses incurred by the purchaser, for alterations and changes made in the machine in order to get it to do the work for

which it was purchased. *Whitehead, etc., Mach. Co. v. Ryder*, 139 Mass. 366.

Sale of Reapers and Mowers.—In *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210, the vendor gave this warranty on the sale of a reaper: "We warrant No. 6 to be a good grain-cutting machine and a good mowing machine. Should the machine fail to do as warranted, then we are to be notified and given time to make the machine work. Should we fail to make it work, then we agree to take it back." Upon suit being brought on one of the notes given for the purchase-money, the defendant pleaded a breach of the warranty and made a counter-claim for loss of his time for himself, two hands, and team, loss of grain out of the crop, caused by delay in harvesting, loss in being compelled to hire extra help and another machine to harvest with, and for money paid on the machine when purchased. It was held that by the last clause in the warranty, the vendee's damages were limited to the recovery back of the money paid on the contract. *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210. See *Hall v. Aetna Mfg. Co.*, 30 Iowa 215. See also *Frohreich v. Gammon*, 28 Minn. 476. And see *Johnston Harvester Co. v. Clark*, 31 Minn. 165, where evidence of cost of repairing the reaper was admitted.

In an action on the warranty, one of the plaintiff's witnesses having testified that the harvester was worthless or nearly so, the expense of reasonable changes to make the machine work with another binder may be shown on cross-examination. *Melby v. Osborne*, 33 Minn. 492.

1. *Beeman v. Banta*, 118 N. Y. 538; 16 Am. St. Rep. 779. In this case, a refrigerator was bought by a person engaged in preparing poultry for market. It was held that the purchaser, in an action for a breach of the warranty that the refrigerator was suitable for his purposes, could recover, in addition to other damages, the market value of the poultry lost through the defectiveness of the machine, less the

The general rule as to the measure of damages, as previously stated, has been applied in other instances to which reference is made in the subjoined note.¹

2. Remote Damages Not Recoverable.—Damages sustained by the purchaser which are only a remote consequence of the breach of warranty, or which cannot be said to have been in contemplation of the parties at the time when the contract was made, are not recoverable.²

cost of getting them to market and the fees and commissions charged by his agents in the city. See also *Frohreich v. Gammon*, 28 Minn. 476.

Upon the sale of an engine and boiler for the vendee's saw mill, to be placed therein in running order, there was a warranty that the engine would run a mill up to a certain horse power, and that the engine and boiler, with their appurtenances, were sound and in good order and would do good work up to their capacity. It was held that this did not amount to a special warranty that the boiler and engine were suited to the mill, but that the warranty was general, and the measure of damages was simply the difference between the actual and the warranted value of the engine and boiler. *Edwards v. Collson*, 5 Lans. (N. Y.) 324.

1. Other Instances of Damages Recoverable.—In *Wilson v. Dunville*, L. R., 4 Ir. 249; L. R., 6 Ir. 210, the plaintiff bought from the defendant, a firm of distillers, a quantity of grains, warranted to be "distiller's grains," and which are commonly used for feeding cattle. It turned out that the grains contained an admixture of lead, so that several of the plaintiff's cattle, which fed upon them, died from the poison. The jury having found that the warranty was broken, though there was no fraud, the plaintiff was allowed to recover, as damages, the value of the cattle killed, on the ground that their death was the natural consequence of the breach of warranty. 2 Benjamin on Sales (Corbin's ed.), § 1361; *Dushane v. Benedict*, 120 U. S. 636. For a somewhat similar case, see *French v. Vining*, 102 Mass. 132; 3 Am. Rep. 440.

In *Horn v. Buck*, 48 Md. 358, a horse which was warranted to be sound proved not to be so, but the vendee used her a month or more before it was fully ascertained that the warranty was broken, and during this time underwent some expense in trying to cure her. The court held that the vendee might recover for the expense incurred

while trying to cure her, but that he should be charged for the benefit of using her.

In an action on a warranty, where the plaintiff shows a return of a machine to the place where he received it, and a refusal by the defendant to give up the notes executed for the purchase-money, the measure of damages recoverable is the amount the plaintiff was compelled to pay on the notes, which had been transferred to a *bona fide* purchaser for value, without notice. *Skeen v. Springfield, etc., Co.*, 34 Mo. App. 485.

2. Damages Not Recoverable.—*Huyett, etc., Mfg. Co. v. Gray*, 111 N. Car. 92; *Carroll-Porter Boiler, etc., Co. v. Columbus Mach. Co.*, 55 Fed. Rep. 451. In an action for a breach of a warranty that a safe was "burglar proof," the difference in its real and represented values is the measure of damages, and the vendee cannot recover for the loss of valuables taken out of the safe by burglars who effected an entrance into it. The loss of such valuables was not a proximate consequence of the breach of warranty, but was the effect of an efficient intervening cause. *Herring v. Skaggs*, 62 Ala. 180; 34 Am. Rep. 4.

On the breach of a warranty made in the sale of a threshing machine, the vendee cannot claim damages for the time and expense incurred in experimenting with the machine, after it has proved to be defective. *Aultman v. Stout*, 15 Neb. 586.

And where the vendor, knowing that the vendee wanted it for immediate use, warranted a harvesting machine sold him, injury to the vendee's grain from a delay in harvesting, while he was experimenting with the machine and trying to make it work, cannot be considered in estimating damages for a breach of the warranty. *Wilson v. Reedy*, 32 Minn. 256.

In an action for damages for breach of a warranty of a horse, no fraud appearing, expenses incurred by the vendee, for medical examination and treatment,

3. Where the Goods Are Returned.—The cases hitherto considered have been those in which the purchaser retained the property which was warranted. As has been seen, however,¹ he has a right, in certain cases, upon discovering the breach of warranty, to return the property to the vendor, and where this is done the measure of damages is the same as in the cases already considered, except that no deduction of the actual value of the property is to be made. The measure of damages, therefore, where the vendee returns the property purchased, is the value of such property if it had been as warranted, together with such damages, in the nature of expenses incurred and losses sustained, as reasonably can be presumed to have been in contemplation of the parties

are not recoverable as special damages in addition to general damages; they are not a natural result, nor can they be said to have been in contemplation of the parties when the sale was made, as a probable result of the breach of the warranty. *Merrick v. Wiltse*, 37 Minn. 41. So, also, damages for the breaking of the vendee's wagon and harness, in consequence of the unkindness of a horse sold to him by the defendant, cannot be recovered in an action of tort for a breach of a warranty that the horse was kind, which, it is alleged, the defendant knew was false when he made it. *Case v. Stevens*, 137 Mass. 551.

In the case of *Bagley v. Saranac River, etc.*, Paper Co., 62 Hun (N. Y.) 618; 135 N. Y. 626, it appeared that the plaintiff guaranteed that certain machinery sold by it to the defendant would "deliver pulp 50 per cent. dry." In such a case, the extra expense of transporting the manufactured product, by reason of its increased weight, caused by the failure of the machinery to produce pulp as dry as warranted, cannot be set off in an action by the vendor for the price of such machinery.

In an action for damages resulting from the sale of unsound meats, the plaintiff having sold some of the damaged meat to another dealer, who returned it and was allowed a sum therefor in settlement, is not entitled to recover the amount so allowed, without evidence of the quality or value of the meats, since such a settlement is not binding on, or conclusive as to, the defendant. *Copas v. Anglo American Provision Co.*, 73 Mich. 541.

Where the purchaser has sustained no special damage in the way of ex-

penses incurred, etc., the damages recoverable cannot exceed the price paid for the article. *Sullivan v. Goldman*, 19 La. Ann. 12. So that where the evidence is that the value of the goods is much less than the price agreed to be paid, but it does not appear that the vendee has paid any greater part of the price than was equal to the value of the goods retained by him, or that their value as warranted exceeded the price, there is no ground for a recovery of more than nominal damages. *Cleveland v. Nellis* (C. Pl.), 18 N. Y. Supp. 448.

Injury by Runaway Horse Warranted "Kind."—Damages for personal injuries received by the buyer of a horse warranted to be kind and gentle, are not recoverable in an action on the warranty, where it is not shown that the seller knew, or had reason to know, that the horse was vicious or unsafe. *Jones v. Ross*, 98 Ala. 448. See also *Case v. Stevens*, 137 Mass. 551.

Damage Sustained by Vendee of Original Purchaser.—In an action for a breach of warranty in the sale of a chain, evidence of injury to the business of the vendee of the original purchaser, incurred by the loss of trade by reason of the breaking of the chain, is not admissible, where the petition claims damages for the cost of substituting a new chain for the old one only, and the testimony fails to show that the purchaser was responsible for consequential damages, or that the defendants, in selling the chain, were aware that such purchaser had agreed to incur such liability. *Sutherland v. Round*, 57 Fed. Rep. 467.

1. See *supra*, this title, *Rescission*;
2 Benjamin on Sales (Corbin's ed.), § 1347, *et seq.*

when the contract was made, and which result as a natural consequence of the breach.¹

4. Where Goods Are Purchased for Resale.—Where the article or goods are purchased with a view to a resale, the vendor is liable for all the damages actually sustained by the purchaser, in consequence of his having to compensate his own purchasers for a breach of warranty in the goods as sold to them.² But he cannot recover, as damages, compensation paid by him to his purchasers, where there was no legal liability on his part to pay such compensation.³ Nor can a purchaser recover, as damages, the loss of profits he would have made by resale of the goods, had they been of the quality represented.⁴ This latter rule, however, does not apply where the vendor, knowing that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfill this contract, agrees to supply the goods to enable him to fulfill it; in such a case, the profits which would accrue to the buyer upon carrying out his contract of resale, are recoverable as having been within the contemplation of the parties at the time the contract of sale was made.⁵

5. Where the Warranty Is Fraudulent.—If the vendor makes a warranty, knowing at the time that it is false, the vendee may sue in tort for the wrong done, and in such cases the damages assume

1. Where Purchaser Returns the Subject of the Sale.—*Tilman v. Stringer*, 26 Ga. 171; *Birdsall v. Carter*, 11 Neb. 143.

A retail dealer, who buys plated goods from a wholesale dealer, under a warranty that they will wear five years, in an action on the warranty can recover only such goods as fell short of the warranty given, and were on that account returned. *Smith v. Sipe* (Ohio C. Pl.), 25 Wkly. L. Bull. 394.

2. Where Goods Are Purchased for Resale.—*Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Dingle v. Hare*, 7 C. B. N. S. 145; 97 E. C. L. 144; 68 Jur. N. S. 697; 1 L. T. N. S. 38. See also *Pennell v. Woodburn*, 7 C. & P. 117; 32 E. C. L. 462; *Lovegrove v. Fisher*, 2 F. & F. 128; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111; 44 Am. Rep. 509.

The measure of damages, in an action brought for a breach of an implied warranty of the genuineness of an article sold as opium, is the value of an article corresponding to the warranty, deducting the value, if anything, of the article sold; and if the vendor has, in the meantime, sold the article with a like warranty, the sum paid on a judgment obtained against him, in an action brought by his vendee for a breach of that warranty, is *prima facie* evidence of the amount which he can recover of his

vendor; and, if he gave notice to his vendor of the commencement of that action, he may also recover his taxable costs therein, but he can in no case recover counsel fees paid for the defense thereof. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166 (opinion by Shaw, C. J.).

Damages Recoverable Where Goods of More Value than Those Ordered Are Furnished.—An action is maintainable by a seed merchant against seed brokers, for falsely warranting turnip seed to be grape seed, although sold by sample, and of greater value than turnip seed, the purchaser having sustained actual loss and injury in his business from having resold it as grape seed, and having had to compensate his customers. *Lovegrove v. Fisher*, 2 F. & F. 128. See same principle in *Walker v. Gooch*, 48 Fed. Rep. 656.

3. Loss of Prospective Profit.—*Sutherland v. Round*, 57 Fed. Rep. 467; *Connoble v. Clark*, 38 Mo. App. 476; *Love v. Ross* (Iowa, 1893), 56 N. W. Rep. 528.

4. English v. Spokane Commission Co., 57 Fed. Rep. 451.

5. Carpenter v. First Nat. Bank, 119 Ill. 352; *Thorne v. McVeagh*, 75 Ill. 81. The rule of the text should not be submitted as an instruction to the jury, unless there is evidence that the contract

a wider range, and recovery may be had for all damages of which the vendee's deceit was the approximate cause, whether they were such as were in contemplation of the parties at the time of the sale or not; but in such cases the action is not on the contract of warranty, but for the fraud.¹ The vendee may, however, in such a case, waive his right of action for the fraud, and pursue his remedy on the contract, and where he does so, the measure of damages is the same as where the warranty is given in good faith.²

6. For Breach of Warranty of Title.—If there is a breach of the warranty of title, and the vendee is deprived of the article sold by paramount title, the measure of damages is the price paid;³ or, if there is not a complete failure of title, but merely an incumbrance on the property, he is entitled to recover the amount necessary to discharge the incumbrance,⁴ unless he chooses to rescind the

of resale existed, and that the vendor knew of its existence. *Carpenter v. First Nat. Bank*, 119 Ill. 352.

1. See *DAMAGES*, vol. 5, p. 13; *Faris v. Lewis*, 2 B. Mon. (Ky.) 375. Thus, in an action to recover damages for deceit in the sale of a horse, the plaintiff having proved that the defendant, at the time of the sale, represented the horse to be perfectly gentle and kind, and that the defendant knew such representation to be false, and having proved also that within a day or two after the trade, and for the first time, he attempted to use the horse before a buggy, when, without any apparent cause, he ran and kicked until the buggy was badly broken, and to save his life the plaintiff leaped upon the ground and thereby broke one of his legs, it was held that it was competent for the plaintiff to introduce evidence to show the full nature and extent of the injuries to his person and his vehicle, and the expenses necessarily incurred in effecting his cure; and that it was for the jury to say, as a question of fact, whether they resulted from the viciousness of the horse, and were the probable and natural consequences of the fraud practiced upon the plaintiff by the defendant. *Sharon v. Mosher*, 17 Barb. (N. Y.) 518.

2. See *supra*, this title, *Measure of Damages—The General Doctrine*.

Where the vendee elects to sue on the contract of warranty, he thereby waives the fraud, and evidence of such fraud is not then admissible. See *infra*, this title, *Evidence of Fraud*.

3. *Glover v. Hutson*, 2 McMull. (S. Car.) 109; *Close v. Crossland*, 47 Minn. 500; *Thiele v. Axell*, 5 Tex. Civ. App.

548; *Smelzer v. White*, 92 U. S. 390 (breach of warranty of genuineness of county warrants); *Electro-Dynamic Co. v. The Electron*, 56 Fed. Rep. 304. The rule of the text applies, although the article may have increased in value since the eviction. *Arthur v. Moss*, 1 Oregon 193.

The measure of damages, in an action for a breach of an implied warranty of title in the sale of a horse, is the price paid, the interest thereon, and the costs recovered against the purchaser or his vendee; and in case of a suit by the owner and notice by the vendor, the costs of the defense are not recoverable. *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Seibles v. Blackwell*, 1 McMull. (S. Car.) 56; *Glover v. Hutson*, 2 McMull. (S. Car.) 109; *Brown v. Woods*, 3 Coldw. (Tenn.) 182.

4. But only actual damages are recoverable. *O'Brien v. Jones*, 91 N. Y. 193. Thus, in the case of *Western v. Short*, 12 B. Mon. (Ky.) 153, A sold to B a horse for which B paid. The animal turned out to be mortgaged to C, who brought suit to foreclose. B executed a bond to have the horse forthcoming to abide the result of the suit. The condition of his bond was broken, and C sued B thereon, and recovered the amount secured by the mortgage, together with the costs in both suits. In a suit by B against A for the breach of the warranty of title, it was held that he could recover from A the amount of the mortgage and costs of the chancery suit, since that was the amount which A, as warrantor, was bound to pay.

Where property is exchanged, as upon a sale, with a warranty that it is

contract, in which case he may, upon returning the property, recover the price paid.¹

If the vendee defends the title against an action brought by a third party, of which the vendor had notice, he may recover, not only the price paid, together with interest thereon, but also the cost of the defense, with interest.² And where the warranty is fraudulent, the vendee is entitled to recover for all other damages which result as a proximate consequence of the breach.³

7. Vendee's Duty to Render Damages as Light as Possible.—It is a fundamental principle that a party cannot recover for damages to himself which he might have prevented by the exercise of reasonable care; this principle is the foundation of the rule of contributory negligence, and applies to actions for a breach of warranty as well as to other cases. The vendee, therefore, owes an active duty to exercise ordinary care, in order to render the damage resulting from the breach of warranty as light as possible.⁴ Nor can he recover for any damages which are the consequence of his own negligence.⁵

unincumbered, and it is incumbered, the vendee cannot recover more than nominal damages, until he has paid the amount of the incumbrance or has been deprived of the possession. *Close v. Crossland*, 47 Minn. 500.

1. See *RESCISSION*, vol. 21, p. 84; *supra*, this title, *Rescission*.

2. *Rowland v. Shelton*, 25 Ala. 217.

In an action for a breach of warranty of title, a *bona fide* second purchaser may recover from the vendor the value of the chattels reclaimed from him by a prior purchaser, who, having procured the sale to himself by fraudulent representations, has obtained possession of part thereof, provided the vendor had done nothing to disaffirm such prior purchaser's title, on the ground of fraud. *Brown v. Pierce*, 97 Mass. 46; 93 Am. Dec. 57.

3. *Brown v. Woods*, 3 Coldw. (Tenn.) 182.

4. "The law imposes, upon a party injured by another's breach of contract or tort, the active duty of making reasonable exertions to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him. This is a practical duty under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are not recoverable, it is of great importance. Where it exists, the labor or expense which its performance involves

is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury, or the part of it, that such measures have or would have prevented." *Sutherland on Dam.* (2d ed.), § 88. *Quoted and applied in Long v. Clapp*, 15 Neb. 420. See also *Miller v. Mariner's Church*, 7 Me. 51; 20 Am. Dec. 341; *Nye v. Iowa City, etc., Works*, 51 Iowa 131; 33 Am. Rep. 121.

Thus, where a party has purchased a machine for planting seed, which is warranted good, but which turns out to be defective, he may recover in damages for the seed wasted, the time lost, the rental value of the land, etc. But as soon as he ascertains that it is defective, it is his duty to abandon the use of it at once, and he cannot enhance the damages by continuing to sow with it, ruining crop after crop with it. *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 325; *Birdsall v. Carter*, 12 Neb. 146.

Where the vendor agrees to replace the horse sold, on its being returned to him in case it should prove unfit for breeding purposes, and ample evidence of its unfitness having been given in the three months immediately following the purchase, the vendee should return it then, and he cannot recover for expenses incurred after that time. *Newberry v. Bennett*, 38 Fed. Rep. 308.

5. Contributory Negligence.—See gen-

XXI. PROCEDURE.—In all cases, a breach of warranty must be pleaded in order to be relied on, whether such breach is set up in an action on the warranty, or for a rescission of the contract of sale, or by way of defense to an action by the seller for the purchase-money. A judgment rendered on the basis of a breach of warranty cannot be sustained on appeal, unless the breach was specially pleaded originally, or by way of amendment at the trial.¹ In such cases it also should be made to appear in the pleadings that the warranty was made at the time and in consideration of the sale,² and further that as a result of the breach the buyer has suffered pecuniary damage.³

erally CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15 *et seq.*; *Pinney v. Andrus*, 41 Vt. 631.

In the case of *Callahan v. Morse*, 37 Mo. App. 189, a water tank, built to order but not as warranted, was accepted by the vendee; it afterward burst, on account of careless handling by him and not because of any defects covered by the warranty. The vendee was not allowed to recover of the warrantor for the damages thus occasioned. See also *Gadsden v. Raysor*, 9 Rich. (S. Car.) 276.

1. *Lamson Consol., etc., Co. v. Hartung* (C. Pl.), 18 N. Y. Supp. 143; *Martin v. Blodget*, 1 Aik. (Vt.) 375; *Cooper v. Landon*, 102 Mass. 58; *Skeen v. Springfield Engine, etc., Co.*, 34 Mo. App. 485; *Woodhouse v. Swift*, 7 C. & P. 310; 32 E. C. L. 521. See also *Allen v. Swenson*, 53 Minn. 133; *Brower v. Nellis*, 6 Ind. App. 323. A defendant, in an action for goods bargained and sold at a specific price, will not be allowed to show, either in bar of the action, or in mitigation of damages, that there was a false representation of the quality of the goods, unless specially pleaded. *Woodhouse v. Swift*, 7 C. & P. 310; 32 E. C. L. 521.

In an action for a breach of warranty of a stable horse, represented to be sound and perfect in all respects, an averment that the horse was unsound, that he was unable, except once in a great while, to perform his duty as a stable horse, is a sufficiently specific allegation of a breach of the warranty. *Schurtz v. Kleinmeyer*, 36 Iowa 392. See also *Bergeler v. Michael*, 84 Wis. 627.

The affidavit of defense required under the *Pennsylvania* practice is insufficient where it merely sets up the warranty without showing whether it was express or implied, what were its

terms, or when, or by whom, or by what authority it was made. *Wile v. Onsel*, 10 Pa. Co. Ct. Rep. 659; *Voneiff v. Braunreuter*, 11 Pa. Co. Ct. Rep. 554; *Martinez v. Earnshaw*, 143 Pa. St. 479; *Bacon v. Scott*, 154 Pa. St. 250.

2. *Penn v. Stuart*, 11 Ark. 41; *Johnson v. McDaniel*, 15 Ark. 109; *Lincoln v. Ragsdale*, 7 Ind. App. 354.

An allegation that the plaintiff exchanged certain property with the defendant, for a horse "which the defendant expressly warranted," etc., sufficiently shows that the warranty was made at the time and in consideration of the exchange. *Curtis v. Moore*, 15 Wis. 134.

In an action for the price of certain iron sold, an averment, in the affidavit of defense, that the plaintiff sold the ore expressly warranting it to be well roasted, free from sulphur, and in all respects equal in quality to a certain lot previously sold, is a sufficient averment of warranty. *Kaufman v. Cooper Iron Min. Co.*, 105 Pa. St. 53.

3. *Hull v. Caldwell* (S. Dak. 1893), 54 N. W. Rep. 100; *Meacham v. Cooper*, 36 Minn. 227.

In an action for damages, for a breach of warranty of the soundness of a chattel sold and delivered, the complaint alleged the sale of the chattel at an agreed value, and a warranty of its soundness, and averred unsoundness at the time of the sale, "to the damage of the plaintiff" in a certain sum. It was held, on demurrer, that the complaint sufficiently alleged that such unsoundness diminished the value of the chattel. *Ferguson v. Hosier*, 58 Ind. 438.

In an action for a breach of warranty in the sale of a mare, allegations that she was of "little or no value," but would have been worth the price if "sound and all right," are sufficiently definite to determine the value of the

A breach of a warranty of soundness is sufficiently set out by negating the words of the warranty; the particulars of the warranty and of the breach need not be alleged, though if alleged, they must be proved.¹

Where a general warranty is relied on, it is not necessary, in pleading, to state whether it is an express or an implied one.² It has been seen already that an action for a breach of warranty is entirely different from an action for fraudulent misrepresentations; the one is an action *ex contractu* while the other is *ex delicto*; in the one allegations or proof of fraud are unnecessary, while in the other fraud must be alleged and proved.³ Allegations or proof of fraud being unnecessary in an action on the

mare and the damage sustained. Means *v.* Means, 88 Ind. 196. See also *Wheeler v. Reed*, 36 Ill. 81.

1. *Leeper v. Shawman*, 12 Ind. 463; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Webster v. Hodgkins*, 25 N. H. 128; *Johnson v. McDaniel*, 15 Ark. 109. See also *Aultman v. Seichting*, 126 Ind. 137; *Parlin v. Bundy*, 18 Vt. 582; *Goodenough v. Snow*, 27 Vt. 720; *Button v. Corder*, 7 Taunt. 405; 2 E. C. L. 403; 1 Moore 109; *Cater v. Wood*, 19 C. B. N. S. 286; 115 E. C. L. 286.

In the case of *Ferris v. Comstock*, 33 Conn. 513, which was an action on a warranty, the declaration alleged that the defendant sold the plaintiff sixteen pounds of onion seed for sixteen dollars, which amount the plaintiff paid, and that in consideration of the premises, the defendant warranted the seed to be "fresh, genuine, and the product of the preceding year." The proof was that the sum paid was eight dollars, and that the warranty was that the seed was "good, fresh, and such seed as would grow." It appeared that the terms of the warranty alleged, and those proved, generally were understood and used as having the same import. It was held that there was a fatal variance as to the consideration, but that there was no variance as to the warranty.

In an action for the breach of a warranty of the soundness of a horse, it is sufficient to allege in the declaration that the horse was unsound, without specifying the particular kind of unsoundness. *Wheeler v. Wheelock*, 33 Vt. 144; 78 Am. Dec. 617.

A complaint for an alleged breach of warranty, which alleges false representations made by the defendant, is insufficient when it does not allege that the defendant intended that the plaintiff

should rely on such false representations. Such a complaint is also deficient in that it fails to allege a breach of the warranty, or that the statement constituting the warranty was an undertaking made by the seller as a part of the contract of sale, with intent that it should be relied on, and that it induced, or was in consideration of, the purchase. *Lincoln v. Ragsdale*, 7 Ind. App. 354. But as to the first objection to such a complaint, see *supra*, this title, *Intention to Warrant*.

2. *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163; *Long v. Armsby Co.*, 43 Mo. App. 253.

It was held, however, in *Douglas v. Moses* (Iowa, 1893), 56 N. W. Rep. 271, that where the complaint stated the cause of action as being for the breach of an express warranty, there was no error in an instruction that "if no representations were made at the time of the sale" the plaintiff cannot recover; the objection that it withdraws from the jury the question as to a breach of the implied warranty is not valid, since that question does not arise on such pleadings. See also *Wile v. Onsel*, 10 Pa. Co. Ct. Rep. 659.

3. **Fraud.**—See *supra*, this title, *Distinguished from Fraud*. See also *infra*, this title, *Evidence of Fraud*; *Brink v. Winguard*, 2 C. & K. 656; 61 E. C. L. 656; *Rose v. Hurley*, 39 Ind. 77; *Wallace v. Wren*, 32 Ill. 146. In *Mumery v. Paul*, 1 C. B. 316; 50 E. C. L. 314; 2 D. & L. 582; 14 L. J. C. P. 9, the declaration alleged that the plaintiff bargained with the defendant to buy his interest in a lease and fixtures and the good will of a business; and that the defendant, by falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amounts received for commissions in the course of

warranty, it is improper to instruct the jury as to what would constitute fraud.¹

In an action on the warranty, a general allegation of damage is sufficient to admit proof of general damages, that is, such damages as necessarily accrue from the breach. But if special damages are claimed, the facts entitling the party to them, as a rule, must be pleaded.²

A special count in assumpsit for a breach of warranty in the sale of an article, and a second count for the recovery of money paid without consideration, setting up the circumstances under which it was obtained and that the article purchased was absolutely worthless and without any value, are not inconsistent, and the plaintiff cannot be compelled to select upon which of the two he will proceed.³

It is not essential that the declaration should allege that the vendor, in making the representations, intended to give a warranty, where there is a positive affirmation relied on by the buyer; in such cases the intention to warrant is presumed conclusively.⁴

Various other cases involving particular questions of pleading and practice in actions of this nature are reviewed in the subjoined note.⁵

the business, and the net profits of the trade, were of a certain amount, sold to the plaintiff the lease and fixtures, and the good will of the business; it then went on to allege that the representation was false, and occasioned a consequent damage to the plaintiff. It was held that, under a plea of not guilty, the plaintiff was bound to prove a sale by producing the agreement between the parties, which appeared to be in writing, as well as a false and fraudulent representation; and that it was not enough to prove an assignment of the lease, fixtures, and good will.

Scienter Need Not Be Alleged or Proved.—In an action on the warranty, no *scienter* need be alleged, even though a declaration in deceit for the same cause of action is joined. *Shippen v. Bowen*, 122 U. S. 575; *Schuchardt v. Allens*, 1 Wall. (U. S.) 368; *Lassiter v. Ward*, 11 Ired. (N. Car.) 443; *House v. Fort*, 4 Blackf. (Ind.) 293. In this last case, the court said: "But as to a *scienter*, that it is not necessary to be laid when there is a warranty, even though the action be in tort; and if it be laid in such a case, there is no necessity of proving it."

1. *Wallace v. Wren*, 32 Ill. 146.

2. *Meacham v. Cooper*, 36 Minn. 227; *Huyett, etc., Mfg. Co. v. Gray*, 111 N. Car. 92.

3. *Murphy v. McGraw*, 74 Mich. 318.

In an action on the case for a breach of warranty, a count in deceit for knowingly misrepresenting the quality of a chattel, may be joined with a count for a breach of the warranty. *Lassiter v. Ward*, 11 Ired. (N. Car.) 443.

4. Declaration Need Not Allege Intention to Warranty.—In *McClintock v. Emick*, 87 Ky. 166, the court, by Holt, J., said: "If it be conceded that a clear, positive affirmation by the vendor, made during the negotiation, that the article is sound, be an express warranty, that it is as much so as if he were to say: 'I warrant it to be sound,' then is it required of the vendee, in suing upon it, to aver that the vendor intended he should rely upon it? If the vendor expressly warranted the article to be sound, and did not merely express a belief as to it, then he is liable without regard to his intention. He has lulled the vendee into security as to its condition, and he will not, and ought not, in good morals, to be heard to say that he did not intend the purchaser to rely upon the warranty. This being so, is it necessary to the sufficiency of the pleading to aver what the vendor will not be allowed to dispute? We think not." *Citing Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595.

5. Unnecessary Averments.—A claim for expenses which cannot be recovered

XXII. EVIDENCE.—The rule as to the admission of parol evidence, where the contract of warranty is in writing, has been examined in a preceding section of this article.¹ The cases in which questions of evidence in actions on warranties have been passed upon are almost innumerable, but in this section all of those of practical value are reviewed.

Experts may testify as to the character and extent of any defects complained of in the article sold; in such cases, however, it is necessary first to show the capacity of the witness offered, to form a correct opinion on the matters submitted to him.² But it

in an action against the seller for false representations, or for a breach of warranty, will not vitiate a pleading which states a good cause of action exclusive of such averment. *Byard v. Harkrider*, 108 Ind. 376.

Admission of Allegations in Complaint.—In *Mandeville v. Newton*, 119 N. Y. 10, which was an action for a breach of warranty made on the sale of certain promissory notes, the complaint alleged that the transaction was a *bona fide* purchase of the notes, and that they had been paid, and that defendant's testator, the vendor, knew they had been paid. The answer made no direct denial of this, but set forth the transaction in detail, and concluded by denying that the defendant's testator "made any other or different transfer of said notes than as herein stated." No objections were made to the admission of evidence of the transaction. It was held that the referee was justified in refusing to find that the defendant admitted the allegations of the complaint.

Joinder of Parties.—The general rules relative to the joinder of several parties as plaintiffs or defendants, and the effect of misjoinder or nonjoinder, has already been examined. See **PARTIES TO ACTIONS**, vol. 17, pp. 607-611. Where the action is against two defendants, and is *ex delicto*, judgment may be rendered against one defendant and the other discharged, though the rule is otherwise where the action is *ex contractu*, unless there is a special statutory provision. *Carpenter v. Lee*, 5 Yerg. (Tenn.) 265; *Darwin v. Cox*, 5 Yerg. (Tenn.) 257.

Motion to Have Machine Tested Before Trial.—In an action on a breach of warranty in the sale of a threshing machine, the defendants, before answering, moved the court for permission to use the machine in question for the purpose of testing its capacity to

do the work it was warranted to do. The motion having been denied, it was held on appeal that there was no error in the denial. *Rogers v. Hanson*, 35 Iowa 283.

1. See *supra*, this title, *Oral Warranty Where Contract Is in Writing*.

2. **Expert Evidence.**—*Dunham v. Rix*, 86 Iowa 300; *Woodrum v. Gross* (Va. 1893), 17 S. E. Rep. 764; *Albany, etc., Co. v. Lundberg*, 121 U. S. 451.

A witness who had been accustomed to handle and care for horses for fifty years, had successfully treated them for many diseases, had himself owned many horses, and was acquainted with the horse in question, is competent to testify whether the horse was sounder. *Vates v. Cornelius*, 59 Wis. 615. See also, in this connection, *Finch v. Phillips*, 41 Wis. 387, where, the vendee having shown that soon after the sale the mare was found to have bone spavin, the vendor was allowed to testify that he did not think it possible that when he sold her she could have had a bone spavin without his knowing it. See also *Earl v. Lefler*, 46 Hun (N. Y.) 9.

Chemist's Analysis of Fertilizers.—In an action for the price of a fertilizer, sold under an agreement stipulating that it was bought and accepted entirely upon its analytical standard, the seller in no case to be responsible for its practical results, it was held that a chemist's analysis of a sample, though imperfect, the state of preservation of the sample being unknown, and the date of the analysis not given, was admissible, in connection with other evidence that might be introduced, to make a complete defense; and that testimony as to the practical results of the use of the fertilizer was admissible, for the purpose of throwing light upon the question as to whether the fertilizer delivered came up to the analytical

is error to allow a non-expert to state his opinion as to a matter of fact which properly is to be determined by the jury.¹

The fact that similar articles sold by the vendor in the same locality had given satisfaction, is no evidence that the particular article sold to the vendee complaining was free from defects, and evidence as to the sufficiency of such other articles is not admissible.² It seems, however, that either party may show the quality of the larger lot of goods from which those sold were taken.³

standard. *DeLoach v. Hardee*, 64 Ga. 94. See also, as to effect as evidence of chemist's analyses, *Wilcox v. Hall*, 53 Ga. 635.

1. In an action for a breach of warranty on the sale of a stallion, where it is shown that the seller refused to accept a return of the stallion, as provided in the contract in case he did not come up to the warranty, on the ground that he was not in as good condition as when sold, it is error to permit non-expert witnesses to testify as to the horse's condition when offered to be returned, that being a question for the jury. *Dunham v. Rix*, 86 Iowa 300.

2. Evidence as to Satisfactoriness of Other Articles; Comparisons.—*Murray v. Brooks*, 41 Iowa 45. In this case, which was an action on a warranty given on the sale of a reaper, the defendant offered to prove that sixty similar machines sold in the same vicinity, had given satisfaction. It was held that it was incompetent. See also, as sustaining the view of the text, *Osborne v. Bell*, 62 Mich. 214, in which the rule applied where a breach was set up in defense of an action for the price. *Fox v. Stockton*, etc., *Agricultural Works*, 83 Cal. 333; *Albany*, etc., *Co. v. Lundberg*, 121 U. S. 451, *distinguishing* *Ames v. Quimby*, 106 U. S. 342. Compare *Raynor v. Bryant*, 43 Kan. 492; *Aultman v. Weber*, 28 Ill. App. 91; *Larrison v. Payne* (Supreme Ct.), 5 N. Y. Supp. 221.

Where a threshing machine has been rejected because of its failure to do the work intended, it is proper to admit evidence comparing it with a good machine afterward used by the defendants, as showing that it did not comply with the conditions of the warranty. *Davis v. Sweeney*, 80 Iowa 391. In this case it was held proper to permit a witness to testify that he had never seen a machine that did not do better work.

On the issue whether there was a breach of warranty in the sale of a lot

of onions, evidence is inadmissible to show that other onions, originally of the same lot, were unripe and improperly cured, unless it appears that those had been subject to the same conditions in harvesting, storing, etc. *Lake v. Clark*, 97 Mass. 346.

In a suit for the price of a harvesting machine, where the defendant sets up a breach of the warranty that the machine could do as good work as other machines, a comparison between the work done by the machine in question and the other machines is competent evidence, and evidence of the working of the machine during several harvests is also admissible. *Osborne v. Carpenter*, 37 Minn. 331.

A harvesting machine sold under a warranty, having proved defective, the vendor attempted, both during the season in which it was sold and during the following year, to remedy the defects by repairs and improvements. In an action for a breach of the warranty, it was held that evidence of the value of the machine in each of said years was admissible. *Osborne v. McQueen*, 67 Wis. 392.

3. Evidence as to Quality of Other Goods of Same Lot.—*Green v. Donaldson*, 16 Vt. 162; *Buchanan v. Collins*, 42 Ala. 419; *Raynor v. Bryant*, 43 Kan. 492; *Ames v. Quimby*, 106 U. S. 342.

On the trial of an action for the price of a Marsh windmill, sold with a warranty as to its capacity for pumping water, the defense being that the mill failed to come up to the requirements of the warranty, testimony showing the worthless character of another mill of the same name, and purchased by the witness from the same parties from whom the mill in controversy was obtained, is irrelevant and inadmissible. *Marsh v. Snyder*, 14 Neb. 237.

Where a machine is warranted to do as good work as that of the purchaser's brother, evidence that the machine is as good as any in the market is properly excluded. *McCormick*

Evidence as to the existence and character of the warranty, or as to the breach of it, must be confined to the time when the warranty was made or when the breach of it took place, and evidence of facts remote in point of time cannot be introduced except in peculiar cases.¹

Evidence of a usage of the particular trade, or of the vendor, to give a warranty in the sale of certain classes of goods, is admissible to prove a warranty.² And any evidence which has a legitimate tendency to satisfy the jury that the warranty was not broken, or which may be material upon the question of damages, is admissible.³ So, also, any evidence on the part of the purchaser, bearing directly on the question whether the warranty was

Harvesting Mach. Co. v. Cochran, 64 Mich. 636.

In a suit for a breach of warranty, a written contract relating to a different transaction from the one sued on is properly excluded. *Harrisburgh Car Mfg. Co. v. Sloan*, 120 Ind. 156.

1. Evidence Must Not Be Remote in Point of Time.—*Myers v. McFarlane*, 3 Brev. (S. Car.) 513; *Postel v. Oard*, 1 Ind. App. 252; *Miller v. McDonald*, 13 Wis. 673; *Brisbane v. Parsons*, 33 N. Y. 332. In this last case, which was an action on a warranty of a horse, declarations of a former owner of the horse, made to the defendant some months previous to the time of the sale and warranty, were held to have been properly excluded.

But in a suit on a warranty of a horse, evidence that two years after he was bought he killed himself in a fit of balking, is not too remote, if it is shown that his balking was a common habit, extending through the whole time. In such a case, evidence may also be given that he was balky three years before the sale. *Daniells v. Aldrich*, 42 Mich. 58; *Finley v. Quirk*, 9 Minn. 194; 86 Am. Dec. 93. *Compare Myers v. McFarlane*, 3 Brev. (S. Car.) 513. So, also, in an action for a breach of a warranty of the soundness of a slave, evidence is admissible to show the value of the slave a few months after the sale, as shedding light on the question of his value at the time of the sale. *Stone v. Watson*, 1 Ala. Sel. Cas. 236. See also, in this connection, *Moore v. Haviland*, 61 Vt. 58. And proof that a horse, upon the trial a few days after his purchase, was balky, is proof that he was balky at the time of the sale, unless the balking was caused by peculiar circumstances. *Finley v. Quirk*, 9 Minn. 194; 86 Am. Dec. 93.

Where the commodity is, by its nature, subject to change or deterioration, and no fraud or concealment is shown, the buyer, to make out a breach of warranty, must show that the defect or deterioration existed at the time of the sale, or that it was discovered as soon as it was practicable to make an examination. *Hall v. Plassan*, 19 La. Ann. 11.

2. Evidence of Usage of Trade.—*Harris v. Nassits*, 23 La. Ann. 457. *Compare Rice v. Codman*, 1 Allen (Mass.) 377; *DeWitt v. Berry*, 134 U. S. 306.

In *Canestoga Cigar Co. v. Finke*, 144 Pa. St. 159; 29 W. N. Cas. 71, it appeared that the plaintiff purchased leaf tobacco by sample, from a dealer who had purchased from the defendants, each sample having on it one of defendant's tags, inscribed "Stripped and sample warranted." In an action to recover for breach of warranty, it was held that evidence was properly received to show that, by the usage of trade and of the defendants, the warranty on the tag inured to the benefit of purchasers from the defendant's vendee, though there was no privity of contract between the defendants and such purchasers.

Of Technical Trade Terms.—Thus, where timber was sold warranted "sound," and an issue was taken as to whether it was sound or not, evidence was allowed to be given, with a view to showing that in the timber trade the word "sound" had a technical and conventional meaning. *Woodhouse v. Swift*, 7 C. & P. 310; 32 E. C. L. 521. See also *Powell v. Horton*, 2 Hodges 12; 2 Bing. N. Cas. 668; 29 E. C. L. 452; 3 Scott 110.

3. *Lytle v. Erwin*, 26 How. Pr. (N. Y. Supreme Ct.) 491; *Esterly v. Eppelsheimer*, 73 Iowa 260. A written contract of sale, containing a warranty of

broken, and to what extent, is admissible, unless, of course, it violates the fundamental rules of evidence, as, for example, those excluding hearsay evidence, etc.¹

The general rule of law excluding all evidence which is not pertinent or material, or which is mere hearsay, has been applied in numerous cases, a brief statement of which is given in the note below.² The fact that the defendant objects to certain evidence

soundness, is the highest and best evidence of that warranty, and, as such, admissible to prove it, in assumption, for its breach, although the consideration averred in the declaration is a certain sum of money, while that expressed in the written contract is the defendant's acceptance of that sum. *Brown v. Jones*, 24 Ala. 463.

1. *Whittier Machine Co. v. Graffam*, 156 Mass. 415; *Hodges v. Wilkinson*, 111 N. Car. 56; *Blackmore v. Fairbank*, 79 Iowa 282; *McGaughey v. Richardson*, 148 Mass. 615 (advertisement of an auction sale); *Gutta Percha, etc., Mfg. Co. v. Wood*, 84 Mich. 452; *Jones v. Ross*, 98 Ala. 448. Compare *McCormick Harvesting Mach. Co. v. Brower* (Iowa, 1893), 55 N. W. Rep. 537.

In an action for breach of warranty of soundness of a horse, where it was sought to show that the horse had the glanders, it appearing that the disease was contagious, it was held proper to allow the plaintiff to prove that a mule, which had worked with the horse, took that disease and died. *Wallace v. Wren*, 32 Ill. 146.

Where the vendee, on being sued for the purchase price, sets up a breach of warranty by way of defense, all evidence tending to show what it would cost to supply the defect complained of in the machine, is admissible. *Wheeler, etc., Mfg. Co. v. Thompson*, 33 Kan. 491. See also *Hull v. Belknap*, 37 Mich. 179.

In an action by a farmer against a chemist, for vending a sheep-wash which killed his sheep, the evidence being that it was used according to the chemist's directions, and that the sheep died from the absorption of arsenic contained in it, although it was also shown that the same mixture had been sold by the chemist for many years and used with impunity, the jury was directed that they might find for the plaintiff on this evidence. *Black v. Elliot*, 1 F. & F. 595.

In Sales of Fertilizers.—In a suit to recover purchase-money agreed to be

paid for a chemical preparation to be used as a fertilizer, the defense was that the article was not of the quality warranted. It was held that the defendant might exhibit to the jury material represented to be of the substance sold, although admitting that the directions of the vendor for composting had not been entirely followed. *Robson v. Miller*, 12 S. Car. 586. So where the defendant resists recovery on the ground that the article purchased as a fertilizer was not what he ordered, and was worthless, he may testify as to the manner and effect of his use of it in the cultivation of the crop. *Claghorn v. Lingo*, 62 Ala. 230.

2. Immaterial or Impertinent Evidence.—Thus, in an action for the price of a harvester, where damages caused by a breach of the warranty are set up by way of counterclaim, it is a reversible error to admit evidence of statements made by the vendee to the vendor's agent, when negotiating for the machines, as to the number of acres the vendee had to harvest. *Aultman v. Falkum*, 47 Minn. 414. See, in this connection, *Troy Laundry Mach. Co. v. Henry*, 23 Oregon 232; *Levi v. Dimmick*, 99 Cal. 490; *Halley v. Folsom*, 1 N. Dak. 325 (evidence of poor credit of vendee incompetent).

Where, in an action to recover for certain hogs sold and delivered, the defendant sets up and relies solely on a warranty by the plaintiff that they were to be "hard or corn-fed hogs, and suitable for the New York City market," it is not error to exclude testimony offered by the defendant to show the object for which he purchased the hogs; the only question in such a case is what the plaintiff said or did. *Bartlett v. Hoppock*, 34 N. Y. 118. So, in an action on a warranty in the sale of a certain lot of cows, evidence that the purchaser, who resold them, did not warrant them so fully as his own vendor had done, is immaterial and incompetent. *Richardson v. Mason*, 53 Barb. (N. Y.) 601.

offered by the plaintiff, on the ground that it is immaterial, does not estop him afterward to offer it in his own behalf.¹

1. Evidence of Fraud.—It is not essential to a recovery on the warranty that it should have been fraudulently made, and therefore proof of fraud, where the action is on the warranty, is unnecessary and incompetent.² But where the action is not on the

In *McCeney v. Duvall*, 21 Md. 166, which was an action for the breach of a warranty of a slave, the attendant physician of the defendant's slaves testified that he never was called to see the slave in question. He was then asked whether the defendant was in the habit of sending for a physician when his slaves were at all sick. It was held that the question was inadmissible, as the evidence, if given, could have no tendency to sustain the issues, or to rebut the presumption that the slave was unsound when sold, if any such presumption had been raised by the plaintiff's evidence.

The case of *Gates v. Moore*, 51 Vt. 222, was an action on a warranty that a horse would "work well in a team drawing heavy loads," and it appeared that the plaintiff gave, in exchange for the horse, a colt and a note against A. It was held that as it was not claimed that the contract in evidence varied from that in the declaration, testimony by A. to show that the note was conditional was inadmissible, and that evidence that a horse trainer said to the plaintiff that he would subdue the horse and make him work well for \$5.00 was also inadmissible.

Goods Bought for Specific Purpose ; Evidence of Market Value.—Where the goods are bought for a special purpose, and the action is for damages for the failure of the vendor to supply goods suitable for that purpose, evidence of the market value of the thing actually supplied is incompetent; and the error of receiving it is not cured by stating to the jury a proper rule of damages, if they are not told explicitly to disregard the evidence of market value. *Wing v. Chapman*, 49 Vt. 33.

So where the question is one of fact as to whether a sale was made with warranty, evidence of the market value of the goods sold is not admissible, for the purpose of showing that the price paid by the plaintiff was below that of the market value of the goods suitable for the vendee's purposes, and so far below it as to raise a presumption that they could not have been of the qual-

ity warranted. *Ockershausen v. Durant*, 141 Mass. 338.

Hearsay Evidence.—In an action on the warranty of a horse sold by the son of the defendant, as agent for his father, a part of the defense being that the son had no authority to warrant, it was proposed to ask a witness whether, on the day on which the sale took place, the defendant's son did not, in answer to a question put by the witness as to the price of the horse, say that he would warrant the horse. It was held that such evidence was inadmissible, as being a conversation with a stranger; but that, if the defendant's son, in offering the horse for sale, had offered a warranty, it might have been otherwise, as that would have been a statement accompanying an act done in the course of his agency. *Allen v. Denstone*, 8 C. & P. 760; 34 E. C. L. 623. See also *Smith v. Groneweg*, 40 Minn. 178.

In an action for a breach of the warranty of the soundness of a horse, a witness may be asked the name of the horse in order to identify him, but an answer that he had heard him called "the big-legged runaway horse" should be excluded as mere hearsay. *Jones v. Ross*, 98 Ala. 448.

What the purchaser of goods from the vendee may have said as to the quality of the goods, is mere hearsay, on the question of a breach of warranty as between the original vendor and vendee. *Barrett v. Wheeler*, 71 Iowa 663.

Proof of Notes or Other Writings.—The rule that, before any written instrument can be admitted as evidence, its execution must be proved, was applied in *McHugh v. Brown*, 33 Mich. 2, where, in an action upon a warranty of title, free from incumbrances, of a span of horses sold by the defendant to the plaintiff, it was held error to receive in evidence, against objection, a note and mortgage on the horses, purporting to be executed by the defendant, without any proof of their execution.

1. *Hadley v. Bordo*, 62 Vt. 285.

2. *Wiggins v. Long*, 9 Humph. (Tenn.)

warranty, but independent of it, and is based on the fraudulent representations of the vendor, the fraud must be proved, and it is essential to prove, not only that the representations were not true, but also that the defendant knew they were untrue when he made them.¹ In this, as in all other cases in which fraud is relied on as the basis of recovery, the proof must be clear and convincing.²

XXIII. PROOF.—Proof of a warranty, where the contract is in writing, cannot be made by parol, but must be shown from the written contract, unless the case is within one of the exceptions mentioned in a previous section.³ The sufficiency of the proof, in any given case, must depend upon the circumstances and upon the character and weight of the evidence adduced. Where the buyer sets up the warranty and the seller denies it, and there is no corroborating evidence on either side, the warranty is not established; something more than the bare testimony of the buyer is necessary to prove it.⁴ Where it is alleged that the warranty was made by

140; *McKinnon v. McIntosh*, 98 N. Car. 89; *Gerst v. Jones*, 32 Gratt. (Va.) 518; 34 Am. Rep. 773; *Bartholomew v. Bushnell*, 20 Conn. 271; 53 Am. Dec. 338. See also, in this connection, *Humbert v. Larson* (Iowa, 1893), 56 N. W. Rep. 454; *House v. Fort*, 4 Blackf. (Ind.) 293; *Massie v. Crawford*, 3 T. B. Mon. (Ky.) 218; *Tipton v. Triplett*, 1 Metc. (Ky.) 570; *McLeod v. Tutt*, 1 How. (Miss.) 288; *Ross v. Mather*, 47 Barb. (N. Y.) 582; *Vanleer v. Earle*, 26 Pa. St. 277.

In an action for a breach of warranty in the sale of a horse, it would be improper to instruct the jury what would constitute a fraud on such sale. In such an action, the jury has nothing to do with the question of fraud. *Wallace v. Wren*, 32 Ill. 146. And where there is an action for the price and the defendant pleads, by way of defense, a breach of the warranty, no fraud being alleged, it is reversible error to give, three times, an instruction that a failure of consideration, or a breach of warranty, or fraud, is a valid defense. *Farmers', etc., Bank v. Upham*, 37 Neb. 417.

1. *Bartholomew v. Bushnell*, 20 Conn. 271; 53 Am. Dec. 338.

2. **Proof of Fraud.**—*Martin v. Edwards*, 11 Humph. (Tenn.) 374. See **FRAUD**, vol. 8, p. 654; *West v. Emery*, 17 Vt. 583; 44 Am. Dec. 356.

The misrepresentations must be proven, and it must also be shown that they were willfully made. A *scienter* is the basis of such an action. *Stevens v. Webb*, 7 C. & P. 60; 32 E. C. L. 435.

In order to maintain an action for fraudulent deceit, the fraudulent intent must be established, but it may be inferred, however, from the fact that material false statements are made with a knowledge of their falsity; and where a party who is in a position to know the truth, deliberately makes unqualified representations in reference to a material matter, which representations are not true, a fraudulent intent is presumed. But ordinarily the question of fraudulent intent is one for the jury. *Haven v. Neal*, 43 Minn. 315.

Where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have been packed falsely, though not by the seller, an action for a false and fraudulent representation is not maintainable, without showing that such representation was false, to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. *Ormrod v. Huth*, 14 M. & W. 651; 14 L. J. Exch. 366. Compare *Jones v. Bowden*, 4 Taunt. 847.

3. See *supra*, this title, *Oral Warranty Where Contract Is in Writing*.

4. *Raines v. Totman*, 64 How. Pr. (N. Y. Supreme Ct.) 493. See, in this connection, *Rouple v. McCarty*, 1 Bay (S. Car.) 480. A declaration, in a warranty, that a lot of tobacco contracted to be delivered by the defendant to the plaintiff, was good and sound, is not

a firm, it is sufficient to show that the sale was by the firm and that a single partner gave the warranty.¹

The burden of proof always rests on the buyer who sets up the warranty, to establish the fact that it was made and that a breach of it has occurred.² But where, in a sale by sample, the buyer refuses to accept the goods, on the ground that they are not as represented, the burden of proving that they correspond with the sample is on the seller.³

Proof of a mere qualified or conditional warranty will not support a declaration on an absolute warranty.⁴

supported by a representation merely, about the time the contract was made, that the tobacco was of a good quality. *Moor v. Dewees*, Litt. Sel. Cas. (Ky.) 227.

1. **Warranty Given by a Partnership.**—*Eldridge v. Hargreaves*, 30 Neb. 638.

2. *Cook v. Tavener*, 41 Ill. App. 642; *Morris v. Wibaux*, 47 Ill. App. 630; *Cunningham v. Hall*, 4 Allen (Mass.) 268; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600; *Plano Mfg. Co. v. Root* (N. Dak. 1893), 54 N. W. Rep. 924; *Stockfleet v. Fryer*, 2 Strobh. (S. Car.) 301; *Palmer v. Mt. Sterling Nat. Bank* (Ky. 1892), 18 S. W. Rep. 234; *McKendry v. Sinker*, 1 Ind. App. 263; *Mallan v. Radloff*, 17 C. B. N. S. 588; 112 E. C. L. 587. *Compare McCormick Harvesting Mach. Co. v. Brower* (Iowa, 1893), 55 N. W. Rep. 537.

Thus, in an action upon a warranty of a machine, the plaintiff must show in what particular the machine failed to do the work. *First Nat. Bank v. McCann*, 4 Ill. App. 250.

Proof of a conditional or qualified warranty, on the sale of personal property, will not support a declaration on an absolute warranty. *Deming v. Foster*, 42 N. H. 165.

But where there is some evidence of a warranty, it becomes a question for the jury as to whether there was any actual warranty, and it is error in such a case to nonsuit the vendee in an action on the warranty. *Wilbur v. Cartwright*, 44 Barb. (N. Y.) 536.

3. *Penn v. Smith*, 98 Ala. 560; *Merrimaw v. Chapman*, 32 Conn. 146. In this latter case the court said: "If the action had been brought upon the executory contract, for not accepting and paying for the goods, it is apparent that in order to prove his whole case, the plaintiff must show that the goods correspond with the sample, since otherwise it would not appear

that his part of the contract had been performed, while on an executed contract, it is only necessary for the plaintiff to prove its execution, and it is then for the defendant to show that the goods were inferior to the quality stipulated for, in order to reduce the price to be paid for them. Here the plaintiff sues upon an executed contract. He may do this, if he can show in point of fact it has been so far executed as to create a debt against the defendant for which *indebitatus assumpsit* will lie, and he can do this in one of two ways; he may show a delivery of the goods, and an acceptance of them by the defendant, either expressly or by retaining them for an unreasonable time, or an appropriation of them to his own use; or he may show an execution of the contract on his part by the delivery of the goods corresponding in quality with the stipulations of the contract."

Thus, in an action to recover the price of a gas governor, for which the defendant had promised to pay, provided it would show, after sixty days' use, a saving of from fifteen to forty per cent. in gas, the burden of proving that the proviso has been complied with is on the seller. *Patterson Gas Governor Co. v. Glenby* (C. Pl.), 24 N. Y. Supp. 575. But see *Bringham v. Retelsdorf*, 73 Iowa 712, where it was held that one buying goods by sample has the burden to show, if he so alleges, that they do not correspond to the sample, and all evidence tending so to show is admissible for that purpose.

4. *Deming v. Foster*, 42 N. H. 165.

In *assumpsit*, on a warranty that a horse was not over seven years old, proof of a warranty that he would be seven years old the next spring after the sale is no variance. *Henry v. Henry*, 1 D. Chip. (Vt.) 265.

WASTE.—(See also ESTATES, vol. 6, p. 875; INJUNCTION, vol. 10, p. 777; LANDLORD AND TENANT, vol. 12, p. 658; MORTGAGES, vol. 15, p. 725; QUESTIONS OF LAW AND FACT, vol. 19, p. 598; TRESPASS, vol. 26, p. 568.)

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I. DEFINITION.—Waste is any permanent or lasting injury done or permitted to be done, by the holder of the particular estate, to the inheritance, or to the prejudice of anyone who has an interest in the inheritance.¹

1. *Duval v. Waters*, 1 Bland (Md.) 569; 18 Am. Dec. 350; *Lander v. Hall*, 69 Wis. 326; *Alexander v. Fisher*, 7 Ala. 514; *McDaniel v. Callan*, 75 Ala. 327; *Smith v. Sharpe, Bush*, (N. Car.) 91; 57 Am. Dec. 574; *Dooly v. Stringham*, 4 Utah 107; *McCullough v. Irvine*, 13 Pa. St. 438; *Woodman v. Good*, 6 W. & S. (Pa.) 169; *Davenport v. Magoon*, 13 Oregon 3; 57 Am. Rep. 1; *Hamilton v. Austin*, 36 Hun (N. Y.) 138; *Elwell v. Burnside*, 44 Barb. (N.

II. KINDS OF WASTE—1. Voluntary or Commissive Waste.—Voluntary waste consists in the commission of some positive, unreasonable act, of a kind likely to cause injury to the estate in remainder or reversion.¹ Generally, it is that kind of waste which is done by actual design of the party committing it.²

2. Permissive Waste.—Permissive waste consists in the negligent or willful omission to do what is required to prevent injury to the estate.³ The term seems to include, also, not only all destruction

Y.) 447; *Childs v. Kansas City, etc., R. Co.* (Mo. 1891), 17 S. W. Rep. 954; *Proffitt v. Henderson*, 29 Mo. 325; *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621; *Cooley on Torts* (2d ed.), p. 392; 2 *Minor's Insts.* (2d ed.), p. 528; *Washburn on Real Prop.* (5th ed.), vol. 1, p. 146; *INJUNCTIONS*, vol. 10, p. 817.

1. *Yool on Law of Waste and Nuisance*, p. 3; *Cooley on Torts* (2d ed.), p. 392; *Powell v. Dayton, etc., R. Co.*, 16 Oregon 33; 8 Am. St. Rep. 251; *Stevens v. Rose*, 69 Mich. 259.

The placing in a barn of a weight which is excessive, whereby damage to the barn results, is voluntary waste. *Chalmers v. Smith*, 152 Mass. 561.

Detaching from a gin house, and selling, the running gear or machinery thereto belonging, suffering the gin house to be partially dismantled, and allowing land to become forfeited for non-payment of taxes, are three acts of unmistakable voluntary waste. *Cannon v. Barry*, 59 Miss. 289.

2. *Stevens v. Rose*, 69 Mich. 259. See 4 *Kent's Com.* 77; 3 *Co. Litt.* 248; *Bacon's Abr.*, "Waste" (H) 1.

"Waste is either voluntary, which is an act of commission, as by pulling down a house or cutting down timber; or it is permissive, being such spoil or destruction as arises from omission or neglect only, as by suffering a house to fall for want of necessary reparations, or, as is believed, from the act or neglect of strangers." 2 *Minor's Insts.* (2d ed.), p. 528.

In a case where a tenant of a house, from year to year, moved out and closed the premises against intrusion, but within a few days thereafter the plumbing work was cut out and stolen by persons unknown, it was held that the waste was voluntary or commissive and not permissive. *Regan v. Luthy*, 16 Daly (N. Y.) 413. The court, in this case, citing *Washburn on Real Prop.*, p. 126, par. 2; 2 *Bouvier's Law Dict.*, tit. "Waste" said: "Permissive waste consists in the negligent or willful

omission to do what is required to prevent an injury to demised premises, as, to suffer the demised premises, or a part thereof, to go to decay for the want of repairs. Voluntary or commissive waste consists of injury to the demised premises, or some part thereof, when occasioned by some deliberate or voluntary act, as, for instance, the pulling down of a house, or the removal of wainscots, floors, benches, furnaces, windows, doors, shelves, or other things fixed to, and constituting a material part of, the freehold."

3. *Regan v. Luthy*, 16 Daly (N. Y.) 413; *White v. M'Cann*, 1 Ir. C. L. 205; *Yool on Law of Waste and Nuisance*, p. 3; 1 *Washburn on Real Prop.* (5th ed.), p. 146; 2 *Minor's Insts.* (2d ed.), pp. 528, 543.

Permissive waste is that arising from mere negligence and want of care. *Stevens v. Rose*, 69 Mich. 259.

"To do or make waste includes as well permissive waste, which is waste by reason of omission, or not doing (as for want of reparation), as waste by reason of commission, as to cut down trees, or prostrate houses, or the like." 1 *Co. Inst.*, p. 145.

The buildings constituting the particular estate must be kept in repair, and failure to do so will be permissive waste. *Schulting v. Schulting*, 41 N. J. Eq. 130.

It is permissive waste to suffer a mansion to go to decay. *Cannon v. Barry*, 59 Miss. 289.

Where the neglect and omissions of lessees to perform their obligations under a lease, if permitted to continue, must eventually result in the ruin and destruction of its subject-matter, they constitute waste. *Anderson v. Hammon*, 19 Oregon 446; 20 Am. St. Rep. 832.

The decay and dilapidation of a fence caused by negligence to repair, on the part of a dowress, does not constitute permissive waste, it seems, within the meaning of the statutes of *Delaware*. *Richards v. Torbert*, 3 *Houst. (Del.)* 172.

arising from neglect of the necessary reparations, but also such as proceeds from all casualties, not occasioned immediately by an act of God.¹

3. Equitable Waste.—Equitable waste consists in the doing of such acts as are not considered waste at law, because not inconsistent with the legal rights of the party committing them, but which are deemed waste in equity on account of their manifest injury to the inheritance.² A bad motive for doing such acts is not necessary to constitute equitable waste.³

a. WITHOUT IMPEACHMENT OF WASTE.—If a tenant for life holds an estate without impeachment of waste, but commits acts especially destructive to the inheritance, or acts of wanton and malicious mischief, the law holds that his legal power to commit waste is being used unconscientiously, and he may be restrained in equity, although no action of waste at law would lie.⁴

The intention of the clause, “without impeachment of waste,” is to enable the tenant to do many things, such as cutting wood,

Permissive waste consists in suffering that to take place, to the injury of the inheritance, which ordinary care would prevent. Cooley on Torts (2d ed.), p. 395.

The law implies an obligation, on the part of a tenant, to use the premises leased in a proper and tenantable manner, and not to expose the buildings to ruin or waste by acts of omission or commission. *Powell v. Dayton, etc.*, R. Co., 16 Oregon 33; 8 Am. St. Rep. 251.

1. 4 Kent's Com. 77; 3 Co. Litt. 248; Bacon's Abr., “Waste” (H) 1.

“Thus, it is permissive waste if the tenant suffers the sea wall to be in decay, so as, by the flowing and reflowing of the sea, the meadow or marsh becomes sedgy and unprofitable.” 2 Minor's Insts. (2d ed.), p. 543.

2. 2 Story's Eq. Jur. (13th ed.), § 915; 1 High on Injunctions (3d ed.) 680; 2 Minor's Insts. (2d ed.) 543; INJUNCTIONS, vol. 10, p. 824.

3. In *Turner v. Wright*, 29 L. J. Ch. 598, Campbell, L. C., said: “But equitable waste is that which a prudent man would not do in the management of his own property. This court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may in some sense be regarded as unconscientious, if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. . . . The presence or absence of

a bad motive will not alone enable us to draw any satisfactory line between what is to be considered malicious, and what is to be considered equitable, waste; and no line to regulate the interposition of a court of equity by injunction can well be drawn, other than the recognized and well established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty; but the principle on which the line is to be traced is known and invariable.”

4. Yool on Law of Waste and Nuisance, p. 15; 10 Bacon's Abr., p. 468; 1 High on Injunctions (3d ed.) 680; *Baker v. Sebright*, 13 Ch. Div. 179; 49 L. J. Ch. 65; 41 L. T. 614; 28 W. R. 177; *Vane v. Bernard*, 1 Salk. 161; *Clement v. Wheeler*, 25 N. H. 361.

“So if there be a tenant for life without impeachment for waste, and he should pull down houses, or do other waste wantonly or maliciously, a court of equity would restrain him; for it is said a court of equity ought to moderate the exercise of such a power, and *pro bono publico* restrain extravagant humorous waste. Upon this ground, tenants for life without impeachment for waste, and tenants in tail, after possibility of issue extinct, have been restrained, not only from acts of waste to the destruction of the estate, but also from cutting down trees planted for the ornament or shelter of the premises. In all such cases, the party is deemed guilty of a wanton and unconscientious

opening new mines, etc., which would otherwise, at the common law, amount to waste; but the words are not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate, which otherwise in law might be waste.¹

No particular form of words seems to be required to make an estate dispunishable of waste.² And if the estate is made dispunishable of waste, permissive waste of the life tenant is excused.³

In several instances estates granted "in strict settlement,"⁴ or

abuse of his rights, ruinous to the interests of other parties." 2 Story's Eq. Jur. (13th ed.), § 915.

1. In *Stevens v. Rose*, 69 Mich. 259, the court, by Long, J., said: "But these words do not operate as a license to the tenant to destroy the estate, or to commit malicious waste, such as cutting down fruit-bearing trees, or trees which serve for shade or ornament. If he is tenant 'without impeachment of waste' he has the same right to cut timber, work mines, etc., for his own use, as the owner of the inheritance; but those words do not justify him in demolishing the buildings, or doing that which operates as destructive or malicious waste."

2. *Webster v. Webster*, 33 N. H. 21; 66 Am. Dec. 705.

"To have and to hold, and to use and control as the lessee thinks proper, for his benefit during his natural life," are words which clearly import a leasing for life without impeachment of waste. *Stevens v. Rose*, 69 Mich. 259.

In *Goodright v. Barron*, 11 East 220, a will was executed with this clause: "Also, I give and bequeath to my wife, Elizabeth, whom I likewise make my sole executrix, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed." In an action of ejectment, the court, in reference to this clause, by Ellenborough, J., said: "But these words may have been meant to make her dispunishable of waste, for which, as tenant for life only, she would have been liable. . . . If the words, 'during her life,' had been added, that would have made the intent clear in one way."

A conveyance by quitclaim, releasing all right to the premises to another, during the grantor's life, leaves the life estate subject to impeachment for waste, unless there is an express provision to the contrary. *Chase v. Hazelton*, 7 N. H. 171.

A deed conveying land in fee simple

containing a reservation in these words: "Reserving all the right, title, and interest in and unto the above named land and buildings, for and during my natural life," does not reserve to the tenant for life the right to cut down and sell wood and timber. *Webster v. Webster*, 33 N. H. 18; 66 Am. Dec. 705.

3. *Duncombe v. Felt*, 81 Mich. 332.

4. If an executory trust for the settlement of freehold estates, "in strict settlement," directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispunishable of waste. *Stanley v. Coulthurst*, L. R., 10 Eq. 259; 39 L. J. Ch. 650; 18 W. R. 969; 23 L. T. N. S. 761. In this case, Malins, V. C., said: "The general doctrine of the court is, that where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an estate for life, as in *Leonard v. Earl of Sussex*, 2 Vern. 526, and all that long line of cases referred to in *Fearne on Contingent Remainders*, in which the general intention could only be effected by limiting estates to the issue as purchasers, there the life estates are made unimpeachable for waste. But no one could suppose that if a testator were to direct a settlement to be made on A for life with remainder to his issue, without adding the words 'in strict settlement,' A would be impeachable for waste; but that if the testator had directed a settlement in precisely the same terms, but added the words 'in strict settlement,' A would be unimpeachable of waste. On the contrary, in my opinion, the addition of the words 'in strict settlement' would rather cut down than enlarge the measure of ownership to be allowed to the tenant for life." See also *Davenport v. Davenport*, 33 L. J. Ch.

with restraint on anticipation, have been held to be impeachable of waste.¹

b. ORNAMENTAL AND SHADE TREES.—The common-law courts refused to grant relief for waste committed by the destruction of ornamental and shade trees, or very young trees, and those seeking such relief were compelled to go into courts of equity, which now enjoin such destruction, on the ground that it constitutes equitable waste.²

c. TIMBER AND UNDERGROWTH.—The destruction of timber³ and undergrowth⁴ may also be prevented, on the ground that it is equitable waste.

d. DESTRUCTION OF BUILDINGS.—Pulling down the mansion house,⁵ or other houses or buildings on the estate,⁶ are other instances of waste, against which relief may be had in equity, although there may be no remedy at law.

e. PARTIES HAVING EQUITABLE RIGHTS ONLY.—Another instance of equitable waste is where the party aggrieved has equitable rights only; and it has been said that courts of equity will grant an injunction to stop waste more readily where there is a trust estate.⁷ Thus, in the case of mortgages, if the mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction will be granted, although there is no remedy at law.⁸

4. Collusive Waste.—If waste be of such a nature that there is no remedy at law, but a bill for an account will lie, as where the waste has been committed by collusion and fraud between the

33; 9 L. T. N. S. 370; 10 Jur. N. S. 35; 12 W. R. 6; 1 H. & M. 775; 3 N. R. 26.

1. In *Clive v. Clive*, L. R., 7 Ch. App. Cas. 433; 41 L. J. Ch. 386; 20 W. R. 477; 26 L. T. N. S. 409, James, L. J., said: "The testator has directed the trustees to settle the property on his granddaughter for her separate use, without power of anticipation, and has expressly authorized them to give power to her husband to commit waste, but has authorized nothing of the kind with respect to the granddaughter herself. It appears to me difficult to conceive how a power to commit waste can exist consistently with a restraint on anticipation. The very object of the restraint is to protect the property against the husband, but if the power to commit waste was given, all the timber on the estate might be swept away to pay the husband's debts."

2. *Chamberlayne v. Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 548; *Aston v. Aston*, 1 Ves. 265; *Packington v. Packington*, Dick. 101; *Williams v. McNamara*, 8 Ves. 70; *Tamworth v. Ferrers*, 6 Ves. 419; *Lushington v. Boldero*, 6

Madd. 149; *Bubb v. Yelverton*, L. R., 10 Eq. 465; 40 L. J. Ch. 38; 18 W. R. 1146; *Packington's Case*, 3 Atk. 215; *Morris v. Morris*, 15 Sim. 505; 16 L. J. Ch. N. S. 201; 11 Jur. 196; *Marker v. Marker*, 9 Hare 1; 20 L. J. Ch. N. S. 246; 15 Jur. 663; *Wombwell v. Belasyse*, 6 Ves. 110; *Dounshire v. Sandys*, 6 Ves. 107; *Day v. Merry*, 16 Ves. Jr. 375; 2 *Minor's Insts.* (2d ed.) 544; 1 *High on Injunctions* (3d ed.), §§ 681-683.

3. *Duncombe v. Felt*, 81 Mich. 332; *Stevens v. Rose*, 69 Mich. 259.

4. *Aston v. Aston*, 1 Ves. 264; *Brydges v. Stephens*, 6 Madd. 279.

5. *Vane v. Barnard*, 2 Vern. 738; *Prec. Ch.* 454; *Gilbert's Eq. Rep.* 127; 1 *Eq. Abr.* 399; 1 *Salk.* 161.

6. *Aston v. Aston*, 1 Ves. 265; *Rolt v. Somerville*, 2 *Eq. Ab.* 759.

7. *Robinson v. Litton*, 3 Atk. 209; *Garth v. Cotton*, 1 Dick. 183; 1 Ves. 555; *Stansfield v. Habergham*, 10 Ves. 277; 2 *Story's Eq. Jur.*, § 914; 2 *Minor's Insts.* (2d ed.) 545.

8. *Farrant v. Lovell*, 3 Atk. 723; *Humphreys v. Harrison*, 1 J. & W. 581; 2 *Story's Eq. Jur.* (13th ed.), § 914.

owner of the particular estate and the remainderman, it is called collusive waste.¹

Where the waste was alleged to have been committed by the tenant for life, who was also the remainderman in fee at the time, the charge of collusion was held not to be supported, the tenant having laid out, upon permanent improvements of the inheritance, a sum far in excess of that realized by the acts of waste.²

5. Eventual Waste.—Eventual waste may be defined to be that done by an admitted particular tenant, after the institution of a suit involving the title, or a partition suit.³

6. Meliorating Waste.—Meliorating waste is an act which increases the value of an estate, but which damages the inheritance by increasing the burden upon it, or by impairing the evidence of title.⁴

III. WASTE DISTINGUISHED FROM TRESPASS.—Waste is distinguished from trespass in that the latter is committed by strangers to the title, who have no right of possession, and consists usually of one or more distinct acts of destruction.⁵

1. In *Garth v. Cotton*, 1 Ves. 524, a tenant for ninety-nine years, if he should so long live, without impeachment of waste, except voluntary waste, remainder to trustees to preserve contingent remainders, remainder to his first son in tail, remainder to A in fee, having no son at the time, colluded with A to fell the timber, and divide with him the proceeds. The tenant afterward had a son, who, as owner of the inheritance, was held to be entitled to recover what A so received. In this case, the court, by Hardwicke, L. C., said: "But this was a collusion with the remainderman. Where a legal right is acquired by collusion, this court shall enjoin or give a recompense. I will adhere, as far as I can, to the rule *æquitas sequitur legem*; though till the remainder is vested, no action of waste lay, yet a remedy is given."

In *Williams v. Bolton*, 1 Cox 72, the particular estate and the remainder in fee were united in the same person, who, so to speak, colluded with himself in his double character. The case was as follows: B. was tenant for life in possession of the estate, remainder to his first and other sons in tail, remainder to O. for life, remainder to O.'s first and other sons in tail, remainder to B. in fee. O. had a son, who died an infant. B., relying perhaps on O. continuing childless, and having no child of his own, committed waste, but afterward O. had another son. The court held that B. ought not to take advan-

tage of his own wrong by taking the timber thus cut.

2. *Birch Wolfe v. Birch*, 18 W. R. 594; L. R., 9 Eq. 683.

3. *Duvall v. Waters*, 1 Bland (Md.) 569; 18 Am. Dec. 350.

4. *Green v. Cole*, 2 Wm. Saund. 259; *Simmons v. Norton*, 7 Bing. 640; 20 E. C. L. 273; *Wild v. Straddling*, Finch 135; *Ligo v. Smith*, 2 Vern. 263; *Mollineux v. Powell*, 3 P. Wms. 268 n; *Barry v. Barry*, 1 J. & W. 651; *Leeds v. Amherst*, 2 Ph. 117; *Morris v. Morris*, 3 De G. & J. 323; *Copinger v. Gubbins*, 3 J. & L. 397; 9 Ir. Eq. 304; *Doran v. Carroll*, 11 Ir. Ch. 397; *Yool on Law of Waste and Nuisance*, p. 2.

5. **Distinguished from Trespass.**—See *INJUNCTIONS*, vol. 10, p. 817.

In *Lander v. Hall*, 69 Wis. 326, the court, by Cole, C. J., said: "It will be observed that only one wrongful act is complained of, which was committed by parties who were strangers to the title, and had no right of possession. It was a naked trespass, and the parties guilty of the tort were merely trespassers."

In *Duvall v. Waters*, 1 Bland (Md.) 569; 18 Am. Dec. 350, the court, by Bland, C., said: "In general, waste is the abuse or destructive use of property by him who has not an absolute, unqualified title. And, in general, trespass is an injury, or use without authority, of the property of another, by one who has no right whatever."

IV. WASTE DISTINGUISHED FROM DEVASTAVIT.—The term waste, when confined to its strict technical meaning, may be said to be distinguished from the term *devastavit*, as that word is used in legal terminology, the term *devastavit* being used to denote the wasting of an estate by the executor or administrator, whether real or personal.¹

V. WHAT CONSTITUTES WASTE—1. In General.—The criterion of waste is, do the acts complained of do a lasting damage to the freehold or inheritance, and tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance.²

While this criterion is uniform, its application depends upon the condition and usages of the place where it is to be made. Thus, many acts, which in *England* would constitute waste, are not considered as such in the *United States*, owing to the difference in the condition of the two countries.³

"The distinction between waste and trespass consists in the former being the abuse or destructive use of property by one who, while not possessed of the absolute title thereto, has yet a right to its legitimate use; trespass being an injury to property by one who has no right whatever to its use." 1 High on Injunctions (3d ed.), § 650.

1. See, for a definition of *devastavit*, EXECUTORS AND ADMINISTRATORS, vol. 7, p. 346.

In a *Massachusetts* case, the same distinction was taken in effect, a statute having provided that "the supreme judicial court shall have exclusive jurisdiction of all actions of waste, and all actions of the case in the nature of waste," and the court said: "We cannot doubt that it (the statute) applies solely to the action of waste technically known as such—the action of waste given to the reversioner, or him who has the immediate remainder, against a tenant for life or years, for the recovery of the place wasted, with treble damages, as authorized by the ancient English statutes, and recognized as adopted into our code, but now modified and regulated by *Massachusetts* Rev. Stat., ch. 105." The court also held that the statute did not apply to an action against an executor or administrator, for wasteful management of the property of his testator or intestate. *Wilbur v. Wilbur*, 7 Met. (Mass.) 249.

2. *McGregor v. Brown*, 10 N. Y. 114; *King v. Miller*, 99 N. Car. 583; *Proffitt v. Henderson*, 29 Mo. 325; *Alexander v. Fisher*, 7 Ala. 514; *Waples v. Waples*, 2 Harr. (Del.) 281; 1

Washburn on Real Prop. (5th ed.), p. 147.

That only is to be considered waste which is substantially an injury to the inheritance. Therefore, if the jury, in an action of waste, find insignificant damages, judgment shall be arrested. *Sheppard v. Sheppard*, 2 Hayw. (Tenn.) 382.

In an action by the owner of the fee, against the owner of the life estate, to enjoin the commission of waste by cutting timber, the court instructed the jury as follows: Waste is whatever does a lasting damage to the inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. So what might be for the good and convenience of the tenant for life, by clearing parts of the land, might at the same time be to the permanent loss of the owner in fee simple, and consequently waste. If the jury believe that the contemplated cutting, if done, would lessen the value of the fee after the death of the life tenant, they should find for the plaintiff; if not, then for the defendant. It was held that the instruction was a correct enunciation of the law, on the subject of waste, as recognized in the *United States*. *Dawson v. Coffman*, 28 Ind. 220.

3. **Application of Law of Waste Differs in United States and England.**—3 Dane's Abr. 232; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304; 45 Am. Dec. 207; *Keeler v. Eastman*, 11 Vt. 293; *Jackson v. Tibbits*, 3 Wend. (N. Y.) 341; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; 5 Am. Dec. 258; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Chase v. Hazelton*,

Therefore, the word "waste" is not an arbitrary term to be applied inflexibly, without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong;¹ and the question

7 N. H. 177; note to *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362; *Drown v. Smith*, 52 Me. 141; *Ward v. Shepard*, 2 Hayw. (N. Car.) 283; 2 Am. Dec. 625; *Shine v. Wilcox*, 1 Dev. & B. Eq. (N. Car.) 631; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Cannon v. Barry*, 59 Miss. 289; *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686; *Proffitt v. Henderson*, 29 Mo. 325; *Bond v. Lockwood*, 33 Ill. 212.

In *King v. Miller*, 99 N. Car. 583, the court, by Smith, C. J., said: "While, in its essential elements, waste is the same in this country and in *England*, being a spoil or destruction in houses, trees, and the like, to the permanent injury of the inheritance, yet, in respect to acts which constitute waste, the rule that governs in a new and opening land, covered largely with primeval growth, must be very different. Where the proportions of arable and woodland are adjusted to give the greatest value to the farm in its present condition, a conversion of one kind into another may be in itself a waste committed, while here the clearing of the forest growth, and fitting the virgin soil which it covers, for cultivation, which is ordinarily an improvement most valuable to the property, and is not, nor can it be, injurious to the succeeding estate in fee."

In *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277; 29 Am. Dec. 72, the court, by O'Neill, J., said: "According to English authorities, cutting down woodland, interspersed as our forests universally are with timber trees, would be waste. But there has been some modification of this rule in this state."

As the law of waste in *England* varies and accommodates itself to the varying wants and situations of the different counties of that country, so the law of waste, in its application here, varies and accommodates itself to the situation of our new and unsettled country. *Findlay v. Smith*, 6 Munf. (Va.) 134; 8 Am. Dec. 733.

In *Owen v. Hyde*, 6 Yerg. (Tenn.) 334; 27 Am. Dec. 467, the court, by Green, J., said: "In respect to the privilege of a tenant for life, in the de-

struction of timber, the law must necessarily be varied in this country from the English doctrine. There, we could not well conceive of the destruction of timber without attaching to it the idea of an injury to the estate; as timber is scarce, and forest trees are planted and raised for fuel and for timber, it is of too much value to permit its unnecessary destruction. That not being the state of things here, but on the contrary, as a benefit often results to the estate from clearing away the timber, it would be absurd to apply the rigid principles of the English law to a state of things wholly variant from theirs."

Waste is a spoiling or destroying of the estate with respect to buildings, wood, or soil, to the lasting injury of the inheritance; but the acts done or permitted that constitute such injury, differ according to the condition of the country. The clearing of land by a life-tenant is waste in *England*, but in this country, it is left for the jury to say whether the life-tenant has dealt with the land in a husbandman-like manner, and has observed the proportions of cleared and woodland as a prudent owner in fee would in the management of his own land. *Sherrill v. Connor*, 107 N. Car. 630.

The fact that a large portion of *Indiana* consists of vast forests, requiring, in the advance of improvements and the increase of population, that these forests should be turned into cultivated fields, makes the rule of the common law, that the cutting of a standing tree is waste, wholly inapplicable in that state. *Dawson v. Coffman*, 28 Ind. 220.

The common-law doctrine as to waste can have no application to the members of a band of Indians, occupying a large tract of wild land in *Indiana*, granted to them by the *United States*. It is competent for them to change the forest into cultivated fields, to build houses on the land, to occupy and cultivate it in convenient portions, and in short, to use it as a prudent farmer would his own land. *Wheeler v. Meshing-go-me-sia*, 30 Ind. 402.

1. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686.

To remove timber prostrated by a

as to whether it has been committed is one of fact to be determined by the jury.¹

To constitute waste, the acts complained of must either diminish the value of the estate, or increase the burdens upon it, or impair the evidence of title of him who has the inheritance.²

Destruction occasioned directly by the act of God, or of a public enemy, without any default on the tenant's part, does not constitute waste.³

2. Timber.—Trees are parcel of the inheritance, and general ownership in them remains, therefore, in the proprietor of the inheritance; if they are severed by the tenant, or any other person, or by tempest or otherwise, they belong to the owner of the inheritance.⁴ But a tenant for life or years is entitled, of common right, to take prudently sufficient estovers, unless restrained by particular covenants, or exceptions in the lease; but not to sell the timber.⁵

tempest is not waste, where the timber is valueless, but is in fact an amelioration, and in such case the technical doctrine of waste which prevails in *England* would not apply. *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281.

1. Waste a Question of Fact for the Jury.—*Drown v. Smith*, 52 Me. 141; *King v. Miller*, 99 N. Car. 583; *Webster v. Webster*, 33 N. H. 18; 66 Am. Dec. 705; *McCullough v. Irvine*, 13 Pa. St. 438; *Hastings v. Crunkleton*, 3 Yeates (Pa.) 261; *Lynn's Appeal*, 31 Pa. St. 46; 72 Am. Dec. 721; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; 5 Am. Dec. 258; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *McGregor v. Brown*, 10 N. Y. 114; *Jackson v. Tibbits*, 3 Wend. (N. Y.) 341; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Keeler v. Eastman*, 11 Vt. 293; *Proffitt v. Henderson*, 29 Mo. 325; *Davis v. Gilliam*, 5 Ired. Eq. (N. Car.) 308; *Pynchon v. Stearns*, 11 Met. (Mass.) 304; 45 Am. Dec. 207; *Crockett v. Crockett*, 2 Ohio St. 180; *Machen v. Hooper*, 73 Md. 342; *INJUNCTIONS*, vol. 10, p. 818; *QUESTIONS OF LAW AND FACT*, vol. 19, p. 598. See also *Eysaman v. Small*, 61 Hun (N. Y.) 618; 15 N. Y. Supp. 288.

A lease authorized the lessee to make any inside alterations to the premises that he might think proper, provided the same did not injure said premises. The assignees of the lessee made extensive alterations, taking down and removing a number of partitions and doors, gas fixtures, chandeliers, etc. In an action by the lessors against the tenant, to recover for the

alleged injuries, it was held that whether the acts the defendant did really caused injury to the reversion, or whether they were reasonable for the enjoyment of the premises according to the business which was carried on, could not be determined as a question of law, but was rather a matter of fact, and, as such, was a question for the jury. *Agate v. Lowenbein*, 57 N. Y. 604.

What is waste is properly a question of law, and the facts which may be held at law to constitute waste are to be passed upon and determined by a jury. A court of equity will not interfere with, or restrain, a suit for that object. *Van Syckel v. Emery*, 18 N. J. Eq. 387.

2. *Huntley v. Russell*, 13 Q. B. 572; 2 Bl. Com. 281; 3 Dane Abr. 215; 1 Washburn on Real Prop. (5th ed.), p. 147; *INJUNCTIONS*, vol. 10, p. 818.

3. 2 *Minor's Insts.* (2d ed.), p. 529; *INJUNCTIONS*, vol. 10, p. 824.

4. 2 *Minor's Insts.* 530. See also *Farrington v. Birdsall*, 5 Wkly. Dig. (N. Y.) 421.

5. Taking Estovers Is Not Waste.—3 Co. Litt. 239; *Lee v. Alston*, 1 Ves. Jr. 78; 2 *Minor's Insts.* 531; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *Harris v. Goslin*, 3 Harr. (Del.) 340; *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621; *Alexander v. Fisher*, 7 Ala. 514; *ESTATES*, vol. 6, p. 883; *ESTOVERS*, vol. 7, p. 33; *INJUNCTIONS*, vol. 10, p. 823.

Where no custom is alleged of a tenant's power to cut down timber, it must be taken according to the common law, by which he has no power

The tenant may not only cut, but sell, timber, however, where to clear the land is worth more than the timber and wood upon it, so that cutting timber, instead of being an injury to the inheritance, enhances its value.¹ If the cutting of timber can be justified as good husbandry, therefore, it is immaterial that the tenant profits by its sale.² And land may be cleared for cultivation, without the commission of waste, if sufficient timber for the

over it. *Edwards v. Heather*, Sel. Ch. Cas. 3.

A tenant for life of a farm of one hundred and sixty-five acres, is not entitled to firebote for the dwelling of a farmer or laborer in addition to firebote for the mansion. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 604. But a tenant in dower has the right to take wood to supply, not only the house which she occupies, but also that of her servant who cultivates the land. *Gardiner v. Derring*, 1 Paige (N. Y.) 573.

A tenant cannot cut down trees for repairs and sell the same; he must use the timber itself in repairs, the sale being waste. *Gower v. Eyre*, Coop. 160.

A tenant for life has no right to exchange timber growing on the farm, for lumber with which to make repairs upon buildings which it is the duty of the tenant to make, unless it is clearly more economical to buy or exchange timber for lumber, than to take the timber from the farm at that time, with which to make such repairs. *Miller v. Shields*, 55 Ind. 71. To the same effect is *Loomis v. Wilbur*, 5 Mason (U. S.) 13.

Where, by devise of her husband, a wife has an estate for life, she is entitled to take from the land a reasonable quantity of wood for fuel, for the support of herself and family upon the premises, to be cut and removed in a prudent and proper manner, including a reasonable supply for necessary servants employed to carry on the farm; and the fact that such persons are paid by a share of the crops, as tenants at the halves, and in cold weather keep a separate fire, does not of itself prove that the quantity used is unreasonable. *Smith v. Jewett*, 40 N. H. 530.

If there is a house upon the land, the tenant in dower is entitled to take firewood and timber which is necessary for the repair of buildings on the dower estate. *Alexander v. Fisher*, 7 Ala. 514; *Calvert v. Rice*, 91 Ky. 533.

Estovers Must Be Prudently Taken.—Although the tenant for life has the right to take necessary fuel from the

trees growing on the premises, the right must be exercised in a prudent manner. *Rutherford v. Aiken*, 3 Thomp. & C. (N. Y.) 60. In this case, the court, by Miller, J., said: "It is manifest from the findings of fact, that green trees were cut for fuel, while other timber could have been used for that purpose without any injury to the inheritance, and it may well follow as a conclusion of law, from the character of the trees which were cut, as well as the timber which could have been used for fuel, that good husbandry demanded that the defendant should not have cut the green trees, and that such cutting was waste."

1. 2 Minor's Insts. 531; *Cramley v. Timberlake*, 2 Ired. Eq. (N. Car.) 460; *Ward v. Sheppard*, 2 Hayw. (N. Car.) 283; 2 Am. Dec. 625; *King v. Miller*, 99 N. Car. 583; *Crockett v. Crockett*, 2 Ohio St. 180; *Keeler v. Eastman*, 11 Vt. 293; *Proffitt v. Henderson*, 29 Mo. 325; *Hancock v. Day*, 1 McMull. Eq. (S. Car.) 69.

In *Davis v. Gilliam*, 5 Ired. Eq. (N. Car.) 308, the court, by Ruffin, C. J., said: "We should hold, as the state of the country now is, that a tenant for life of land entirely wild, might clear as much of it for cultivation as a prudent owner of the fee would, and might sell the timber that grew on that part of the land. Clearing for cultivation has, according to the decisions, peculiar claims for protection; and a sale of the timber from the field cleared may be justly made, in compensation for clearing and bringing it into cultivation. But it seems altogether unjust that a particular tenant should take off the timber, without any adequate compensation to the estate for the loss of it. For he takes, in that case, not the product of the estate arising in his own time, but he takes that which nature has been elaborating through ages, being a part of the inheritance itself, and that, too, which imparts to it its chief value."

2. *Wilkinson v. Wilkinson*, 59 Wis. 557.

permanent use of the estate is left.¹ Trees may be cut down also, if they impede cultivation, and if good husbandry requires their removal.² Dead and decaying timber may be cut and felled without the commission of waste.³

But it is waste if the timber is cut, not for the purpose of improving the land, but for sale;⁴ and the tenant is liable to account for

Rule as to Cutting Timber.—In the *United States*, where timber in many places is a hindrance to the enjoyment of the estate, whether it be for life or in fee, the law is that cutting timber for the purpose of cultivation (if it does not lessen the value of the inheritance), is a privilege following a tenancy for life, when it is necessary for the proper and reasonable enjoyment of the estate, and as long as the tenant only acts in so doing in conformity to good husbandry, regard being had to the situation of the country and the comparative value of the timber. But this is a privilege which can only be exercised for the purpose mentioned, *i. e.*, the proper enjoyment of the estate which is hindered by the timber. Therefore, cutting and destroying timber, not for firewood, repairs to the premises, or for cultivation, but for the purpose of converting it into railroad ties for the market, will constitute waste for which the tenant will be liable. *Davis v. Clark*, 40 Mo. App. 515.

The cutting of timber, not for the purpose of husbandry nor for the purpose of clearing the land, constitutes waste, and particularly where it is done in denial of the rights of the complainants in a bill filed to restrain the commission of waste on the land, and is sufficient in itself, in the absence of denial, to justify the inference that the defendant is liable to continue to commit waste, and to authorize the issuance of an injunction to restrain such waste. *Webster v. Peet*, 97 Mich. 326.

1. *Ward v. Sheppard*, 2 Hayw. (N. Car.) 283; 2 Am. Dec. 625; *Owen v. Hyde*, 6 Yerg. (Tenn.) 334; 27 Am. Dec. 467; *King v. Miller*, 99 N. Car. 583. But see *Clark v. Holden*, 7 Gray (Mass.) 8; 66 Am. Dec. 450.

2. *Sayers v. Hoskinson*, 110 Pa. St. 473; *Keeler v. Eastman*, 11 Vt. 293.

3. *Sayers v. Hoskinson*, 110 Pa. St. 473; *Keeler v. Eastman*, 11 Vt. 293; *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281.

4. *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *Lester v. Young*, 14 R. I. 579; *Clemence v. Steere*, 1 R. I. 272;

53 Am. Dec. 621; *Davis v. Gilliam*, 5 Ired. Eq. (N. Car.) 308; *Dorsey v. Moore*, 100 N. Car. 41; *Parkins v. Cox*, 2 Hayw. (N. Car.) 339; *Fleming v. Collins*, 2 Del. Ch. 230; *Kidd v. Denison*, 6 Barb. (N. Y.) 9; *Chase v. Hazelton*, 7 N. H. 171.

In *Proffitt v. Henderson*, 29 Mo. 325, the court, by Ewing, J., said: "It is conceived that the profitable enjoyment of the land is not the proper criterion to determine the question of waste. There may be waste where there is such profitable enjoyment, and there may be profitable enjoyment without waste. The cutting of the timber may have been necessary to the profitable enjoyment of the land, according to the tenant's standard of profit, and yet have been a great outrage upon the rights of the reversioner."

Where a person in possession of land, as tenant from year to year of one who had a life estate in the land, cut down the timber thereon, not in the ordinary course of husbandry, for the purpose of clearing the land for cultivation, or for firewood, but to be sawed into lumber for sale in the market, it was held that such cutting was waste. *Weatherby v. Wood*, 29 How. Pr. (N. Y.) 404.

Selling or otherwise using timber unnecessarily is waste. *Brashear v. Macey*, 3 J. J. Marsh. (Ky.) 93.

It is committing waste for a tenant for life to sell and authorize the cutting and removal of valuable timber trees growing on the land. *Modlin v. Kennedy*, 53 Ind. 267.

It is waste for a person to take timber from a tract in which he has curesy, to make improvements on a tract of land of which he is owner. *Armstrong v. Wilson*, 60 Ill. 226.

It is waste for the tenant for life to sell wood upon the estate, for the payment of the expense of cutting and conveying to her house the fuel to which she is entitled. *Johnson v. Johnson*, 18 N. H. 594.

Defense to an Action for Waste.—It is no ground of defense or recoupment, in an action against the tenant for life,

the value of trees wrongfully cut by him from the estate, with interest from the time when they were cut; and he is not entitled, when held to account for their value, to deduct sums expended in procuring from other sources wood to be used for fuel upon the premises, and the fact that new growth upon the land is as valuable as the increased growth of the trees which are cut, is immaterial.¹ The tenant will be held liable for waste, if timber is cut to the detriment of the remainder or the reversion;² or if the clearing of land is found by the jury to be bad husbandry;³ or unauthorized by the terms of the lease.⁴

by the reversioner, for waste in selling timber growing on the land, that he has at his own expense made valuable improvements on the estate, which he was not bound to make. *Miller v. Shields*, 55 Ind. 71.

1. *Phillips v. Allen*, 7 Allen (Mass.) 115. But see *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 604, where it was held that, in an account decreed against a tenant, for waste of timber, he might be allowed, in mitigation, for firewood and timber furnished by him for the farm, from other premises.

2. *Fleming v. Collins*, 2 Del. Ch. 230; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Proffitt v. Henderson*, 29 Mo. 325; *Alexander v. Fisher*, 7 Ala. 514; *Fuller v. Wason*, 7 N. H. 341; *Sherill v. Connor*, 107 N. Car. 543; *Davis v. Gilliam*, 5 Ired. Eq. (N. Car.) 308; *Crawley v. Timberlake*, 2 Ired. Eq. (N. Car.) 460; *Calvert v. Rice*, 91 Ky. 533; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *Moses v. Johnson*, 88 Ala. 517; 16 Am. St. Rep. 58; *Clow v. Plummer*, 85 Mich. 550; *Johnson v. Johnson*, 2 Hill's Eq. (S. Car.) 277; 29 Am. Dec. 72; *Hancock v. Day*, 1 McMull. Eq. (S. Car.) 69; *Maxwell v. Maxwell*, 31 Me. 184.

Cutting timber trees on woodland by a tenant in dower, not for the use of the estate, is waste, although done with the intention of restoring the land to the condition of pasture land, in which it was when the estate for life commenced; and although it would be good husbandry in an owner in fee so to restore it. *Clark v. Holden*, 7 Gray (Mass.) 8; 66 Am. Dec. 450.

3. *Chase v. Hazelton*, 7 N. H. 171.

4. Where the whole of a farm, when leased, is in a wild state, with the exception of a few acres, and for the use of it the lessee agrees to pay a rent, the

parties will be held to have intended that the lessee should be at liberty to fell part of the timber, in order to fit the land for cultivation; but this right will not authorize the lessee to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value; nor will he be permitted, just before the expiration of his lease, to cut down timber, upon the pretext of gradually clearing up the land and preparing it for cultivation. *Kidd v. Dennison*, 6 Barb. (N. Y.) 9.

Where a tenant has covenanted not to cut down, destroy, or carry away any more wood or timber than should be actually used or employed on the farm, and that he would not make any manner of waste, sale, or destruction of the wood or timber, it is waste for him to cut down and use wood growing on the demised premises to burn brick for sale. *Livingston v. Reynolds*, 26 Wend. (N. Y.) 115.

A tenant who has leased a lead mine with liberty to smelt ore, is entitled to use so much timber as may be necessary for that purpose, but if such tenant use more timber than is necessary, it cannot be recovered by the landlord in an action upon the contract for the rent, though it may in a separate suit for the waste. *Wilson v. Smith*, 5 Yerg. (Tenn.) 381.

In *Sheridan v. McMullen*, 12 Oregon 150, the defendant sought to justify the cutting of timber by claiming that a grove adjacent to the house, in which the lease prohibited him from cutting timber, was really part of a belt of timber in which the lease did allow him to cut timber. But the court took cognizance of the fact that this grove had peculiar advantages as a building site and for other purposes, and in character and identity was clearly distinguishable from the contiguous timber, and was, therefore, under the lease, to

Whether the cutting of timber amounts, in any instance, to waste depends upon the relative amount of cleared and wooded land on the estate;¹ what prudent men, owners of the fee, would do in a course of good husbandry; and whether lasting damage has been done to the freehold;² and the custom of farmers, the situation

be protected from waste committed or to be committed by the tenant for years.

If a party to an agreement to manage a farm on shares, is prevented from performing it by the actions of a third person, whose personal services are an element of the contract, any attempt by the former to cut and remove timber will be waste. *Litka v. Wilcox*, 39 Mich. 94.

1. *Woodman v. Good*, 6 W. & S. (Pa.) 169; *Hastings v. Crunckleton*, 3 Yeates (Pa.) 261; *Shine v. Wilcox*, 1 Dev. & B. Eq. (N. Car.) 631.

Where a farm of two hundred and seventy-six acres is nearly all in a wild, uncultivated state, and is leased for a valuable consideration, the lessee will be presumed to have the right to fell part of the timber to fit the land for cultivation. *Kidd v. Dennison*, 6 Barb. (N. Y.) 9.

Where a farm of ninety acres contains but seventeen acres of woodland, and this is necessary to the proper use of the farm, and for the shading of a contemplated house, many of the trees being large and old, a trespasser who cuts any of them commits waste. *Powell v. Cheshire*, 70 Ga. 357; 48 Am. Rep. 572.

The cutting of five out of nine acres of timber, on a one hundred and sixty acre tract, is waste. *Duncombe v. Felt*, 81 Mich. 332.

A widow has a right to clear the lands assigned to her for dower, for the purposes of cultivation, where it is necessary for the enjoyment of the estate, provided it is done with due regard to the proportion of wood and cleared land. The clearing of sixteen acres in addition to thirty acres already cleared in a tract of two hundred and forty acres, heavily timbered, is not out of proportion or unreasonable as regards the rights of the remainderman. *Lambeth v. Warner*, 2 Jones Eq. (N. Car.) 165.

The assignee of a widow who was entitled to one hundred and three acres of land as dower, has a right to clear ten acres of such dower land, where the clearing of the timber thereon is neces-

sary for the proper cultivation of the remainder; and also, necessary for the support of the widow and her children. *Joyner v. Speed*, 68 N. Car. 236.

2. *Martyn v. Knowllys*, 8 T. R. 145; *Arthur v. Lamb*, 2 Dr. & Sm. 428; *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621; *Johnson v. Johnson*, Hill's Eq. (S. Car.) 277; 29 Am. Dec. 72; *Drown v. Smith*, 52 Me. 141; *King v. Miller*, 99 N. Car. 583; *Woodman v. Good*, 6 W. & S. (Pa.) 169; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Webster v. Webster*, 33 N. H. 18; 66 Am. Dec. 705; *Owen v. Hyde*, 6 Yerg. (Tenn.) 334; 27 Am. Dec. 467; *Keeler v. Eastman*, 11 Vt. 293; *Wilkinson v. Wilkinson*, 59 Wis. 557; *Fleming v. Collins*, 2 Del. Ch. 230.

Under a plea of *nullum vastatum* in waste for cutting trees, the defendant may show that the cutting the timber was not to the disadvantage of the estate. *Waples v. Waples*, 2 Harr. (Del.) 281.

In *Crawley v. Timberlake*, 2 Ired. Eq. (N. Car.) 460, the court, by Ruffin, C. J., said: "A vendor cannot cut timber for sale, after the contract, unless the privilege be reserved. On the other hand, if a vendor is to retain possession of land, used for purposes of agriculture, for another year, it must be assumed that he is to use the tract for cultivation as a judicious owner himself would do, or would allow a tenant to do, and, therefore, if, according to the state of the property, the proportion of wood and cleared land, and the course of crops or usages of agriculture, in the particular part of the country, it would be prudent and proper to clear the land from which the wood was cut, we should hold that the wood cut in that way might be sold by the vendor. It may be for the benefit of the vendee to open the land and prepare it for cultivation, and, at any rate, it is one of the reasonable advantages reserved by the vendor in retaining the use for a period, and the sale of the wood as a part of the fruit of his labor employed in a reasonable use of the land. It stands, we think, much upon the same ground with the rule laid down respecting

of the country, the value of the timber, and the manner of its cutting.¹

The tenant may acquire a right by contract, express or implied, to take and use wood or timber freely; thus, where land is appendant in its use to, and let with, a furnace for smelting ore, it is not waste for the tenant to cut wood from the premises to supply the furnace.² And the same rule applies in case the tenant uses wood in the manufacture of salt from salt wells on the premises.³

Oak, ash, and elm are timber trees throughout *England*, but other trees than these may be the subject of waste, if they constitute the timber of the country where they grow.⁴ But cutting oak trees for fuel, if such is the common usage, is not, in itself, waste.⁵ And trees, even of the kinds that may become timber, may be cut, if they are under the growth of twenty years, and the cutting is done seasonably.⁶

a. *EQUITABLE WASTE OF TIMBER*.—The cutting of timber which has been planted or left standing for ornament is waste,

waste, as between a tenant for life and the remainderman, in *Shine v. Wilcox*, 1 Dev. & B. Eq. (N. Car.) 631."

1. *Davis v. Gilliam*, 5 Ired. Eq. (N. Car.) 309; *Proffitt v. Henderson*, 29 Mo. 325; *McCullough v. Irvine*, 13 Pa. St. 438; *Hastings v. Crunkleton*, 3 Yeates (Pa.) 261; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; 5 Am. Dec. 258; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Keeler v. Eastman*, 11 Vt. 293.

In *Dunn v. Bryan*, 7 Ir. Eq. 143, the court, by Chatterton, V. C., said: "The principles to be derived from the cases on the subject appear to me to be that it is not waste in a lessee to cut down trees not timber, unless they are planted for the ornament or shelter of the house, or perform some important function, such as supporting a bank, or the like; and provided, also, that he cuts them so as not to destroy the generative or reproductive power of the stools. Also, that trees, even of the kinds that may become timber, do not attain that character till they are of twenty years' growth; from which it would follow that trees even of these kinds may, if under the growth of twenty years, be cut by a lessee, at least, if they be cut seasonably, that is to say, according to what has been done either with the same trees if springing from old stools, or other trees in the same place, or in the same neighborhood, on former occasions."

2. *Den v. Kinney*, 5 N. J. L. 552.

3. *Findlay v. Smith*, 6 Munf. (Va.) 134; 8 Am. Dec. 733.

4. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; 5 Am. Dec. 258; Co. Litt. 53 a; Comyn's Dig., "Waste," D 5; 2 Roll. 281 10; 3 Dane's Abr. 218, 233; Tudor's Lead. Cas. 65.

Oak, ash, and elm are timber, if they are twenty years of age and are not too old to have usable wood in them. *Honywood v. Honnywood*, L. R., 18 Eq. 306. In this case, the court, by Jessel, M. R., said: "Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even white-thorn and black-thorn, and many other trees, are considered timber in peculiar localities—in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth."

5. *Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Babb v. Perley*, 1 Me. 6; *Lester v. Young*, 14 R. I. 579.

6. *Dunn v. Bryan*, 7 Ir. Eq. 143; *Honywood v. Honnywood*, L. R., 18 Eq. 306.

against which equity will grant relief, even though the tenant is unimpeachable of waste.¹ Equitable waste may be committed of rides extending through woods at a considerable distance from the mansion house;² of clumps of firs on a common two miles from the house, they having been planted there for ornament;³ of trees planted for the purpose of excluding objects from view;⁴ and of underwood.⁵

But equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental, namely, an extensive wood;⁶ and in case of doubt it is necessary to show some act of the settlor impressing an ornamental character upon the timber.⁷

The intention of the settlor will govern the court in its decision as to what is equitable waste of ornamental timber;⁸ and such

1. *Chamberlayne v. Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 548; *Packington v. Packington*, Dick. 101; *Aston v. Aston*, 1 Ves. 265; *Williams v. M'Namara*, 8 Ves. 70; *Tamworth v. Ferrers*, 6 Ves. 419; *Lushington v. Boldero*, 6 Madd. 149; *Bubb v. Yelverton*, L. R., 10 Eq. 465; 40 L. J. Ch. 38; 18 W. R. 1146; *Stevens v. Rose*, 69 Mich. 259.

The court will restrain a tenant for life, without impeachment of waste, from cutting down trees in lines or avenues, or ridings in a park, as they are for ornament; and whether the trees grow naturally, or are planted, if they serve for ornament or shelter, it is the same thing. *Packington's Case*, 3 Atk. 215.

2. *Wombwell v. Belasyse*, 6 Ves. 110.

3. *Downshire v. Sandys*, 6 Ves. 107.

4. *Day v. Merry*, 16 Ves. Jr. 375.

5. *Aston v. Aston*, 1 Ves. 264; *Brydges v. Stephens*, 6 Madd. 279.

6. *Burges v. Lamb*, 16 Ves. 174.

7. *Halliwell v. Phillips*, 4 Jur. N. S. 607; 6 W. R. 408.

8. In *Marker v. Marker*, 9 Hare 1; 20 L. J. Ch. N. S. 246; 15 Jur. 663, a tenant for life was restrained from cutting timber, when such cutting would impair the beauty of the estate, contrary to the provisions of the settlement providing that enough timber should always remain to leave the beauty of the place unimpaired. The court, by Turner, V. C., said: "I have felt myself compelled, therefore, to consider this motion upon the substantial merits of the case, and I think it may well be considered in two points of view: First, whether the plaintiffs are entitled to the injunction, upon the ordinary doctrine of the court

in cases of equitable waste; and, secondly, whether they are so entitled, under the special terms of the particular deed on which their title is founded. With reference to the first point, I consider the doctrine of the court applicable to cases of equitable waste to be perfectly well settled. The court considers the excessive use of the legal power, incident to an estate unimpeachable of waste, to be inequitable and unjust, and therefore controls it; but it exercises that control with reference to the presumed will and intention of the party by whom the power was created, and not to any fancied notions of its own; and, therefore, as to ornamental timber, confines its protection to timber planted or left standing for ornament. The question, therefore, in all such cases, is a question of fact, and the main difficulty lies in the evidence necessary to establish the fact. With respect to the second point, it is, so far as I am aware, a somewhat new question. The evident intention of the settlement is to preserve the beauty of the place unimpaired; and the deed as evidently refers to the state of the property at the time of its execution, 'of which timber it is hereby declared that enough shall always remain to preserve the beauty of the place unimpaired.' May it not be considered then, that the settler has set up a standard of beauty defined by the existing state of the place? And although there will be, no doubt, great difficulty in executing a trust or enforcing an injunction to preserve the property according to that standard, I am not prepared to hold that the difficulty is such that it is beyond the power of the court to grapple with it."

waste is not to be judged, therefore, by what a prudent owner would do in the proper or ordinary course of management, for the tenant is bound by the taste or want of taste of the absolute owner by whom the timber may have been planted, or left standing.¹ And if a testator had pulled down a mansion house, without any intention of rebuilding it, the tenant may cut down ornamental trees which stood around it.²

The tenant is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber, but the court may restrain the tenant from such cutting, and direct it to be done under the supervision of the court.³ But the assent of parties beneficially interested should be secured, before ornamental trees alleged to be prejudicial are cut down.⁴

Equitable waste may also be committed of timber which is not specifically ornamental, if an unreasonable amount is cut down in proportion to the amount which is left on the estate; and this is the case even though the tenant be without impeachment of waste.⁵

b. UNDERWOOD.—On the same principle that the cutting of timber of insufficient growth is waste, the cutting of underwood

If a devise is made without impeachment of waste, except the timber growing in the park avenues, demesne lands, and woods adjoining to a capital messuage, the restriction as to cutting timber will be confined to the premises specified in the exception clause, and will not be extended to the woods adjoining to the excepted parts, nor to the avenues made by the testator in those woods; and no proceeding for equitable waste can be maintained as to trees planted, for ornament, around a house which had formerly been a principal mansion, and having gone to decay, had been restored by the tenant for life. *Newdigate v. Newdigate*, 8 Bligh. N. S. 734; 2 Cl. & F. 601.

1. *Ford v. Tynte*, 2 De G. J. & S. 127.

2. *Micklethwait v. Micklethwait*, 3 Jur. N. S. 1279; 26 L. J. Ch. 721; 1 De G. & J. 504; 5 W. R. 861.

A mansion house, park, and pleasure grounds, with certain villas on the estates, were limited in strict settlement; and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion house, sell the materials, and apply the proceeds in paying off incumbrances on the estates. The house was accordingly pulled down, but the

tenant for life, unimpeachable of waste, was afterward restrained from felling the ornamental timber in the park and grounds. *Wellesley v. Wellesley*, 6 Sim. 497.

3. *Baker v. Sebright*, 13 Ch. Div. 179; 49 L. J. Ch. 65; 41 L. T. 614; 28 W. R. 177.

4. *Campbell v. Allgood*, 17 Beav. 623.

5. In *Duncombe v. Felt*, 81 Mich. 332, the court, by Long, J., said: "In the present case, it is conceded that there are only nine acres of timber on the whole one hundred and sixty acre tract; that the defendant has already cut about five acres, and threatens to cut and carry away the remainder. . . . There can be no doubt that the defendant in the present case has much of the character of a tenant in fee, but he cannot destroy the inheritance. He may take the timber for his own use and do all those acts which a prudent tenant in fee would do. He cannot pull down the buildings or destroy them, or cut and destroy fruit trees, or those planted for ornament and shelter; neither can he be permitted to entirely strip the land of all timber, and convert it into lumber, and sell it away from the inheritance. It is not claimed that the timber is being used for betterments on the premises, but it is admitted that

not of sufficient growth, according to the custom of the country, is waste.¹

c. ORCHARDS AND FRUIT TREES.—If a tenant is charged with the duty of caring for an orchard, his neglect is waste.²

The destruction,³ and the digging up and removal,⁴ of fruit trees, is likewise waste. But it is not waste for a mortgagor to remove growing nursery stock, if it is done in the usual course of business and in good faith.⁵

d. PROCEEDS OF TIMBER RIGHTFULLY CUT.—Timber felled under the direction of the court, or in such manner as the court approves, is said to be rightfully cut.⁶ The proceeds of timber so cut should be brought into court and invested according to the settlement, and the dividends should be paid to the tenant for life.⁷ Thus, a doweress would receive one third of the income.⁸

the life-tenant is selling it for his own gain and profit." See also *Stevens v. Rose*, 69 Mich. 259.

1. *Brydges v. Stephens*, 6 Madd. 279; *Aston v. Aston*, 1 Ves. 264; *Yool on Law of Waste and Nuisance*, p. 40.

As to whether the cutting of underwood by a mortgagor in possession is waste, the court, in *Humphreys v. Harrison*, 1 J. & W. 581, said: "Underwood is always considered as a crop. The defendant must not cut it out of the usual course; but if he cuts it in the usual course, he cannot be restrained any more than from cutting a crop of corn. It would be the same thing as turning him out of possession. But you may take an injunction to restrain him from cutting it contrary to the usual course of husbandry."

But where the mortgagor is a bankrupt, his cutting of underwood will be enjoined so that the mortgagee may have the estate in the plight in which it was at the date of the bankruptcy. *Hampton v. Hodges*, 8 Ves. 104.

2. In *Anderson v. Hammon*, 19 Oregon 446; 20 Am. St. Rep. 832, the court, by Lord, J., said: "Whose duty, then, was it, under this lease, to attend to these matters? It would seem to me that the language of the lease necessarily included attention to these matters without their express mention. To prune and cultivate an orchard according to the best horticultural methods, would require the doing of all those things which are essential to keep the trees in a good condition and preserve their fruit-bearing qualities, which would include the cutting off of suckers and water sprouts, when necessary to the health of the trees, as well as

the taking of proper steps to remove insect pests, which sapped their lives, when the trees are so infested."

3. *Duncombe v. Felt*, 81 Mich. 332; *Kaye v. Banks*, Dick. 431; *Bellows v. McGinnis*, 17 Ind. 64.

4. *Silva v. Garcia*, 65 Cal. 591.

5. *Robinson v. Russell*, 24 Cal. 467.

In *Hamilton v. Austin*, 36 Hun (N. Y.) 138, the court, by Follett, J., said: "It is not waste for a mortgagor of agricultural lands to sell timber, remove or change fixtures, if done in good faith, in the usual course of good husbandry, and before foreclosure is begun, or default has occurred upon the mortgage. Nor is it waste for him to sell stone from open quarries, or minerals from open mines, if done in the usual course of such business, though the product removed may exceed the value of the remaining freehold. These considerations lead to the conclusion that it is not waste for a tenant of nursery grounds, entering subsequent to a mortgage, to remove and sell in good faith, and in the usual course of business, growing nursery stock, if done before foreclosure is begun, and not in apprehension of foreclosure, or for the purpose of injuring the freehold and the security."

6. *Waldo v. Waldo*, 12 Sim. 107.

7. *Tooker v. Amesley*, 5 Sim. 237; *Consett v. Bell*, 1 Y. & C. C. C. 573; *Tollemache v. Tollemache*, 1 Hare 456; *Ferrand v. Wilson*, 4 Hare 381; *Gent v. Harrison*, Johns. 523; *Yool on Law of Waste and Nuisance*, p. 43.

8. *Dicken v. Hamer*, 1 Dr. & Sm. 284; *Bishop v. Bishop*, 5 Jur. 931; 10 L. J. Ch. N. S. 302. See also 1 Washburn on Real Prop. (5th ed.), p. 168.

If the estate of a tenant for life, without impeachment of waste, comes into possession before any remainder of inheritance, he is entitled to receive the corpus of the fund produced by timber rightfully cut.¹

e. PROCEEDS OF TIMBER WRONGFULLY CUT.—When a fund is formed by a tenant for life, without impeachment of waste, committing equitable waste, as by wrongfully cutting ornamental timber, he will not be allowed any interest in it,² and the proceeds will follow the uses of the settlement,³ or belong to the first owner of the inheritance.⁴

3. Land—*a.* HUSBANDRY.—In *England*, a very stringent rule was adopted by the earlier cases, by which any change in the course of husbandry was held to be waste.⁵ For example, it was waste to plow up an old meadow and convert it to arable land;⁶ or to convert closes of meadow into garden ground.⁷ One reason for the rule was that these acts changed the description of lands, and thus might endanger the evidence of ownership.⁸

But lands in the *United States* are cultivated differently in many respects from those of *England*, and the rigid rule of the early

1. *Waldo v. Waldo*, 12 Sim. 107; *Phillips v. Barlow*, 14 Sim. 263.

2. *Wellesley v. Wellesley*, 6 Sim. 497; *Lushington v. Boldero*, 15 Beav. 1.

3. *Wellesley v. Wellesley*, 6 Sim. 503; *Leeds v. Amherst*, 16 Sim. 431; 2 Phil. 125; *Lushington v. Boldero*, 13 Beav. 418; 15 Beav. 1.

4. *Rolt v. Somerville*, 2 Eq. Abr. 759; *Butler v. Kynnersley*, 5 Madd. 369; *nom Ormonde v. Kynnersley* (see *Morse v. Ormonde*, 5 Madd. 99); 2 Bligh N. S. 374; 7 L. J. Ch. 150; 8 L. J. Ch. 67. In the first-named case the court held that the cutting of such timber as was thriving, and too good to be felled, was waste, and its value should go to him who was next in remainder of the inheritance; and that the value of such timber as was unthriving, and which a prudent husbandman would fell, should be laid out according to the settlement.

5. Washburn on Real Prop. (5th ed.), p. 151.

6. *Simmons v. Norton*, 5 M. & P. 645; 7 Bing. 640.

Although the conversion of ancient meadow into arable land has, in many cases, been considered waste, and is always *prima facie* considered as waste, yet the plowing up of a meadow infested with moss and weeds, for the purpose of laying it down again in grass when properly cleansed, is not waste. *St. Al-*

bans v. Skipwith, 8 Beav. 354. See, *contra*, *Martin v. Coggan*, 1 Hog. 120.

And it has been held not to be waste to plow up land held under a lease, if the land was not ancient meadow or pasture at the date of the lease. In fee-simple estates, a continuance in pasture for twenty years, during the life of the donor or testator, impresses on land the character of ancient pasture. If the period is less than twenty years, the case is open to evidence of intention, but not otherwise. *Morris v. Morris*, 1 Hog. 238.

It is waste for a tenant to cut down, injure, or destroy, underwood, hedges, or fences; to plow ancient meadow, or old pasture land; to sow land with mustard seed or any other pernicious crop; or to remove from it hay, straw, dung, or manure produced thereon. *Pratt v. Brett*, 2 Madd. 373.

If pastures are plowed within six years before the commencement of a lease, the lessee will not commit waste if he plows them also, even after a lapse of thirty years of his leasehold. *Goring v. Goring*, 3 Swanst. 661.

To plow a rabbit-warren, unless it be a warren by charter or prescription, is not waste at common law. *Lurting v. Conn*, 1 Ir. Ch. Rep. 273.

7. *Harrow School v. Alderton*, 2 B. & P. 86; *Pindar v. Wadsworth*, 2 East 155.

8. 2 Bl. Com. 282; *Comyn's Dig.*,

common law does not apply in the *United States*.¹ The question whether any change in the course of husbandry is waste, depends upon whether it is in conformity with the rules of good husbandry, or works permanent injury to the remainder or reversion,² and whether the husbandry is justified by the usage of the locality.³ Thus, it is waste to till a farm contrary to the established rotation of crops, and the usages of good husbandry;⁴ to remove the manure made on the premises in the ordinary course of

"Waste," D 4; *Darcy v. Askwith*, Hob. 234 a; Co. Litt. 53b.

1. In *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621, the court, by Greene, C. J., said: "The defendant is charged with having converted meadow land into pasture land. In *England*, this would be waste. But we are not to apply the English law too strictly. Our lands are in many respects cultivated differently from land in *England*; and this difference is to be taken into account. . . . It is said that the pastures have been permitted to become overgrown with brush. In *England*, that would be waste, but you would not expect so high a state of cultivation in Burrillville as in *England*, or as in the vicinity of a populous city."

2. 3 Dane's Abr. 219; *Crockett v. Crockett*, 2 Ohio St. 180; *Keeler v. Eastman*, 11 Vt. 293; *Phillipps v. Smith*, 14 M. & W. 594; *McGregor v. Brown*, 10 N. Y. 118; *Proffitt v. Henderson*, 29 Mo. 325; *Shaeffer v. Chambers*, 6 N. J. Eq. 548; 47 Am. Dec. 211.

3. *Jones v. Whitehead*, 1 Pars. Eq. Cas. (Pa.) 304; *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601; *Webster v. Webster*, 33 N. H. 25; 66 Am. Dec. 705; *Chapel v. Hull*, 60 Mich. 167.

In *Shine v. Wilcox*, 1 Dev. & B. Eq. (N. Car.) 631, the court, by Gaston, J., said: "We hold, also, that the turning out of exhausted lands is not waste. An improved system of agriculture has commenced with us, which we hope will in time supersede the present slovenly, and as it respects the country at large, injurious course of husbandry. But as yet the usage is almost universal, of cultivating the cleared land until it is worn out, permitting it to rest, and grow up with pines and scrubby oaks in order to shield it from the sun, and return by their straw and leaves a portion of the fertility it once possessed; and clearing new ground to supply the place of that given back to nature."

The tenant must treat the land in a husbandlike manner, and according to

the custom of the country. *Onslow v. —*, 16 Ves. Jr. 173.

4. *Darden v. Cowper*, 7 Jones (N. Car.) 210; 75 Am. Dec. 461.

Grubbing, improperly cutting, or allowing cattle to destroy the germen of a hedge, is waste. *Dunn v. Bryan*, 7 Ir. Eq. Rep. 143.

A tenant who plows about one hundred acres out of one hundred and forty acres of tillable land, including meadow land, uses the farm in an unhusbandlike manner, exhausts the soil by improper tillage, and therefore commits waste. *Chapel v. Hull*, 60 Mich. 167. In this case, the court, by Champlin, J., said: "There is, in this case, an implied covenant or agreement, on the part of the defendant, to use the farm in a husbandlike manner, and not exhaust the soil by improper tillage. A due proportion of meadow land, upon a farm of the size and kind in question, is consistent with good husbandry in the neighborhood, as appears from the record before us; and upon principle, it would be waste for an outgoing tenant to plow up all the meadow land upon the farm, as much as it would be for an outgoing tenant of garden ground to plow up strawberry beds. *Wetherell v. Howells*, 1 Campb. 227."

In *Wilds v. Layton*, 1 Del. Ch. 226; 12 Am. Dec. 91, it was held that the working of a field two years successively in Indian corn was waste, because it was contrary to the established rotation of crops on it, and contrary to the usage of that part of the country.

It would be waste to suffer pastures to become overgrown with brush. *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 620. But it is not waste for a tenant in dower to suffer pasture to become woodland, on account of the growth of trees. *Clark v. Holden*, 7 Gray (Mass.) 8; 66 Am. Dec. 450.

Mere ill husbandry will not constitute waste on the part of a tenant in

husbandry;¹ to remove bog grass from a farm, which had usually been foddered on the farm;² or to cut turf for sale where a lease gives a right of estovers only.³

b. DIGGING CLAY AND GRAVEL.—The opening of gravel pits in the land, and the digging and selling of gravel therefrom, or digging and selling the soil or clay, or digging clay and making it into bricks for sale, are waste;⁴ unless such acts constituted the usual method of enjoying the land before the particular estate began.⁵

c. OPENING MINES AND QUARRIES.—The opening of lands in search of mines, unless mines are expressly demised with the lands, is waste, as is the opening of new mines, unless the demise includes them.⁶ But the holder of the particular estate may make unlimited use of mines, quarries, and minerals, if they were opened and

dower. *Richards v. Torbert*, 3 Houst. (Del.) 172.

Plowing, burning, breaking, or sowing down land is waste. *Worsley v. Stuart*, 4 Bro. P. C. 377.

1. *Lewis v. Jones*, 17 Pa. St. 262; 55 Am. Dec. 550; *Daniels v. Pond*, 21 Pick. (Mass.) 367; 32 Am. Dec. 269; *Onslow v. —*, 16 Ves. Jr. 173. But this doctrine applies only to agricultural tenants, and therefore not to manure made in a livery stable. 2 Minor's Insts. (2d ed.), p. 532.

2. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601.

3. *Courtown v. Ward*, 1 Sch. & Lef. 8.

4. *University v. Tucker*, 31 W. Va. 632; *Huntley v. Russell*, 13 Q. B. 591; *Livingston v. Reynolds*, 2 Hill (N. Y.) 157; *Smith v. Rome*, 19 Ga. 89; 63 Am. Dec. 298; *Martin's Appeal* (Pa. 1887), 9 Atl. Rep. 490; *Taylor on Landlord and Tenant* 164; Co. Lit. 53b; *Tudor's Lead. Cas.* 65.

5. *Huntley v. Russell*, 13 Q. B. 591; *Knight v. Moseley*, Ambl. 176; *Tudor's Lead. Cas.* 65; *Angier v. Agnew*, 98 Pa. St. 587.

Where there were old clay pits which had not been worked for twenty years, and it was alleged that the last owner had, for some purpose or other, taken clay out of them, and had made some preparations for working them, yet they were not in course of working at his death, it was held that it was not at his death an open mine. *Viner v. Vaughan*, 2 Beav. 466.

The use of clay, by a mortgagor of an undivided interest and his cotenant, for the purpose of making brick, may be continued by them after the mortgage is given, and they will not

thereby commit waste. *Russell v. Merchants' Bank*, 47 Minn. 286. In this case, the court, by Vanderburgh, J., said: "It may be conceded that the unauthorized digging of clay by a tenant is waste, where there is nothing in the situation of the premises or other special circumstances to take the case out of the general rule. . . . And so, in special cases, an injunction will issue to restrain injuries to the freehold in the nature of waste between tenants in common. . . . But where works of the character described, for carrying on the business of making brick, have been constructed and established, and the business lawfully undertaken by the owners of the land, we are of the opinion that, as between the subsequent grantee of an undivided interest in the land and cotenants in possession, it is not waste for the latter to continue the business in the customary way, and that to so continue the manufacture is within the legitimate exercise of the enjoyment of their property by such cotenants."

6. Opening New Mines Is Waste, Unless Especially Authorized.—Co. Lit. 53 b; 2 Bl. Com. 282; *Comyn's Dig.*, "Waste," D 4; *Saunders' Case*, 5 Rep. 12; *Stoughton v. Leigh*, 1 Taunt. 410; *Darcy v. Askwith*, Hob. 234; *Viner v. Vaughan*, 2 Beav. 466; *U. S. v. Gear*, 3 How. (U. S.) 120; *Childs v. Kansas City, etc.*, R. Co., 117 Mo. 414. See also *Williamson v. Jones* (W. Va. 1894), 19 S. E. Rep. 436.

A vendor of land, who remains in possession according to the contract of sale, commits waste if he quarries and removes rock therefrom. *Holmberg v. Johnson*, 45 Kan. 197.

in use at the beginning of the particular estate;¹ or may sink new

1. Customary Use of Mines and Quarries Is Not Waste.—Findlay v. Smith, 6 Munf. (Va.) 134; 8 Am. Dec. 733; Sayers v. Hoskinson, 110 Pa. St. 473; Lynn's Appeal, 31 Pa. St. 44; 72 Am. Dec. 721; Neel v. Neel, 19 Pa. St. 324; Ward v. Carp River Iron Co., 47 Mich. 65; McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134; 49 Am. Rep. 686; Stoughton v. Leigh, 1 Taunt. 410; Crouch v. Puryear, 1 Rand. (Va.) 258; 10 Am. Dec. 528; Reed v. Reed, 16 N. J. Eq. 248; 2 Bl. Com. 282; Taylor on Landlord and Tenant 165.

Coal mines which were opened before the life estate began, may be used by the tenant for life, but only for such purposes as those for which they were used before the beginning of the life estate. Franklin Coal Co. v. McMillan, 49 Md. 549.

As to opening mines and quarries, and cutting timber, the privileges of a life tenant under the laws of *Pennsylvania* are much greater than under the common law of *England*. Lynn's Appeal, 31 Pa. St. 44; 72 Am. Dec. 721.

It is not waste for a tenant for life to work a mine, quarry, clay pit, or sand pit, which has been opened and used by the former owner. It is a mode of enjoyment of the land to which he is entitled. Reed v. Reed, 16 N. J. Eq. 248.

Where a lease permits the opening of mines, it is not waste to work them to exhaustion. Griffin v. Fellows, 5 Leg. Gaz. (Pa.) 265; 2 Luz. L. Reg. (Pa.) 147.

The working of open mines by a tenant for life is not waste, either at common law or under the statutes of *Pennsylvania*. Nor do the statutes of *Pennsylvania* prescribe any limitation to the use which a tenant for life may make of open mines, though a court, by virtue of its common-law power, might restrain unskillful mining and wanton injury to the inheritance by a tenant for life, yet not such mining as is subject to no other objection than its liability to exhaust the mine. So where a tenant for life, claiming under a will, sold to a coal company all her right, title, and interest to the coal in the land, without limit as to the quantity of coal to be taken therefrom, it was held that estoppel did not lie, in favor of those entitled in remainder, to restrain the company from working largely, for sale, a mine which had

been worked during the life of the testator for the use of the farm and for sale in the neighborhood. Irwin v. Covode, 24 Pa. St. 162.

In *Elias v. Griffith*, 8 Ch. Div. 521, the court, by Cotton, L. J., said: "We will deal first with the question of law raised by the plaintiffs, namely, that, although a termor may lawfully work, during his term, mines which have been opened by the freeholder before the commencement of the tenant's interest, there is such a difference between an open mine and an open quarry that, although a termor may lawfully work a mine opened by the freeholder before he acquires possession, he cannot work a quarry so opened. In our opinion there is no such distinction. To enable a termor or tenant for life, punishable for waste, to work mines, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines, with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a termor. When it is established that a quarry has been worked by, or by the authority of, the owners of the inheritance, for the purpose of making a profit by digging, or otherwise raising and selling part of the inheritance, the same principle applies. There is, however, this difference between a mine and a quarry, namely, that stone or slate is frequently dug for the purpose of building or repairing houses on the property, and not for the purpose of profit, and although this is in one sense an opening of a quarry, it is not so in the sense necessary to enable a termor to continue the working. It is not an opening for the purpose of profit."

In *Ward v. Carp River Iron Co.*, 47 Mich. 65, the court, by Cooley, J., said: "It is consistent with all that is alleged, that the debtor in the execution only continued the use of opened mines in the customary way, as a dowress might have done, . . . or any other tenant for life, . . . or even a tenant for years. . . . And the debtor's rights are certainly not less than those of a tenant for years, in

shafts to reach the same veins, or new and lower strata.¹ But if the mines had been completely abandoned before the beginning of the particular estate, the tenant will be guilty of waste if he works them.² Mines abandoned merely for want of a market, however, may be worked by the tenant, but not if the abandonment had been long continued, and took place with a view to advantaging the estate thereby.³

Where the very purpose of the lease is to carry on mining operations, the lessee will not commit waste by conducting them, and by building houses on the land also, if such erections are authorized by the lease.⁴ If a lessee has the exclusive right to drill on land for natural gas, the lessor may be restrained from drilling also on the leasehold, on the ground that the latter's action is threatened waste.⁵

Quarrying rock from land which was granted to a municipality merely as a right of way, is waste.⁶ But if a valuable mineral, such as marl, be removed from a piscary, which is thereby improved, it is not waste.⁷

any particular. He may not open new mines, but the old mines he may continue to work in the customary and reasonable way."

1. *Crouch v. Puryear*, 1 Rand. (Va.) 258; 10 Am. Dec. 528; *Clavering v. Clavering*, 2 P. Wms. 388; *Spencer v. Scurr*, 31 Beav. 334.

Where a vein of ore has been opened and worked in the lifetime of the owner of the fee, the life tenant may sink new shafts and pursue the workings upon the vein which has been so opened. *Gaines v. Green Pond Min. Co.*, 33 N. J. Eq. 603.

2. **The Working of Abandoned Mines Is Waste.**—*Viner v. Vaughan*, 2 Beav. 466; *Franklin Coal Co. v. McMillan*, 49 Md. 549; *Martin's Appeal* (Pa. 1887), 9 Atl. Rep. 490.

In *Gaines v. Green Pond Iron Min. Co.*, 32 N. J. Eq. 86, *Runyon, C.*, said: "In this case the diggings had not been worked for over sixty years when the company took possession. The owner, by whom they were made, never supposed that he could make the ore available as iron ore. He was convinced to the contrary. He abandoned the use of it for the special purposes in which he had employed it, and ceased to dig for or use it, and the abandonment was complete and thorough, and continued for sixty years and more. It cannot be said that he contemplated making profit of the substance of the estate by mining. The company cannot be said to be pur-

suing the same means of profit from the land which he and those who held under him took."

3. *Bagot v. Bagot*, 32 Beav. 509; *Legge v. Legge*, 32 Beav. 515.

4. *Heil v. Strong*, 44 Pa. St. 264.

5. Under a lease of land for the sole purpose of drilling and operating for oil and gas, the lessee's right in the surface of the land is in the nature of an easement of entry and examination, with a right of possession arising where the particular place of operation is selected, and the easement of ingress, egress, storage, transportation, etc., during the continuance of operations. The real subject of possession to which the lessee is entitled, is the oil or gas contained in or obtainable through the land; these are minerals *feræ naturæ*, and are part of the land and belong to its owner only so long as they are in it and under his control; the lessee, when he has drilled a gas well and controls the gas produced thereby, is in possession of all the gas within the land. Therefore, the lessor will be restrained as for threatened waste, if he drills on the leasehold, the rights granted to the lessee being necessarily exclusive. *Westmoreland, etc., Natural Gas Co. v. De Witt*, 130 Pa. St. 235.

6. *Smith v. Rome*, 19 Ga. 89; 63 Am. Dec. 298; *Denniston v. Clark*, 125 Mass. 216.

7. *Smith v. Sharpe*, Busb. (N. Car.) 91; 57 Am. Dec. 574.

The removal of a barrier, or a boundary between two mines, has been held to be waste.¹

4. **Buildings**—*a*. **DESTRUCTION**.—It has been held that the destruction of buildings is waste, even if such destruction is made with the intention, on the part of the tenant, of replacing the structures with others of as good or better character.² Thus, a tenant for years, who has merely a power to make certain alterations, commits waste if he destroys the building, even though he should erect a better or more expensive one in its place.³ The fact that a house is not tenantable is no excuse for tearing it down, for whatever may be its value, the reversioner has a right to it.⁴

But buildings so dilapidated as to be dangerous to life may be

1. *Marker v. Kenrick*, 13 C. B. 188; 22 L. J. C. P. 129.

2. **Destruction of Buildings**.—*Huntley v. Russell*, 13 Q. B. 588; *Cornish v. Strutton*, 8 B. Mon. (Ky.) 586; *Durrett v. Simpson*, 3 T. B. Mon. (Ky.) 517; 16 Am. Dec. 115.

In *Dooley v. Stringham*, 4 Utah 107, the court, by Boreman, J., said: "Waste is substantial damage to the reversion, done by one having an estate of freehold or for years, during the continuance of the estate. Adams' Equity *208. The affidavits show the building to be of value. Its destruction would, therefore, be 'substantial damage' to the reversion. Whether appellant would ever replace it with a better, or as good a building, or any building, is beyond our province to inquire. It might become an impossibility, no matter how willing appellant might be."

In *Smyth v. Carter*, 18 Beav. 78, Romilly, M. R., said: "I entertain no doubt that this court will restrain a tenant from pulling down a house and building another which the landlord dislikes. It is not sufficient to show that the house proposed to be built is a better one; and the fact of the defendant's showing that the landlord does not know his own interest, will not affect the judgment of the court in any respect whatever. The landlord has a right to exercise his own judgment and caprice, whether there shall be any change; and if he objects, the court will not allow a tenant to pull down one house and build another in its place."

Placing an excessive weight in a building, because of which it falls, is waste, *Chalmers v. Smith*, 152 Mass. 561; but it is not waste if the building

falls by reason of its imperfect construction, and if the tenant is using it in a proper manner. *Machen v. Hooper*, 73 Md. 342.

Destroying a dovecote is waste. *Kimpton v. Eve*, 2 Ves. & B. 349.

Pulling down buildings and carrying away the materials just before the end of the term is waste. *London v. Hedger*, 18 Ves. 355.

3. Where only power of alteration is given, destruction is waste. *Davenport v. Magoon*, 13 Oregon 3; 57 Am. Rep. 1. In this case, the court, by Lord, J., said: "By the terms of his lease, the defendant is authorized to make alterations in the building. The stipulation is, that he 'may make alterations in the building now on said lands, so as to adapt it to other business than that of a livery stable.' But does the right to make alterations in the building, so as to adapt it to other business than that of a livery stable, confer or include the power to tear down and destroy such building, and to erect or rebuild a new or different structure? To alter, or 'to make alteration' in, a building or thing, it is necessary to vary or change the form or nature of such building or thing without destroying its identity. The idea is that the identity of the subject is preserved, although the form or nature may have been modified or changed. (Abbott's Law Dict., tit. 'Alter.')

To tear down a building is not to alter, but to destroy its existence as such. . . . The effect, then, of making alterations in a building, is to change or modify its form without destroying its identity or existence."

4. *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621.

torn down.¹ And the rule of the common law that the destruction of buildings is waste, even if better ones are erected in their places, has been modified, it is believed, both in *England* and the *United States*;² so that the proper test, of whether the destruction of buildings is waste, seems to be, do the acts result in lasting injury to the inheritance as it will come to the reversioner.³

b. ALTERATIONS.—The right of the tenant for years is to use the buildings as they are, and, therefore, it will be waste if he attempts to force upon the reversioner something new or different in the place of them; he may not turn a dwelling into a shop or a stable; nor, on the other hand, may he make over a shop or a stable into a dwelling.⁴ Slight changes may be made, however, provided they do not injure the inheritance, but preserve the estate substantially the same.⁵ And alterations made in accordance with the stipulations of the lease are not waste.⁶

c. ERECTION OF NEW BUILDINGS.—While, at the common law,

1. *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621.

2. 1 Washburn on Real Prop. (5th ed.), p. 146.

3. Acts Must Result in Lasting Injury to the Inheritance in Order to Constitute Waste.—*Young v. Spencer*, 10 B. & C. 145; 21 E. C. L. 47; *Doe v. Burlington*, 5 B. & Ad. 507; 27 E. C. L. 117; *Hasty v. Wheeler*, 12 Me. 434; *Phillipps v. Smith*, 14 M. & W. 595, n; *Webster v. Webster*, 33 N.H. 25; 66 Am. Dec. 705; *McGregor v. Brown*, 10 N. Y. 118; *Jackson v. Andrew*, 18 Johns. (N. Y.) 431.

In *Davenport v. Magoon*, 13 Oregon 3; 57 Am. Rep. 1, the court, by Lord, J., said: "From these definitions, to constitute waste, the injury to real property must be of a permanent character—some act which does a lasting injury to the property, or tends to destroy its identity."

4. Material Alterations, Unauthorized, Constitute Waste.—*Cooley on Torts* (2d ed.), p. 394; *Huntley v. Russell*, 13 Q. B. 572; *Bonnett v. Sadler*, 14 Ves. 526; *Maunsell v. Hort*, 11 Ir. R. Eq. 478.

At law, the tenant is guilty of waste if he pulls down doors, windows, wainscots, or in any way alters the material form and features of the demised buildings. *North v. Guinan*, Beat. 343.

The tenant has no right to pull down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same

premises, substantially, at the expiration of the term. *Winship v. Pitts*, 3 Paige (N. Y.) 259.

Alterations of partitions and removal of mantels, in leased premises, are waste, or in the nature of waste. *Wotton v. Wise*, 47 N. Y. Super. Ct. 515.

In *Sweetser v. Emes*, 3 Dane Abr. 233, it was held not to be waste for the lessee of a corn and grist mill to "turn the mill into one for grinding dyewoods," although the lessee took away part of the apparatus for grinding corn, and substituted others.

5. *Cannon v. Barry*, 59 Miss. 289.

6. Material Alterations, Authorized, Do Not Constitute Waste.—The conversion of a dwelling house into a shop is not waste, if power to improve and add to demised premises is given in the lease. *Doe v. Jones*, 4 B. & Ad. 126; 24 E. C. L. 37.

A gave B a lease of a "store and cellar" for five years, if not sooner determined by the lessor. The lessee covenanted not to commit strip or waste, but was to have the right "to repair, alter, and improve the premises, in such manner as should be for his interest and benefit"—and "all fixtures which should be added to the premises should remain and become the property of the lessor." The lessee entered, raised the store from one to two feet, and finished off a victualing cellar, it never having been used for that purpose before, and made other alterations. It was held that this did not constitute waste. *Hasty v. Wheeler*, 12 Me. 434.

the erection of new buildings on the premises was generally waste,¹ the better opinion now is that it is not necessarily waste.²

d. REMOVAL.—A structure erected by a tenant for years, of whatever size or material it may be, may be removed, though erected and used for purposes of agriculture or manufacture, if such erection and removal do not essentially injure the inheritance, and are accomplished during the term;³ and should a tenant for life remove a building erected by him, but not affixed to the freehold, except as merely standing upon it, it would not be waste.⁴

But permanent improvements annexed to the freehold become a part of the inheritance, and if erected by the tenant for life, he may not remove them.⁵ For instance, if the husband of a tenant in dower erects a dwelling house upon the wife's lands, the removal of it after her death will be waste.⁶ Thus it seems that a tenant for years is not held to the same accountability, as to the removal of buildings, as is a tenant for life.⁷

1. If a lessee for years builds a house on the premises leased, it is waste, and if he lets it fall, it is a new waste. Anonymous, 11 Mod. 7.

To build a chimney without the landlord's consent, is waste. Brock v. Dole, 66 Wis. 142.

2. Erection of New Buildings Is Not Waste Necessarily.—1 Washburn on Real Prop. (5th ed.), p. 147; Beers v. St. John, 16 Conn. 329.

The erection of houses upon land, in accordance with the terms of a mining lease, does not constitute waste. Heil v. Strong, 44 Pa. St. 264.

In Winship v. Pitts, 3 Paige (N.Y.) 259, an injunction was refused to a landlord whose tenant was proceeding to erect a brick building on the demised premises. The court, by Walworth, C., said: "But whatever doubts may have been formerly entertained on this subject, I have no hesitation in saying, that by the law of this state, as now understood, it is not waste for the tenant to erect a new edifice upon the demised premises, provided it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. . . . It cannot be waste to make new erections upon the demised premises, which may be removed at the end of the term without much inconvenience, leaving the property in the same situation it was at the commencement of the tenancy; and the materials of which new buildings, if left on the premises, would more than compensate the owner of the reversion for the expenses of their removal."

If a tenant for life erects a new smokehouse, in place of one gone to decay, from materials obtained on the homestead, it is not waste. Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 607.

3. Van Ness v. Pacard, 2 Pet. (U. S.) 137; 3 Dane Abr. 222; 1 Washburn on Real Prop. (5th ed.), p. 148.

4. Clemence v. Steere, 1 R. I. 272; 53 Am. Dec. 621.

5. Austin v. Stevens, 24 Me. 520.

6. Dozier v. Gregory, 1 Jones (N. Car.) 100; McCullough v. Irvine, 13 Pa. St. 438.

In Washburn v. Sproat, 16 Mass. 449, creditors of an intestate sought to have a building, which he had erected on his wife's land, made subject to the payment of their claims. But the court held that as the building had been erected voluntarily by the husband, and under no particular contract, it became a part of the realty, and could not be removed.

7. Power of Tenant for Years to Remove Buildings, Broader than that of Tenant for Life.—1 Washburn on Real Prop. (5th ed.), p. 148.

The reason for holding to be waste the removal of buildings by a tenant for life, which would not be held as such if done by a tenant for years, may perhaps be found in the following extract: In McCullough v. Irvine, 13 Pa. St. 438, the court, by Coulter, J., said: "There is a debt due to the land in return for its fruits and products, and a good tenant for life always pays it. He manures it, fences it, and builds a habitation on it, and they become part of the freehold, and thus the

A vendee in possession of land, the title to which still remains in the vendor as security for the purchase price, may build houses on the land and sell them to third parties, and the removal of the houses will not necessarily be waste.¹

e. FAILURE TO REPAIR; IMPROPER USE.—A tenant is clearly liable for waste, if he permits a house or fences on the premises to go to decay, when by reasonable diligence he is able to prevent it.² A tenant from year to year is not held liable to make good the mere wear and tear of the premises;³ he is obliged only to keep the house wind and water tight.⁴ But the tenants for years or for life are bound to keep the premises in repair, whether there is such a stipulation in the lease or not;⁵ and although some of the earlier cases held that such tenants were not liable to an action on the case for permissive waste, because of failure to repair, but the remedy was upon an express or implied covenant to repair;⁶ the modern opinion seems to be that the action on the case will lie, especially if there is an express covenant to repair.⁷ The law implies an obligation on the part of the tenant for years or for life,⁸ and at will,⁹ to use the premises leased in a proper and tenantable manner; and, therefore, any exposure of buildings to ruin or deterioration is waste, whether it be accomplished by acts of omission or commission.¹⁰

interest of agriculture is promoted. These exertions are the voluntary gift of the life tenant, to the inheritance. He dedicates them to the inheritance when he has enjoyed the fruits of his labor. A good farmer creates, but does not destroy; and I may add that this rule, just in itself, has a tendency to liberalize the social affections as well as to promote agriculture. It banishes that sordid and selfish spirit which would destroy what the individual can no longer enjoy."

1. *Miller v. Waddingham*, 91 Cal. 377.

2. 1 Washburn on Real Prop. (5th ed.), p. 149.

3. *Torriano v. Young*, 6 C. & P. 8; 25 E. C. L. 253; *Regan v. Luthy*, 16 Daly (N. Y.) 413.

4. *Anworth v. Johnson*, 5 C. & P. 239; 24 E. C. L. 299.

5. *Schulting v. Schulting*, 41 N. J. Eq. 130; *Long v. Fitzsimmons*, 1 W. & S. (Pa.) 530; *Caldwell v. Baylis*, 2 Meriv. 408; *Woodhouse v. Walker*, 5 Q. B. Div. 404.

6. *Herne v. Benbow*, 4 Taunt. 764; *Jones v. Hill*, 1 Moore 100; *Gibson v. Wells*, 1 N. R. 290; *Yellowly v. Gower*, 11 Exch. 294; *Turner v. Buck*, 22 Viners' Abr., tit. "Waste," p. 523.

7. *Woodhouse v. Walker*, 5 Q. B. Div. 404; *Stevens v. Rose*, 69 Mich.

259; 22 Sol. J., p. 522; 24 Sol. J., p. 722; *Harnett v. Maitland*, 16 M. & W. 257; *White v. M'Cann*, 1 Ir. C. L. 205; *Dozier v. Gregory*, 1 Jones (N. Car.) 100.

8. A tenant in possession, under a lease containing a clause conferring upon him the privilege of purchasing the demised premises, having failed to exercise said privilege within the time allowed, is liable for waste committed on the premises during his possession. He is bound to treat the demised premises in such manner that no substantial injury shall happen, and to make the tenantable repairs. *Powell v. Dayton*, etc., R. Co., 16 Oregon 33; 8 Am. St. Rep. 25.

If imprudent alterations, or the storing of an excessive quantity of goods in a building, by a lessee, lead to the destruction of the building, the lessee will be liable for the waste committed. *Machen v. Hooper*, 73 Md. 342.

If a lessee uses a building in a reasonable and proper way, but it is damaged in the use, he is not liable for waste. *Saner v. Bilton*, 7 Ch. Div. 815; *Machen v. Hooper*, 73 Md. 342.

9. *Chalmers v. Smith*, 152 Mass. 561.

10. *Exposure of Buildings to Deterioration.*—*Powell v. Dayton*, etc., R. Co., 16 Oregon 33; 8 Am. St. Rep. 251; *Pratt v. Brett*, 2 Madd. 373.

The tenant is liable for waste done upon the premises by a stranger, but not for that done by the acts of God, public enemies, or the law;¹ but if a house be unroofed by a tempest, the tenant may not suffer it to remain so.² By statutes 6 Anne, ch. 31, and 14 Geo. III., ch. 78, § 86, tenants in *England* were exonerated from the consequences of fires occurring by accident in their own houses;³ and in the *United States*, if fire occurs while the tenant is exercising reasonable care and diligence, he will not be liable for waste.⁴

f. **EQUITABLE WASTE OF BUILDINGS.**—The legal powers of a tenant for life, without impeachment of waste, to deal with the buildings as he pleases, are very much limited by the doctrine of equitable waste.⁵ Thus, the tenant for life, even though he is without impeachment of waste, may be decreed to repair and rebuild the mansion house which he has pulled down;⁶ or may be restrained from pulling down the farm houses on the estate.⁷ And where a tenant, without impeachment of waste, is made liable, by the settlement, for all voluntary waste in pulling

If a tenant removes from a house before the expiration of the term, and securely closes the premises, but within a few days thereafter the plumbing work is cut out and stolen by a stranger, it is waste for which the tenant is liable to the landlord. *Regan v. Luthy*, 16 Daly (N. Y.) 413.

1. Waste Committed by Strangers or Act of God.—1 Washburn on Real Prop. (5th ed.), p. 150; *Regan v. Luthy*, 16 Daly (N. Y.) 413; *Cook v. Champlain Transp. Co.*, 1 Den. (N. Y.) 91; *Parrott v. Barney*, 2 Abb. (U. S.) 197.

A corporation is liable for waste committed on land leased by it, even though such waste was committed by a receiver in whose hands it then was. *Powell v. Dayton, etc.*, R. Co., 16 Oregon 33; 8 Am. St. Rep. 251.

In *Attersoll v. Stevens*, 1 Taunt. 183, the court, by Heath, J., said: "It is common learning that every lessee of land, whether for life or years, is liable in an action of waste, to his lessor, for all waste done on the land in lease, by whomsoever it may be committed;" and by Chambre, J., in the same case: "The situation of the tenant is extremely analogous to that of a common carrier; to prevent collusion (and not on the presumption of actual collusion) both are charged with the protection of the property intrusted to them, against all but the acts of God and the King's enemies; and as the tenant in one case is charged with the actual commission of waste done by

others, so in the other case the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him."

2. Co. Litt. 54a; 3 Dane Abr. 216, 221; *Smith on Landlord and Tenant* 195 n; *Pollard v. Shaffer*, 1 Dall. (U. S.) 210.

3. *Tilliter v. Phippard*, 11 Q. B. 347; 1 Washburn on Real Prop. (5th ed.), p. 150.

4. *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Maull v. Wilson*, 2 Harr. (Del.) 443; *Clark v. Foot*, 8 Johns. (N. Y.) 421; *Lansing v. Stone*, 37 Barb. (N. Y.) 15, which holds that the English statutes (6 Anne, ch. 31, and 14 Geo. III., ch. 78) have become part of the common law of *New York*.

5. *Yool on Law of Waste and Nuisance*, p. 59.

6. *Vane v. Barnard*, Prec. Ch. 454; 2 Vern. 738; *Gilbert Eq. Rep.* 127; 1 Eq. Abr. 399; 1 Salk. 161. This case is known as the "*Raley Castle Case*," which, although not the earliest, is the leading authority on this subject. The decree to repair and rebuild the mansion house not having been performed in Lord Barnard's lifetime, an issue was directed to charge his assets with the value of the damages. *Yool on Law of Waste and Nuisance*, p. 59.

7. *Rolt v. Somerville*, 2 Eq. Ab. 759; *Aston v. Aston*, 1 Ves. 265; *Blake v. Peters*, 10 W. R. 826.

down houses or buildings, and not rebuilding the same, or others of equal or greater value, a court of equity will compel the rebuilding, if the original house is being torn down.¹ So, where the settlement contemplates the abandonment of the mansion and the building of another, the tenant will not be liable to an account and inquiry as to the application of the materials of the old mansion house, if they were used in the construction of the new one.² But courts of equity will not interfere to prevent merely permissive waste on the part of a tenant, without impeachment of waste,³ nor acts which do not amount to waste and spoliation.⁴

5. **Fixtures.**—The removal of things not affixed to the freehold

1. *Micklethwait v. Micklethwait*, 1 De G. & J. 504.

2. **A Rebuilding Contemplated by the Settlor Is Not Waste, if Materials of Old Building Are Used.**—*Morris v. Morris*, 28 L. J. Ch. 329; 3 De G. & J. 323; 6 W. R. 427; 5 Jur. N. S. 229. In this case, the court, by Bruce, L. J., said: "This is not a question of injunction, for the act of which complaint is made was done more than thirty years ago. It is a mere question of equitable damage, and in considering that, we must look at the peculiar circumstances of the case. That it was a reasonable, a judicious, and a beneficial thing to pull down the house at Claremont, and to use the materials, so far as they could be used, for building at Sketley, is perfectly clear; but I agree with Mr. Malins that an act may be reasonable, may be judicious, may be beneficial to all persons interested in a settled property, and yet it may be an act prohibited to a tenant for life, if a person interested in the remainder chooses to interfere. I do not put the case, therefore, merely on the reasonableness, on the judiciousness, and on the beneficial nature of what was done; but those considerations are ingredients in the case. The property has been benefited by what has been done, and the plaintiffs, and others interested in the remainder are receiving the benefit of it. Still, if it had been shown, or were in any degree probable, that any part of the materials of the old house had been sold, it is very possible, notwithstanding the much larger expenditure upon the construction of the new mansion house, that the estate of the second baronet would be held liable to account."

3. *Cannon v. Barry*, 59 Miss. 289;

Powys v. Blgrave, 4 De G. M. & G. 448; *Lansdowne v. Lansdowne*, 1 J. & W. 522.

4. **Acts Not Spoliation Are Not Equitable Waste.**—A father who holds an estate, without impeachment of waste, cannot be enjoined by his son, who is tenant in tail, from removing a deal floor which he (the father) had placed, and young oaks he had planted, breaking up meadow land, etc., if such acts do not amount to waste and spoliation. *Peirs v. Peirs*, 1 Ves. 521. In this case the court, by Hardwicke, L. C., said: "The clause, without impeachment of waste, is generally put in to prevent disputes of this kind; but if it was so to be made use of that a son should have it in his power to call a father into a court of equity for every alteration he makes in a walk or avenue, though he removes the trees to another part, and so of the house, it would be such a fund for disputes between a father and son, there would be no end of it; and it would be better for the public, that Raley Castle had been pulled down, than that that precedent had been made."

The non-operation of a manufacturing plant, covered by a mortgage, under an agreement with other manufacturers to restrict production, though attended with the decay and dilapidation incident to all such works when disused, is not such destruction or waste of the property as would, on that account, entitle the mortgagee to ask for the appointment of a receiver. To justify such appointment, the waste must be serious and the danger of destruction, or impairment of the security, imminent. *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. Rep. 286.

is not waste;¹ nor is the using of fixtures waste, if it is the usual and legitimate mode of their enjoyment.²

But the removal of machinery which is intended as a permanent accession to the freehold, is waste,³ unless the mill is so dilapidated that the machinery cannot be used in connection with it.⁴

6. Non-payment of Taxes.—The permission by the tenant for life of the forfeiture of the estate to the state, because of a failure to pay taxes, will constitute waste.⁵ If a tenant deems the taxes

1. *Kimpton v. Eve*, 2 Ves. & B. 349.

The removal and sale of growing nursery stock in the ordinary course of business is not waste. *Hamilton v. Austin*, 36 Hun (N. Y.) 138; *Robinson v. Russell*, 24 Cal. 467.

2. *Dodd v. Watson*, 4 Jones Eq. (N. Car.) 48; 72 Am Dec. 577.

3. Removal of Machinery and Other Fixtures Capable of Use Is Waste.—*Patterson v. Cunliffe*, 11 Phila. (Pa.) 564.

In an action to foreclose a land contract, the purchaser in possession will be enjoined from committing waste, without his insolvency being shown, if he removes machinery which he has placed in a shop built by him (said machinery being intended as a permanent accession to the freehold), if such removal will greatly damage the premises. *Taylor v. Collins*, 51 Wis. 123.

In *Witmer's Appeal*, 45 Pa. St. 455; 84 Am. Dec. 505, *Woodman, J.*, said: "As was said in *Hoskin v. Woodward*, he may sell, in the usual way, the 'lumber, firewood, coal, ore, fruit, or grain,' produced by his land, without violating the rights of lien creditors. But as to machinery, which is a constituent part of a mill or manufactory, to the purposes of which the building has been adapted, and without which it would cease to be such a mill or manufactory, the rule is different. To dismantle such an establishment on the eve of bankruptcy, is to destroy its customary use, and to defraud lien creditors, whether by judgment or mortgage. Though not waste under our statute, it is so at common law, and, like other acts contrary to law, is restrainable in equity." In this case, it was decided that the severance of an engine and machinery was a fraud upon the prior judgment creditors of the debtor.

4. Removal of Fixtures Not Capable of Use Is Not Waste.—In *Dodd v. Watson*, 4 Jones Eq. (N. Car.) 48; 72 Am. Dec. 577, the court, by *Pearson, J.*,

said: "If a mill be in running order, and one of the tenants in common is about to use it to grind stone for gold, or saw soapstone slabs, he may be enjoined, because that is not 'a usual, legitimate' mode of enjoyment. So, if he removes the stones, or saw, or anything necessary for the use of the mill. But, in our case, the mill was not in running order; on the contrary, it had been suffered to go down for the want of necessary repairs, and was in such a condition that it could not be used. So, the question is, must all the things which had appertained to the mill lie idle and be suffered to rust, rot, or be broken? and did the defendant, by removing them to another mill, where he could use them, so far violate the rights of the plaintiffs as to entitle them to the interposition of this court? Both questions are evidently with the defendant."

5. *Stetson v. Day*, 51 Me. 434.

In *Cannon v. Barry*, 59 Miss. 289, *Chalmers, C. J.*, said: "More serious than these was his act in voluntarily permitting a large body of the woodland to become forfeited to the state for unpaid taxes. That the land forfeited was unproductive, that there remained belonging to the estate sufficient wood to supply its wants indefinitely, that the land had been overvalued by the assessor, and that the defendant had tried in vain to have the valuation reduced, and that the board of supervisors in making the levy of county taxes had exceeded the limit of their authority, afford no excuse for his action. He took the estate as a whole, and was bound to so preserve it. He cannot segregate the profitable from the unprofitable, nor the sterile from the fertile, by preserving the one at the sacrifice of the other. The taxes were his individual debt, and the fact that they constituted a lien on both his own interests and that of the re-

assessed to be illegal, notice should be given to the reversioner, and he be indemnified against loss if payment of the taxes is to be resisted.¹

VI. WHO MAY COMMIT WASTE—1. Tenants for Life or Years.—At the common law, a tenant for life or years was not liable for waste, because it was presumed that the demise or lease creating his estate would have provided against waste if it were to be prohibited,² but the common law was changed by the statutes of Marlbridge (52 Hen. 3) and Gloucester (6 Edw. 1., ch. 5), and tenants for life or years were made liable for waste. These statutes have been modified and some of their provisions reenacted in some of the states of the Union, or are considered a part of their common law.³

maindermen made it his duty to keep them down. While a sale for taxes levied in excess of authority would, by the law then in force, have conveyed no title to the purchaser (see *Gamble v. Witty*, 55 Miss. 26), it would have cast a cloud upon the title, and by enabling the purchaser to add onerous damages to the amount paid as a lien on the land (see *Cogburn v. Hunt*, 56 Miss. 718; 57 Miss. 681), it would have added to the burden cast upon the tenants in remainder." See also *Wilkinson v. Wilkinson*, 59 Wis. 557, where it was decided not to have been an abuse of discretion to refuse to permit the complaint to be amended at the trial, so as to allege non-payment of taxes as a ground of waste, but it was stated that such non-payment constituted an independent cause of action, for which the plaintiffs still had a remedy.

A tenant for life, who neglects to cause all taxes assessed upon the estate during his tenancy to be paid, is liable to an action at law for waste. Whether equity will interfere on the ground of such neglect, *quære*. *Phelan v. Boylan*, 25 Wis. 679.

1. *Stetson v. Day*, 51 Me. 434.

2. *Moore v. Ellsworth*, 3 Conn. 483. The reason was, as stated by Coke, in 2 Inst. 300: "For that the law created their [tenants in dower and by the curtesy] interests, therefore, the law gave against them a remedy; but a tenant for life or years came in by demise and lease of the owner of the land, etc., and, therefore, he might in his demise have provided against the doing of waste by his lessee, and if he did not, it was his negligence and default."

The estate in the homestead, as

created by the constitution of *North Carolina*, is a determinable fee, and the owner thereof is not impeachable for waste. *Poe v. Hardie*, 65 N. Car. 447.

3. *Sackett v. Sackett*, 8 Pick. (Mass.) 309; *Hasty v. Wheeler*, 12 Me. 438; 4 Kent's Com. 79; 1 Washburn on Real Prop. (4th ed.), p. 157, and note.

In *North Carolina*, the word "may" has been substituted for "shall" in the old statute of Gloucester. *Sherrill v. Connor*, 107 N. Car. 543.

In *Chase v. Hazleton*, 7 N. H. 171, the court, in speaking of the statutes of Marlbridge and Gloucester, by Upham, J., said: "Whether these statutes constitute a portion of our common law, our courts have not been called upon to decide. They are considered as adopted as part of the law of *Massachusetts*, except so far as modified by their statutes. *Sackett v. Sackett*, 8 Pick. (Mass.) 309."

The material parts of the statutes of Marlbridge and Gloucester have been reenacted in *North Carolina*. *Dozier v. Gregory*, 1 Jones (N. Car.) 100.

In *Pennsylvania*, tenants for life are forbidden by the statutes to commit such acts as at common law constitute waste, except they be such as are necessary, in the judgment of the common pleas, to the reasonable use and enjoyment of the estate. *Irwin v. Covode*, 24 Pa. St. 162.

The minister of a parish, settled for life or for a term of years, is seised of an estate of freehold upon condition in ministerial land, and is answerable for waste. *Cargill v. Sewall*, 19 Me. 288.

Where the tenant for life, out of the profits of the estate, has erected a new building in the place of one which was destroyed by the act of God, he has no right to re-imburse himself for such

a. **LIABILITY FOR PERMISSIVE WASTE.**—The term “fermors” in the statute of Marlbridge comprehended all who held by lease for life or lives, or for years, by deed or without deed; and the words “do or make waste,” as used in both statutes, include as well permissive as voluntary waste, according to Lord Coke.¹ But some of the earlier cases held, that the action on the case for permissive waste, as for failure to repair, would not lie, as the remedy was in contract for breach of an express or implied covenant to repair, and not in tort as is the nature of the action on the case for waste.² The modern opinion seems to be, however, that an action on the case for permissive waste will lie, especially if there is an express covenant to repair.³ But it seems that equity will not generally relieve in the case of permissive waste.⁴

b. **LICENSE FROM REMAINDERMAN.**—The tenant for life may, with the license of the remainderman, do acts which would otherwise be waste, and be under no liability therefor.⁵

c. **PRESUMPTION IN FAVOR OF TENANT.**—In cases of alleged waste, the presumption is in favor of the tenant until the contrary appears.⁶ But his innocence or honesty of purpose will not excuse the commission of waste.⁷

d. **LIABLE FOR WASTE BY WHOMSOEVER COMMITTED.**—Both the tenant for life,⁸ and the tenant for years,⁹ are liable for waste by whomsoever committed.

outlay by committing waste on the inheritance, or by selling and bartering the timber growing thereon. *Miller v. Shields*, 55 Ind. 71.

1. 2 Coke's Inst. 145.

2. *Herne v. Benbow*, 4 Taunt. 764; *Jones v. Hill*, 1 Moore 100; *Gibson v. Wells*, 1 N. R. 290; *Yellowly v. Gower*, 11 Exch. 294; *Turner v. Buck*, 22 Viner's Abr., tit. “Waste,” p. 523. In the last case it was held that there was no remedy in law or equity, as a general rule, for permissive waste, after the death of the particular tenant.

3. *Woodhouse v. Walker*, 5 Q. B. Div. 404; *Stevens v. Rose*, 69 Mich. 259; *Harnett v. Maitland*, 16 M. & W. 257; *White v. McCann*, 1 Ir. C. L. 205; *Dozier v. Gregory*, 1 Jones (N. Car.) 100.

4. *Cannon v. Barry*, 59 Miss. 289; *Powys v. Blagrave*, 4 De G. M. & G. 448; *Lansdowne v. Lansdowne*, 1 J. & W. 522. But see *Caldwall v. Baylis*, 2 Meriv. 408, where a tenant for life of copyholds was restrained from committing or suffering any further waste, at the suit of tenants in common of the remainder in fee. Also *Marsh v. Wells*, 2 Sim. & Stu. 87.

5. *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362.

6. *Lynn's Appeal*, 31 Pa. St. 44; 72 Am. Dec. 721.

7. *Rutherford v. Aiken*, 3 Thomp. & C. (N. Y.) 60.

In *Clark v. Holden*, 7 Gray (Mass.) 8; 66 Am. Dec. 450, the court, by Bigelow, J., said: “A tenant for life cannot pull down buildings, cut off timber trees, or do other acts which tend to the disherison of the remainderman or reversioner, and justify them on the ground that he acted in good faith, without any purpose of permanently injuring the estate. Such acts, in law, constitute waste for which the tenant for life is liable, however innocent or honest may have been the purpose with which they were done.”

Improvements by a life tenant are no excuse or a justification for committing waste. More especially, when the waste is to the inheritance, and the improvements are to the fertility of the soil which may be exhausted during the life estate. *Van Syckel v. Emery*, 18 N. J. Eq. 387.

8. *LANDLORD AND TENANT*, vol. 12, p. 680.

9. *Regan v. Luthy*, 16 Daly (N. Y.) 413. See also *LANDLORD AND TENANT*, vol. 12, p. 715.

2. **Tenants in Dower and Curtesy.**—Since the law created the estates of dower and curtesy, it gave, against tenants in dower and by the curtesy, a remedy for waste at the common law, irrespective of any statutes.¹

a. **DOWER IN WILD LANDS.**—As to whether a widow is dowerable of wild land, the decisions are not altogether uniform, though, by the weight of authority, it may be said that she is. In *Massachusetts*, it has been held that she is not.²

b. **DISCRIMINATION BETWEEN REVERSIONARY INTERESTS.**—If the dower lands assigned to a widow consist of different parcels of the same original estate, but the reversionary rights in different parcels are in different persons, the right of the tenant

1. 2 Coke's Insts. 300; *Moore v. Ellsworth*, 3 Conn. 483; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260.

A tenant by the curtesy is liable for waste on the same principle, in point of reason and justice, as a tenant in dower. *Rose v. Hays*, 1 Root (Conn.) 244.

2. In *Conner v. Shepherd*, 15 Mass. 164, it was adjudged that the widow was not dowerable of land in a wild and uncultivated state. A reason given for the decision was that, according to the principles of the common law, her estate would be forfeited if she were to cut down any of the trees valuable as timber. The court said: "If she did not improve the land, the dower would be wholly useless; if she did improve it, she would be exposed to dispute with the heirs, and to the forfeiture of her estate after having expended her dower upon it." This doctrine was affirmed in *Webb v. Townsend*, 1 Pick. (Mass.) 21; 11 Am. Dec. 132, and in *White v. Cutler*, 17 Pick. (Mass.) 248.

In *White v. Willis*, 7 Pick. (Mass.) 143, it was held that a lot of wild land, which had been used by the husband, in connection with his house and cultivated land, to supply wood for buildings, fences, and fuel, might be assigned to a widow as part of her dower, to enable her to take fuel and timber for repairs.

It was said by Mr. Rand, the annotator of the *Massachusetts* reports, that the decision in *Conner v. Shepherd*, 15 Mass. 164, went upon the assumption of what was not true, viz., that a tenant for life can derive no possible benefit from wild lands without committing waste. And see *Hastings v. Crunkleton*, 3 Yeates (Pa.) 261; *Findlay v. Smith*, 6 Munf. (Va.) 134; 8 Am. Dec. 733; *Jackson v. Brownson*, 7 Johns. (N.

Y.) 227; 50 Am. Dec. 258; *Crouch v. Puryear*, 1 Rand. (Va.) 258; 10 Am. Dec. 528; *Jackson v. Sellick*, 8 Johns. (N. Y.) 262; *Ballentine v. Poyner*, 2 Hayw. (N. Car.) 110; *Parkins v. Cox*, 2 Hayw. (N. Car.) 339; *Elliot v. Smith*, 2 N. H. 430; *Loomis v. Wilbur*, 5 Mason (U. S.) 13; *Harrow School v. Alderton*, 2 B. & P. 87; *Jackson v. Andrew*, 18 Johns. (N. Y.) 431.

To the point that if there is no house upon the land when the dower is assigned, the widow will commit waste if she takes firewood from the land, see *Fuller v. Wason*, 7 N. H. 341.

In support of the doctrine that a widow may be dowerable of wild land, and may clear a reasonable proportion for purposes of cultivation, see, in addition to the cases cited above, *Alexander v. Fisher*, 7 Ala. 514; *Parkins v. Cox*, 2 Hayw. (N. Car.) 339; *Owen v. Hyde*, 6 Yerg. (Tenn.) 334; 27 Am. Dec. 467. See also *DOWER*, vol. 5, p. 891.

In *Michigan*, it not being waste to clear wild land, a widow is entitled to dower in such lands. *Campbell v. Clark*, 2 Dougl. (Mich.) 141.

Where the dower assigned to a widow consists of certain wholly unimproved, unproductive town lots and a tract of unimproved woodland, she may sell timber growing on the woodland, sufficient to raise the amount of money necessary to pay the taxes already due upon the lots and land, and the taxes that have become a lien thereupon, and to pay an agent's compensation for making the sales, paying the taxes, and overseeing the premises to protect them from trespasses or other injury; and such sale is not waste. She is not bound to pay such taxes and compensation out of her other means. *Crockett v. Crockett*, 2 Ohio St. 180.

in dower to cut upon any one of them is not thereby affected; provided she treats it fairly as one estate, and does not act from mere caprice and partiality in taking wood from one reversionary interest rather than another.¹

c. CUSTOMARY USE OF LAND.—The widow may continue the use of land according to the methods of enjoyment pursued before the dower estate commenced; thus, she will not commit waste, if she cuts and sells staves and shingles,² or hoop poles,³ or makes turpentine from trees, provided these are the usual and ordinary modes of managing the estate.⁴

d. LIABILITY FOR PERMISSIVE WASTE.—The better opinion seems to be that a tenant in dower is not liable for mere permissive waste,⁵ especially if she deals with the dower estate as a prudent man would deal with it if he owned it absolutely.⁶

e. FORFEITURE OF DOWER ESTATE.—The statutes of some states, and the disposition of the courts, seem to be opposed to the forfeiture of the dower estate because of waste.⁷

1. *Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Dalton v. Dalton*, 7 Ired. Eq. (N. Car.) 197. In the latter case, the court was of the opinion, however, that if the widow acts from mere caprice and partiality, in taking wood from one reversionary interest rather than another, in equity, she may be restrained from so doing.

In *Owen v. Hyde*, 6 Yerg. (Tenn.) 334; 27 Am. Dec. 467, the court, by Green, J., said: "She was not bound to notice any division which may have been made of the reversionary interest among the heirs; she took the dower estate as it was assigned to her with the rights and liabilities which attach to that as a whole; and although she may have destroyed all the timber which was on that part of one of the lots included in her dower, yet, if the dower estate was not injured, but benefited thereby, she would not be guilty of waste; for that is the great criterion by which to determine whether waste has been committed, as that only which does a lasting damage to the inheritance, or depreciates its value, is waste."

A widow, to whom is set off for her dower two distinct estates, cannot take from one of them firewood for use upon the other. *Cook v. Cook*, 11 Gray (Mass.) 123.

2. *Ballentine v. Poyner*, 2 Hayw. (N. Car.) 110.

3. *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621.

Duties of Dowress Concerning Waste.
—A dowress must not, at any time dur-

ing the continuation of her estate, do more clearing than is necessary to the legal and proper enjoyment of her estate in dower. *VanHoozer v. VanHoozer*, 18 Mo. App. 19.

4. The widow has no right to make turpentine upon the land assigned to her in dower, which in the lifetime of her husband had not been used for that purpose. But she may rightfully use, in the ordinary mode of making turpentine, trees that have been boxed or tended for turpentine in his lifetime; and she may box new trees as those already boxed become unfit for use, so as not to enlarge the crop beyond the extent which it had when the dower was assigned. *Carr v. Carr*, 4 Dev. & B. (N. Car.) 179.

5. *Richards v. Torbert*, 3 Houst. (Del.) 172; *Dozier v. Gregory*, 1 Jones (N. Car.) 100.

6. *Harvey v. Harvey*, 41 Vt. 373. Like other tenants for life, a tenant in dower is not entitled to commit or suffer waste, and must keep the premises set off to her, in repair. *Haulenbeck v. Cronkright*, 8 N. J. Eq. 407.

7. *Hickman v. Irvine*, 3 Dana (Ky.) 121; *Robinson v. Miller*, 2 B. Mon. (Ky.) 284; *Richards v. Torbert*, 3 Houst. (Del.) 172.

In *Georgia*, a tenant in dower is liable for waste committed on the estate, but she does not forfeit her estate, and treble damages for waste committed, as provided by the statute of Gloucester. The remedy against her is either by an action on the case, in the

f. THE HUSBAND OF A TENANT IN DOWER.—The husband of a tenant in dower commits waste if he removes from the premises, even after the death of his wife, a house which he has built himself.¹

3. Tenants in Common.—By the common law, one tenant in common could not be guilty of committing waste, and, therefore, the same acts which, committed by a tenant for life or years would constitute waste, would not be waste when committed by a tenant in common.² But this rule has been changed by statute in *England*,³ and in many of the states,⁴ and a tenant in common is now liable for waste. These statutes apply, it seems, to cases where the tenancy in common is not admitted, and one tenant claims title to the whole estate, and commits waste.⁵

If one tenant in common cuts and removes timber from unoccupied lands, he will be guilty of waste,⁶ and if a tenant in common, by cutting down and clearing woodland beyond his interest,

nature of waste to recover the actual damage sustained, or by injunction, when the latter remedy shall be necessary and proper to restrain her from committing waste. *Parker v. Chamberliss*, 12 Ga. 235.

1. *McCullough v. Irvine*, 13 Pa. St. 438. But he is not liable for mere permissive waste, after the death of his wife and after the surrender of his possession. *Dozier v. Gregory*, 1 Jones (N. Car.) 100.

2. *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686.

3. Stat. of Westminster II., ch. 22.

4. The provision of the *New York* statute, as to waste being maintainable by a tenant in common against his cotenant, was taken originally from the English statute. *Elwell v. Burnside*, 44 Barb. (N. Y.) 447. Such statutes have also been adopted in *Michigan*: *Benedict v. Torrent*, 83 Mich. 181; 21 Am. St. Rep. 589; *North Carolina*: *Smith v. Sharpe*, Busb. (N. Car.) 91; 57 Am. Dec. 574; *California*: *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686; *Kentucky*: *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 139; 23 Am. Dec. 387; and *Maine*: *Maxwell v. Maxwell*, 31 Me. 184.

In *South Carolina*, a tenant in common is liable for waste, irrespective of any statutory provision. *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277; 29 Am. Dec. 72.

5. Where one tenant in common

disseises his cotenant, he is liable to an action for rents and for waste, notwithstanding the fact that he is in possession, claiming title as sole owner. *Dodge v. Davis*, 85 Iowa 77.

Where one tenant in common occupies the whole of the land, and excludes his cotenant from entering and enjoying the property, he will be liable to such cotenant for waste, and this without regard to any statute like that of 4 & 5 Anne. *Childs v. Kansas City, etc., R. Co.* (Mo. 1891), 17 S. W. Rep. 954. See, *contra*, *Prescott v. Nevers*, 4 Mason (U. S.) 326.

Where the defendant, a tenant in common, who is in possession of the premises, denies the complainant's right to a share, he cannot be permitted to commit waste by cutting the timber on the premises, pending the proceedings to establish the title, if his portion appears inadequate to answer for such waste. *Van Fleet, V. C.*, in *Brown v. Farley*, Jan., 1883 (N. J.).

6. *Benedict v. Torrent*, 83 Mich. 181; 21 Am. St. Rep. 589.

In *Elwell v. Burnside*, 44 Barb. (N. Y.) 447, the court, by Marvin, J., said: "The plaintiffs and four defendants were tenants in common of the lands. They were not partners in the lumber business. The principal value of the lands consisted in the timber upon them, and they were purchased by the partners on account of the timber, and for lumbering purposes. The defendants, without the consent of the plaintiffs, entered upon the lands and cut

has greatly injured the interest of his cotenant, he will be liable for waste.¹ But if such cutting and clearing benefit the interest of the cotenant, the latter can recover only nominal damages at law.²

If one tenant in common is in possession of a farm, and cuts down timber growing on the land, and not needed for the use of the farm, he will commit waste.³

While one of several tenants in common of a mine, who does not exclude his cotenants, may work the mine in the usual way, and extract ore from it,⁴ he will be chargeable with waste if he is in possession to the exclusion of his cotenants, and excavates, removes, sells, or uses the contents of quarries.⁵

4. Mortgagors and Mortgagees.—The mortgagor will not commit waste by using the products of the estate in the customary way, if the security is not rendered inadequate.⁶ But he will commit waste by using the estate in an unauthorized way,⁷ or so as to

and removed a large quantity of timber, and converted the same to their own use. These acts, in my opinion, in view of all the cases, constituted waste, and I think that they are such acts as were contemplated by the statute, and the parties are tenants in common."

It is no invasion of a privilege to cut timber for the use of a saw mill owned by two, that one of the owners of the mill, who was also a life owner of the land, cut and used a few hundred dollars worth of timber, having left an abundance for the use of the saw mill and for all other purposes. *Dodd v. Watson*, 4 Jones Eq. (N. Car.) 48; 72 Am. Dec. 577.

In *Clow v. Plummer*, 85 Mich. 550, the court, by Long, J., said: "The fact that the timber was liable to destruction by fire was no sufficient reason in law to authorize the defendant to cut, take away, and manufacture the common property. One tenant in common has no right over the property of his cotenant. The defendant had an undoubted right to compel the partition of the common property, but he had no right as cotenant over the undivided interests."

In *Pennsylvania*, one tenant in common is entitled to a writ of estrepement against another, to prevent the cutting and removal of timber. *Hensal v. Wright*, 10 Pa. Co. Ct. Rep. 416.

1. *Johnson v. Johnson*, 2 Hill's Eq. (S. Car.) 277; 29 Am. Dec. 72; *Hancock v. Day*, 1 McMull. Eq. (S. Car.) 69; *Maxwell v. Maxwell*, 31 Me. 184. But he is not liable if no injury is

done to the inheritance. *Martyn v. Knowllys*, 8 T. R. 145.

2. *Hancock v. Day*, 1 McMull. Eq. (S. Car.) 69.

A tenant in common in possession will not commit waste if he cuts timber in accordance with good management. *Arthur v. Lamb*, 2 Dr. & Sm. 428.

3. *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122.

4. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686; *Smith v. Sharpe*, Busb. (N. Car.) 91; 57 Am. Dec. 574.

5. *Childs v. Kansas City, etc., R. Co.* (Mo. 1891), 17 S. W. Rep. 954.

6. In *Moriarty v. Ashworth*, 43 Minn. 1; 19 Am. St. Rep. 203, the land mortgaged constituted four acres, its principal value being a granite quarry thereon. It was held that while the removal of that material depreciated the value of the land, the quarrying had not been carried on to such an extent as to so far impair the value of the land as to render it insufficient security for the debt.

7. A mortgagor in possession held the land under an understanding with the mortgagee, from whom he had purchased it, that the mortgagor was to sell it in building lots; but the mortgagor sold the soil of the land and opened sand and stone quarries. It was held that he committed waste. *Martin's Appeal* (Pa. 1887), 9 Atl. Rep. 490.

After a mortgage foreclosure sale of real property, and while the purchaser is the holder of the sheriff's certificate

render it an inadequate security for the amount due upon the mortgage.¹

The mortgagee in possession will be chargeable with waste if he does not keep the mortgaged premises in repair.²

of sale, but before the issue of the sheriff's deed thereon, removal by the mortgagor of fixtures is waste, for which an action of waste may be maintained by the purchaser to recover damages therefor. (*Wisconsin Rev. Stats.*, ch. 143, §§ 8, 9.) So, where the mortgaged property was a blacksmith's shop, and the articles removed by the mortgagor included door locks and certain iron fixtures imbedded in the masonry of the forge chimney, it was held that these articles were part and parcel of the freehold and the removal of them was waste. *Lackas v. Bahl*, 43 Wis. 53.

The mortgagee may recover for the removal of fixtures, that being considered waste. *Patterson v. Cunliffe*, 11 Phila. (Pa.) 564.

The mortgagor will commit waste if he removes buildings. *Dorr v. Duderar*, 88 Ill. 107.

1. Mortgagor in Possession Using Premises so as to Render Security Inadequate, Commits Waste.—*Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722; *Usborne v. Usborne*, Dick. 75; *Hippesley v. Spencer*, 5 Madd. 422; *King v. Smith*, 2 Hare 239; 7 Jur. 694; *Simmins v. Shirley*, 6 Ch. Div. 173; *Fairbank v. Cudworth*, 33 Wis. 358; *Coker v. Whitlock*, 54 Ala. 180; *Southworth v. Van Pelt*, 3 Barb. (N. Y.) 347; *Jones on Mortgages* (4th ed.), § 684. The same principle applies to the owner of the equity of redemption. *Scott v. Webster*, 50 Wis. 53.

Persons holding land, both as mortgagees and as grantees of the mortgagor, are liable for waste of timber to the second mortgagee. *Scott v. Webster*, 50 Wis. 53.

A purchaser of land subject to a mortgage, who removed a building from the mortgaged premises onto his own land, thereby rendering the security inadequate for the payment of the mortgage, is guilty of waste, and, in case of deficiency, is liable for the value of the building so removed. *Edler v. Hasche*, 67 Wis. 653.

No authority to commit waste upon

mortgaged premises will be implied from the object for which the property was purchased, nor from the price agreed to be paid. *Cowgill v. Milburn Land Co.*, 25 N. J. Eq. 90.

In an action by a second mortgagee of realty, against the mortgagor or his assign, for an injury to the security resulting from the removal of fixtures or other waste, plaintiff need not prove actual knowledge of his mortgage on the part of the defendant. Constructive notice by proper registration is sufficient; nor need he prove that the defendant acted fraudulently or intended to injure him. Actual damage necessarily resulting from the defendant's act is the legal basis of his suit; nor is the insolvency of his debtor a material fact. *Jackson v. Turrell*, 39 N. J. L. 329.

The owner of the equity of redemption may not cut the growing timber, if the premises are a scanty security for the mortgage debt thereon. *Bird, V. C.*, in *Gross v. Hoffman*, Nov., 1884 (N. J.).

A purchaser at a tax sale, holding only a sale certificate, and before the execution of a tax deed, has no such title or right to the land as will protect him in committing waste. *Douglass v. Dickson*, 31 Kan. 310.

2. Lenderking v. Rosenthal, 63 Md. 28; *Barnett v. Nelson*, 54 Iowa 41; 37 Am. Rep. 183; *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722.

A mortgagee in possession of the mortgaged premises, or his assignee, is accountable for the profits and for waste. *McCormick v. Digby*, 8 Blackf. (Ind.) 99.

A mortgagee in possession is bound to account for all rents, issues, and profits received by him, and for all waste and destruction of the premises, and must deduct the allowance for these matters from the amount due on the mortgage. But such allowances can only be claimed, either on bill to foreclose, or bill to redeem, against a mortgagee in possession, and in possession as mortgagee. He cannot be called to account in such suits for trespasses committed by him; nor, if he is in possession as tenant of the mortgagor,

5. **Vendors and Vendees.**—A vendor of land, who retains possession after the contract of sale is made, will commit waste if he cuts timber for sale, unless he is authorized so to do.¹ The same liability is imposed by the law, upon a vendee who takes possession after the contract is made, the legal title remaining meanwhile in the vendor as security for the purchase price.²

Both vendor³ and vendee⁴ are liable for waste committed, if they injure, or permit to be injured, buildings or fixtures⁵ upon the premises sold.

6. **Tenants at Will.**—The tenant at will is under an implied agreement to use the premises in a tenantlike manner, and if he commits voluntary waste, he will be liable therefor upon his implied agreement.⁶ He will be liable for waste if he cuts timber for other purposes than the repair of fences and buildings, etc., which he has agreed to keep in repair;⁷ removes manure made on the land;⁸ places in a building an excessive weight;⁹ or allows a meadow to be injured and fruit trees destroyed.¹⁰

The commission of waste by a tenant at will is a determination of the will.¹¹ But it seems that a tenant at will is not liable to an action on the case for permissive waste,¹² although it is a well

under a lease from him, which a mortgagee may take as well as a stranger, can the mortgagor claim an allowance for rent due on the lease, or waste committed as tenant. *Onderdonk v. Gray*, 19 N. J. Eq. 65.

1. *Crawley v. Timberlake*, 2 Ired. Eq. (N. Car.) 460; *Holmberg v. Johnson*, 45 Kan. 197.

2. In *Moses v. Johnson*, 88 Ala. 517; 16 Am. St. Rep. 58, the court, by Stone, C. J., said: "We have found but a single case precisely like the present one in its facts. In *Scott v. Wharton*, 2 Hen. & M. (Va.) 25, a sale of land had been made on a credit, and title retained by the vendor. The vendee went into possession, and a bill was filed by the vendor, charging him with committing waste by cutting timber, and praying for an injunction. The court treated the case precisely as if it had been a bill by mortgagee against mortgagor, to restrain him from lessening the security by felling and removing the timber. *Fairbank v. Cudworth*, 33 Wis. 358."

3. Waste after contract of sale, where possession is to be delivered at a future day, must be borne by the vendor, if committed by his tenants. In such a case he must tender compensation before he can require the vendee to perform his part of the contract. *Durrett v. Simpson*, 3 T. B. Mon. (Ky.) 517; 16 Am. Dec. 115.

4. A purchaser in possession of mills, who negligently suffers them to be burned, will be responsible to his vendor for the loss, upon a rescission of the contract. *Cornish v. Strutton*, 8 B. Mon. (Ky.) 586.

5. *Taylor v. Collins*, 51 Wis. 123.

6. *Chalmers v. Smith*, 152 Mass. 561.

7. *Suffern v. Townsend*, 9 Johns. (N. Y.) 35; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Wright v. Roberts*, 22 Wis. 161.

8. *Daniels v. Pond*, 21 Pick. (Mass.) 367; 32 Am. Dec. 269.

9. *Chalmers v. Smith*, 152 Mass. 561.

10. *Bellows v. McGinnis*, 17 Ind. 64.

11. *Daniels v. Pond*, 21 Pick. (Mass.) 367; 32 Am. Dec. 269; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Perry v. Carr*, 44 N. H. 118; *LANDLORD AND TENANT*, vol. 12, p. 674.

If a tenant at will does any act which amounts to waste, this will be a determination of the tenancy, and he and those who assist him may be treated as trespassers. *Pettengill v. Evans*, 5 N. H. 54.

12. *Harnett v. Maitland*, 16 M. & W. 256; *Yool on Law of Waste and Nuisance*, p. 62.

A tenant at will, or by sufferance, is not liable for waste committed by a stranger, and, therefore, can have no action against a railroad for fires communicated by sparks from one of its engines. *Coale v. Hannibal, etc., R. Co.*, 60 Mo. 227.



established rule that he is liable in such an action for voluntary waste.¹

7. Mere Possessors or Trespassers.—In former times, waste lay only between persons having a privity of title, and not between parties claiming by adverse titles, acts of spoliation committed by the latter being known merely as trespasses; but the tendency of modern decisions is to break down this distinction and give for such trespasses the remedies for waste.²

a. BY ONE IN POSSESSION.—Where acts of spoliation are committed by one in possession, a court of equity will not interfere in favor of one out of, but claiming the right to, possession, unless such acts are so flagrant as to be destructive of the estate.³

b. BY ONE OUT OF POSSESSION.—If the acts of trespass or waste are committed by one who is out of possession, and not claiming to have color of title, equity will not interfere, unless the acts of destruction are so ruinous as to be incapable of actual measurement in money, or there are other grounds for equitable interference.⁴

8. Tenants in Qualified Fees—*a.* TENANT IN FEE WITH EXECUTORY DEVISE OVER.—A tenant in fee, subject to an executory

1. *Bellows v. McGinnis*, 17 Ind. 64; *Wright v. Roberts*, 22 Wis. 161; *Freeman v. Headley*, 33 N. J. L. 523.

2. In *Loundes v. Bettle*, 33 L. J. Ch. 451, *Kindersley, V. C.*, said: "It appears to me that the case comes under the head of 'irremediable waste,' as defined by Lord Eldon, that is, a destruction of the substance of the inheritance; and I think it comes within the cases in which, the plaintiff being in possession and the defendant not, an injunction has been granted. I think, therefore, that under the circumstances, and having regard to what appears, to me, to be the constant tendency of the decisions upon the subject, viz., to break down the unreasonable distinction between trespass and waste, that this is a case in which the injunction ought to be granted."

A stranger committing waste upon premises leased or held by a particular estate, is liable to the tenant for the injuries to the possession, and to the landlord or reversioner for the injury to the freehold or inheritance. The right of each is distinct from that of the other, and the satisfaction made to one is no bar to an action brought by the other. *California Dry Dock Co. v. Armstrong*, 17 Fed. Rep. 216.

3. *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; 11 Am. Dec. 484, where an elaborate note treats of this whole

question. *Loundes v. Bettle*, 33 L. J. Ch. 451.

4. *Shipley v. Ritter*, 7 Md. 408; 41 Am. Dec. 371; *Davis v. Reed*, 14 Md. 152; *Powell v. Cheshire*, 70 Ga. 357; 48 Am. Rep. 572. In the last case, the court, by Jackson, C. J., said: "The facts alleged here, we think, make a case within these rules of law defining the limits within which equity will interfere by injunction. If the shade trees, necessarily the growth of years, in some instances of centuries, standing in a man's yard, where he has built his residence, or is about to build it, are being cut down and destroyed, nothing but time, and time beyond a generation, can replace them. It is impossible to estimate the value to the homestead in money. It is irreparable in damages. If the only timber on a ninety acre farm is being cut down, and all forest vegetation laid waste, so that nothing will be left to shade man or beast, in toil or in rest, in the field or the pasture—nothing to repair fencing or mend the fire, it would be very difficult to ascertain the damage in money. In either case, both of which appear in this bill, how can damages be estimated at all? Is not the waste destructive to the freehold as a farm, for farming purposes, and almost equally so to the freehold chosen as the spot for a residence, and cleared of undergrowth for

devise over, is not impeachable for waste, except as to equitable waste,¹ unless he is prohibited from committing waste by the instrument creating his estate.²

b. CONTINGENT INTEREST IN THE FEE.—Devises holding contingent interests in the fee are not impeachable for waste, but will be prevented from despoiling the inheritance.³

9. Tax Delinquents.—The statutes of some states make special provisions to prevent waste upon lands on which taxes are due and remain unpaid.⁴

10. Purchasers of State Lands.—In case of forfeiture of state

that purpose? Especially should equity arrest such destruction where the defendant is a mere naked trespasser, without shadow of title or right to the land."

1. In *Turner v. Wright*, 2 De G. F. & J. 234; 6 Jur. N. S. 809, Campbell, L. C., said: "The defendant is tenant in fee simple, with all the incidents of such an estate, although there be executory devises over, in case he should die without leaving issue living at the time of his decease. Not making any unconscientious use of the powers belonging to him as tenant in fee simple, why should he not reasonably exercise these powers? Is there anything unconscientious or unreasonable in his cutting down timber, mature and fit to be cut, and not such as has been planted or left standing by way of ornament or shelter? If we are to regard the intention of the testator in such limitations, can the intention be supposed to be, that the first taker who is made tenant in fee should, during the whole of his life, although he should have numerous children and grandchildren, not be entitled to cut down a tree upon the property, unless for his botes? In this case, the presumed intention of the testator is strengthened by the first executory devise over, which is for life, and *sans waste*. He could not have intended that the first taker to whom he gave a fee should be more restricted in the management of the property than the devisee over, to whom he gave only a life estate. Having given the first taker a fee, he probably thought it quite unnecessary expressly to make him punishable of waste. So that equitable waste is not committed, the bountiful intention of the testator in favor of the devisees over will be completely fulfilled; for on the happening of the contingencies limited, the property will come to them in the

same condition in which it would have been if the testator, being a prudent man, had himself survived, and had managed and enjoyed it till the time when the events happen upon which they are entitled to enter."

2. *Blake v. Peters*, 10 W. R. 826.

3. *Gordon v. Lowther*, 75 N. Car. 193.

If one takes a fee of any sort, he is exempt from the supervision of chancery in respect to waste. *Matthews v. Hudson*, 81 Ga. 120; 12 Am. St. Rep. 305. In this case, it was decided that a certain devisee held a fee determinable upon his dying without issue, and that others who were to receive the estate in that event, took by executory devise and not by contingent remainder. Therefore, the latter were not entitled to treat the cutting and felling of timber by said devisee, as waste.

If a devisee, having a life interest in land, may possibly take under the will an undivided interest in the fee, he is not a life tenant under the *North Carolina* code, and hence is not impeachable of waste, but may be enjoined from cutting timber not warranted by a course of prudent husbandry. *Farabow v. Green*, 108 N. Car. 339.

A devisee, whether his estate be an estate tail or a contingent fee, has no power to commit waste so as to destroy the inheritance. *Wallington v. Taylor*, 1 N. J. Eq. 314.

4. Tax Delinquents.—*Michigan* Laws 1889, Act No. 223, provides: "That when any person, company, or corporation shall neglect or refuse to pay any tax assessed on the lands of such person, company, or corporation, within the time specified by law, the township treasurer shall be entitled to an injunction to restrain waste on any of such lands upon which the taxes shall remain unpaid, when it shall appear that such lands are chiefly valuable for the timber being, standing, or growing

lands for non-payment of the purchase-money, the statutes of some states make special provision against the commission of waste by the purchaser.¹

11. Judgment Debtors.—Acts on the part of a judgment debtor which diminish the value of the premises and impair the security of the creditor, may constitute waste.² But if no injury is done to the freehold, the judgment debtor will not be chargeable with waste;³ nor will he be, if the judgment creditor, after waste

thereon. And any circuit judge, or circuit court commissioner, of the county in which such lands are situated, may, on the application of such township treasurer, make an order restraining any person from committing waste thereon." It was held that under the foregoing statute, a bill may be filed upon a refusal of payment at any time after the taxes can be lawfully demanded, although the treasurer has not returned his tax roll; and that, in order to warrant the filing of a bill before the expiration of the time within which the taxes can be paid to the township treasurer, there must have been a positive, unequivocal refusal to pay the whole or some portion of the same. *Caldwell v. Ward*, 88 Mich. 378.

Under the same act, it is no defense that the tax could have been collected by other process, or that the owners do not intend to commit waste at all, or that after the waste is committed the land will still be of sufficient value to pay the tax. *Rossman v. Adams*, 91 Mich. 69.

Wisconsin Rev. Stat., § 3177, gives a recovery of damages for waste committed by any one upon lands, to the holder of a certificate of sale for taxes, or upon execution, or by virtue of a power of sale in a mortgage. But the term waste is technical, and to sustain the action there must be privy of estate, or the injury will be merely a trespass. *Lander v. Hall*, 69 Wis. 326.

1. Purchasers of State Lands.—The auditor of the county is authorized by *Indiana Rev. Stat.* 1881, § 4648, to bring an action in the name of the state for the use of *Indiana University*, when there has been a sale of any of the land selected by the governor in accordance with the provision of a certain act of Congress, to recover any waste committed, in case of forfeiture by the purchaser. But the statute authorizes a recovery only against such purchasers as committed the waste, or with whose knowledge and permission

it was done. *State v. Gramelspacher*, 126 Ind. 398.

2. Cutting Down and Removing Timber.—*Vandemark v. Schoonmaker*, 9 Hun (N. Y.) 16; *Camp v. Bates*, 11 Conn. 50; 27 Am. Dec. 707; *Lee v. Britton*, 102 N. Car. 166.

In *Witmer's Appeal*, 45 Pa. St. 455; 84 Am. Dec. 505, it was held that the owner of a steam mill property and land, incumbered by judgment liens beyond their value, could not sever and remove the steam engine or other constituent parts of the machinery so that, as personalty, they might be levied upon and sold upon the execution of a subsequent judgment creditor, and that such severance was a fraud upon the prior judgment creditors of the debtor, such as a court of equity would restrain by injunction. So, in *Camp v. Bates*, 11 Conn. 51; 27 Am. Dec. 707, it was held that where the land of an insolvent debtor had been attached in a suit at law, a court of chancery, during the pendency of the suit at law, would enjoin the debtor from committing waste.

3. May Work Mines in the Usual Way.—It was held in *Ward v. Carp River Iron Co.*, 47 Mich. 65, that while the judgment debtor could not open new mines, he could work those already opened, if such working was done in the customary and reasonable way.

Where execution is levied on a mine, the taking of ore from the mine after the sale made on the execution, and during the period allowed for redemption, is not necessarily waste, as the judgment debtor is entitled to continue the working of the mine during that period in a reasonable and prudent manner, having regard to the customary working before the execution sale; and he can dispose of the products. If the mining be improper, excessive, or wasteful, it may at any time be restrained, and the party responsible for it held liable in damages. *Ward v. Carp River Iron Co.*, 50 Mich. 522.

has been committed, purchases the premises at an execution sale.¹

12. Guardians—(See also *GUARDIAN AND WARD*, vol. 9, p. 85).—At the common law, guardians are liable for waste committed by them, but they do not commit waste if the acts complained of work no substantial injury to the estate.²

13. Executors and Administrators—(See also *EXECUTORS AND ADMINISTRATORS*, vol. 7, p. 346).—Wasteful management of the property of his testator or intestate by an executor or administrator is not what is known in the law technically as waste.³

An executor, who becomes a tenant of the tenant for life, cannot be charged as executor for alleged waste committed by him while he is such tenant, if he does not exceed the rights of a tenant for life.⁴

14. Trustees—(See also *TRUSTS AND TRUSTEES*, vol. 27, p. 157).—A trustee is not liable at law for waste committed on the lands which he holds in trust,⁵ unless, perchance, he may be at the same time a tenant for life.⁶

15. Copyholders.—A copyhold tenant is subject to waste, unless it occurs by the act of God.⁷ But although the timber belongs

1. *Hughlett v. Harris*, 1 Del. Ch. 349; 12 Am. Dec. 104.

2. In *Bond v. Lockwood*, 33 Ill. 212, trees upon six acres were cut, but they proved to be of no particular value, and the worth of the land as an estate was not diminished; besides, the guardian accounted for the money which he received for the wood. It was held that he was not chargeable with waste, but it was said that under the common law he might have been, if the acts done had amounted to waste.

The statutes of *Wisconsin* require every guardian to manage the estate of his ward frugally and without waste (*Wisconsin* Rev. Stat., ch. 112, § 24), and this duty courts of equity will impose upon him, in the absence of any statutory provision, so that where injury has been caused to the estate, by bad husbandry and improper cultivation, the guardian will be charged therewith, and must make good in his account. It constitutes waste within the meaning of the law. *Willis v. Fox*, 25 Wis. 646.

3. *Wilbur v. Wilbur*, 7 Met. (Mass.) 249. See *supra*, this title, *Waste Distinguished from Devastavit*.

4. *Lynn's Appeal*, 31 Pa. St. 44; 72 Am. Dec. 721.

5. Where a testator, by his will, appoints a trustee of all his estate during the infancy of his heir, such trustee is neither a guardian, so as to be liable for waste at common law, nor a tenant

for life, or years, or other term, so as to be within the statute against waste. *Kincaird v. Scott*, 12 Johns. (N. Y.) 368. This case was decided in 1815, under the statute combining the provisions of the statute of Marlbridge and the statute of Gloucester, and which gave an action of waste and triple damages and forfeiture "against him or her who holdeth by curtesy, or otherwise, for term of life, or for term of years, or other term; or a woman in dower, as well as against guardians." The court considered that the trustee did not hold "for term of life or for term of years or other term," within the purview of the act.

Where real estate was devised to trustees absolutely and in fee, with full power to lease for the most money that could be obtained, and for any term that they thought proper, it was held that they were not guilty of waste in allowing a tenant to pull down an old building and put up a new one instead, it appearing that the resulting improvement greatly increased the value of the property. *New York Dyeing, etc., Establishment v. DeWestenberg*, N. Y. Daily Reg., Feb. 19, 1886.

6. *Phillips v. Allen*, 7 Allen (Mass.) 115.

7. *Rook v. Worth*, 1 Ves. 462; *Richards v. Noble*, 3 Meriv. 673. *Contra*, but overruled by case last cited, *Dench v. Bampton*, 4 Ves. 700.

to the lord of the manor, the copyholder may by custom have such an interest in it as to enable him to cut, but such a custom ought to be proved by extremely strong evidence.¹

16. Municipalities.—A city which takes rock from land granted to it merely as a right of way, commits waste.² But it has been held that such taking of rock must be substantially a quarry, or it will not constitute waste.³

17. Jointresses.—It is willful waste for a jointress to pull down houses,⁴ or to do other like acts; but if she gives leave to the next in remainder for life, who is without impeachment of waste, to cut timber, and the remainderman in tail acquiesces in such cutting, the jointress is not liable to the remainderman in tail for the waste committed by him who was next in remainder for life.⁵

VII. REMEDIES—1. At Law.—At common law there were two remedies for waste, one by a writ of prohibition and attachment, where waste had been threatened, the other by the writ of waste, where waste had actually been committed, in which latter action the tenant was obliged to pay the value of the waste, and a keeper was appointed to prevent future waste.⁶ Both remedies were granted originally only against tenants in dower, curtesy, and guardians in chivalry, but by the statutes of Marlbridge and Gloucester were extended against tenants for life and for years.⁷

1. *Whitechurch v. Holworthy*, 19 Ves. 213.

2. *Smith v. Rome*, 19 Ga. 89; 63 Am. Dec. 298.

3. *Denniston v. Clark*, 125 Mass. 216; *Dillon on Mun. Corp.* (2d ed.), § 544, note.

4. *Cooke v. Whaley*, 1 Eq. Abr. 400; *Cook v. Winford*, 1 Eq. Abr. 221.

If a jointress has a covenant that her jointure shall be of a certain yearly value, which falls short, though her estate is not without impeachment of waste, yet the court will prohibit her committing waste, so far as to make up the defect of her jointure. *Carew v. Carew*, 1 Eq. Abr. 400.

It is a question whether the court will relieve as to waste if the under tenant of a jointress commits waste sparsim, but improves the yearly value and offers to take a lease at the improved rent and to pay for the timber cut. *Ligo v. Smith*, 2 Vern. 263.

5. *Aston v. Aston*, 1 Ves. 396.

6. 1 *Washburn on Real Prop.* (5th ed.), p. 158; 2 *Coke's Insts.* 299.

7. *Shult v. Barker*, 2 S. & R. (Pa.) 272; *Dozier v. Gregory*, 1 Jones (N. Car.) 100; *Moore v. Ellsworth*, 3 Conn. 483; *Yool on Law of Waste*

and Nuisance, p. 4; *Bract.* 315 b, 316; 2 *Coke's Insts.* 300; 2 *Bl. Com.* 282.

In *Sackett v. Sackett*, 8 Pick. (Mass.) 309, the court, by Parker, C. J., said: "But whatever may have been the reason, it seems that it was thought that some security against waste and destruction, by those who enjoyed the estate without having an interest in the inheritance, was needed, and, therefore, the statute of 52 Hen. 3, was passed, commonly called the statute of Marlbridge, in the year 1267; which provided, 'that fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convicted, they shall yield full damage, and shall be punished by amerciamment grievously.' A few years' experience seems to have proved that this lenient remedy, against those who held freeholds or estates for years, was insufficient to secure such estates against depredations injurious to the inheritance, and probably it was seen that a remedy in damages did not afford

These statutes have been held to be a part of the common law of some of the *United States*, but the courts differ as to the extent of their application.¹

a. WRIT OF PROHIBITION AND ATTACHMENT.—The writ of prohibition issued out of a court of chancery, which, if ineffectual, was followed by an original writ of attachment from the same source, returnable in the courts of common law.² By the statute of Westminster II., the writ of prohibition was taken away, and the writ of summons was substituted in its place.³ But the entire remedy has been replaced in practice by the equitable remedy of injunction.⁴

b. WRIT OF WASTE.—At the common law, the writ of waste referred to waste “committed against our prohibition,” but the maintenance of it was not dependent on the prior issuance of a writ of prohibition, for the common law was itself a prohibition of waste.⁵

(1) *When and by Whom Maintainable*.—At the common law, no one could maintain the action of waste unless he had an immediate estate of inheritance upon the determination of the estate in dower or curtesy, without any interposing vested freehold.⁶ It

indemnity to the reversioner; for many times it would happen, that he who committed or suffered the waste was unable to make the recompense. Those who enjoyed the temporary right would be eager to get the most profit at the least expense, and would be careless of the interests of those who came after them; and for these reasons, no doubt, the statute of 6 Edw. I., called the statute of Gloucester, was enacted only eleven years after the statute of Marlbridge, viz., in 1278. This statute provides, ‘that a man from henceforth shall have a writ of waste in the chancery, against him that holdeth by law of *England*, or otherwise, for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste, shall lease the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at,’ etc.”

1. *Sackett v. Sackett*, 8 Pick. (Mass.) 309; *Hasty v. Wheeler*, 12 Me. 438; 4 Kent’s Com. 79; 1 Washburn on Real Prop. (4th ed.), p. 157. But see *Moore v. Ellsworth*, 3 Conn. 483.

“The courts of the various states have held differently in respect to the extent to which the common law as to waste, or the statutes of Marlbridge and Gloucester have been adopted in the different states.” 1 Washburn on Real Prop. (5th ed.), p. 162.

2. 1 High on Injunctions (3d ed.), § 649; *State v. Com’rs of Roads*, 1 Mill (S. Car.) 55; 12 Am. Dec. 596.

In *Jefferson v. Bishop of Durham*, 1 Bos. & P. 120, the court, by Eyre, C. J., said: “At common law the proceeding in waste was by writ of prohibition from the court of chancery, which was considered as the foundation of a suit between the party suffering by the waste, and the party committing it. If that writ was obeyed, the ends of justice were answered; but if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of attachment out of chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the original writ of attachment which was, and is, the foundation of all proceedings in prohibition.”

3. 2 Coke’s Insts. 389; *Jefferson v. Bishop of Durham*, 1 B. & P. 121.

4. Yool on Law of Waste and Nuisance, p. 78.

5. 2 Coke’s Insts. 300.

6. Comyn’s Dig., “Waste,” ch. 2; Co. Lit. 218b, n 122.

“It will have been remarked that the action can only be brought by one who has the immediate estate of inheritance, *i. e.*, an immediate reversion or remainder in fee or in tail. Thus, ‘if a

was essential to the maintenance of an action of waste that there be a privity of estate between the parties to the action; so that, if the reversioner granted away his reversion after waste done, no action would lie, and the same would have been the effect if the owner of the reversion had died, and it had descended to his heirs; so if, after the commission of waste, the tenant for life died, no action lay against his executors.¹ Thus, if a tenant in dower had assigned her interest, and the reversioner his, the assignee of the reversion could not maintain waste against the assignee of the dower estate, because there was no privity between them.² But in such a case, the heir of the reversioner might maintain the action of waste, or case in the nature of waste, against her after the assignment of her estate. So might the assignee of the heir of the reversioner against the assignee of the life estate. But between the assignee of the reversion of the life estate and the tenant in dower or curtesy, there is no privity at all.³

But these technical rules of the common law have been abolished by statute in some of the states; the heirs or personal representatives of the reversioner being given the right to the action of waste for injury to the reversion done in the lifetime of the ancestor;⁴ and the right of action is also preserved by statute against the executors of the tenant.⁵ But the technical rules of

lease be made to A for life or years, remainder to B for life, and A commit waste, the action cannot be brought by him in the remainder, or reversion in fee or in tail, so long as the estate of B continues. But if B should afterwards die or surrender his estate, the reversioner or remainderman may bring an action against A for the waste so done by him, for by the death or surrender of B the impediment is removed. So, if a lease for life be made remainder for years, the reversioner or remainderman may bring the action notwithstanding the mesne remainder. No person can maintain the action unless he had an estate of inheritance in him at the time of the waste committed, and, therefore, it does not lie by an heir for waste done in the lifetime of his ancestor, nor by the grantee of a reversion for waste done before the grant to him." Yool on Law of Waste and Nuisance, p. 4.

A person who has not the immediate estate of inheritance, expectant on the termination of the life estate, cannot maintain an action of waste against the life tenant. *Hatch v. Hatch*, 31 Wkly. Law Bull. (Ohio) 57.

1. *Whitney v. Morrow*, 34 Wis. 644; Co. Lit. 53b.

2. *Foot v. Dickinson*, 2 Met. (Mass.) 611.

3. *Bates v. Shraeder*, 13 Johns. (N. Y.) 260; *Walker's Case*, 3 Rep. 23; *Foot v. Dickinson*, 2 Met. (Mass.) 611; 2 Coke's Insts. 301.

4. 1 Washburn on Real Prop. (5th ed.), p. 159.

The right to maintain an action of waste survives to the personal representatives of the reversioner, and is assignable. *Rutherford v. Aiken*, 3 Thomp. & C. (N. Y.) 60.

5. 1 Washburn on Real Prop. (5th ed.), p. 159.

The action of waste abates on the death of the defendant (unless statutes provide for its revival against his personal representatives), because it is founded on the statute of Gloucester, which is highly penal, and the action is, therefore, in some degree vindictive. *Browne v. Blick*, 3 Murph. (N. Car.) 511.

Where, in an action to recover damages in the nature of waste, the defendant, a tenant for life, dies, pending such action, it is not error in the court below to allow the personal representative of such defendant to be made a party. Further, the court may, in its discretion, allow the plaintiff to amend

the common law seem to be applied to statutes concerning waste, unless such statutes provide that privity of estate need not exist.¹

The party bringing the action must have the legal title to the land,² or be a trustee, or have a right to the legal title;³ but he need not set out his title particularly in the pleadings, it being sufficient if he shows himself entitled to the immediate estate of inheritance;⁴ neither is he required to recite or refer to the statute giving the action of waste, either in the summons or declaration.⁵ It is not a material variance if several kinds of waste are alleged in the declaration, and only certain, and not all of them, are found by the jury to have been committed.⁶ And if a defendant is found guilty of waste as to part of the premises on which he is charged, it amounts to a verdict of acquittal as to the rest.⁷

The reversioner has also the right to go upon the premises in a peaceable manner, for the purpose of examining the same,

his complaint and declare for actual damages. *Shields v. Lawrence*, 72 N. Car. 43.

1. *Lauder v. Hall*, 69 Wis. 331.

A person must be seized of an estate in remainder or reversion, to maintain an action of waste for an injury done to the inheritance, when there is an intervening estate for life or for years (1 *New York Rev. Stat.* 750, § 8); but a court of equity will sometimes interfere to prevent waste when the party complainant cannot maintain an action at law against the wrongdoer. *Woodruff v. Cook*, 47 Barb. (N. Y.) 309.

Action by Remainderman Under Statute.—The statute (1 *New York Law*, p. 527, Sess. 36, ch. 56, § 33) authorizing any person or persons seized of an estate in remainder or reversion, to maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding an intervening estate for life or for years; gives such person or persons, in remainder or reversion, an action of waste only against the tenant or his assignee or heirs; and an action of trespass against a stranger only. *Livingston v. Haywood*, 11 Johns. (N. Y.) 429.

2. *Gillett v. Treganza*, 13 Wis. 527; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *Lawson on Rights, Remedies, and Practice*, vol. 6, p. 4665.

An executor who has no right or title to the premises, but is only authorized to lease the same, cannot maintain an action for waste. Such action can only be maintained by a reversioner in fee. But the executor may maintain an action upon covenants in the lease,

against committing waste. Page v. Davidson, 22 Ill. 111.

3. A trustee named in a will may maintain the action of waste, even though he does not name himself as trustee in the declaration. *Woodman v. Good*, 6 W. & S. (Pa.) 169.

A *cestui que trust* may maintain an action of waste against his trustee, without first obtaining a conveyance of the legal title. *Wyant v. Dieffendafer*, 2 Grant's Cas. (Pa.) 334. But see *Gillett v. Treganza*, 13 Wis. 472.

4. *Greenly v. Hall*, 3 Harr. (Del.) 9.

In an action of waste, in which the title of the plaintiff to the place wasted was set forth as a devise of a remainder in fee, and the evidence was, that he was entitled to a reversion in fee by descent, subject to a power of sale, it was held that the variance was fatal. *Southerland v. Jones*, 6 Jones (N. Car.) 321.

Under *Massachusetts Act* (1795), ch. 75, § 3, permitting a recovery in debt for waste which was committed pending a suit to which the defendant was not a party, the declaration must allege that the defendant knew of its pendency when he committed the waste. *Reed v. Davis*, 8 Pick. (Mass.) 514.

5. *Carris v. Ingalls*, 12 Wend. (N. Y.) 70.

6. *Dozier v. Gregory*, 1 Jones (N. Car.) 100; *Greene v. Cole*, 2 Wm. Saund. 644. But a mere allegation that large amounts of timber were cut is not a sufficient averment of waste. *Wright v. Roberts*, 22 Wis. 161.

7. *Morehouse v. Cotheal*, 22 N. J. L. 521.

if an action of waste is pending between himself and another.¹ An action of waste may be successfully defended by proving a writ of *ad quod damnum* on behalf of the plaintiff, even if the writ is applied to other purposes than those for which it was granted.²

And although the writ of waste was abolished by 3 & 4 William 4, ch. 27, § 26, the decisions regarding it seem to have been applied generally to the action on the case in the nature of waste, which has been substituted in *England*, and quite generally in the *United States*, for the old writ of waste.³

Though the interposition of a freehold in remainder between the estate of the tenant committing waste, and the remainder or reversion in fee, would prevent the owner of the latter from maintaining waste as the law stood, yet he may seize timber cut upon the premises, bring trover for its conversion, or replevy it, or bring trespass *de bonis* for the removing of it. Nor does it matter whether the timber is cut by a stranger or by the tenant himself, since the tenant cannot convey any interest in it when severed.⁴ The reversioner may maintain trespass for the removal of timber which has been severed from the freehold, against anyone who removes it, even though it be the tenant himself, as the property in chattels carries with it possession as against a wrongdoer.⁵ The tenant for life would be subject to the same liability in this regard, even though the timber had grown upon pasture land when he took possession, and though the natural growth, before the determination of his estate, would become equal in value to the timber which he had severed; and it has been held that he could not set off against the reversioner's claim for damages, what he had paid to procure firewood from other sources for the premises.⁶ These

1. *Conwell v. State*, 3 Ind. 387; 36 Am. Dec. 512.

2. In an action of waste, the plaintiff offered in evidence a writ of *ad quod damnum*, under which the defendant claimed an inquisition thereon, and a lease for eighty years, granted in pursuance thereof, for twenty acres of land, particularly described as being condemned for building a water mill. The plaintiff then proved that the land described on the plots in the case was, at the time of the execution of the writ of *ad quod damnum*, unimproved, and covered with timber and other trees; that the defendant applied the same to other purposes than to the use or support of the mill or houses; that he cleared the land, and put it in a state of cultivation. It was held that the plaintiff was not entitled to recover; that the defendant was not guilty of the waste complained of, but was justified, under the writ and the grant made in virtue of the same, in clearing and cul-

tivating the land. *Adams v. Brereton*, 3 Har. & J. (Md.) 124.

3. Yool on Law of Waste and Nuisance, p. 5; *Jefferson v. Jefferson*, 3 Lev. 131; *Bacon v. Smith*, 1 Q. B. 345; 4 P. & D. 651; *Stevens v. Rose*, 69 Mich. 259; *Stetson v. Day*, 51 Me. 434; *Woodhouse v. Walker*, 5 Q. B. Div. 404.

The action of waste, though generally superseded by the action of ejectment, in *Delaware* is still not obsolete. *Waples v. Waples*, 2 Harr. (Del.) 281.

4. *Lewis Bowles' Case*, 11 Rep. 82; *Berry v. Heard*, Cro. Car. 242; *Richardson v. York*, 14 Me. 216; *Bulkley v. Dolbeare*, 7 Conn. 232; *Mooers v. Wait*, 3 Wend. (N. Y.) 104; 20 Am. Dec. 667.

5. *Lane v. Thompson*, 43 N. H. 320. Waste cannot be maintained against a tenant for cutting and carrying away trees blown down; trover for conversion is the proper action. *Shult v. Barker*, 12 S. & R. (Pa.) 272.

6. *Clark v. Holden*, 7 Gray (Mass.)

remedies are extended also to materials of buildings severed from the inheritance, and the product of mines wrongfully taken.¹

Under the statutes of some of the states, the action of waste may be maintained by the assignee of the reversioner.²

c. ACTION OF TRESPASS ON THE CASE IN THE NATURE OF WASTE.—Owing to usage and legislation, the action of trespass on the case in the nature of waste, has been substituted quite generally for the action of waste,³ although under the statutes of some states both remedies exist. Under such statutes the plaintiff may have an action of waste to recover the place wasted and the damages, or he may have an action on the case in the nature of waste to recover his damages only, but he cannot have both.⁴

8; 66 Am. Dec. 450; *Phillips v. Allen*, 7 Allen (Mass.) 115. But see *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 604.

In an action involving the question of waste by cutting timber, evidence that the land would be worth more cleared than with the trees standing on it, is never allowed as a justification for the waste. *Huddleston v. Johnson*, 71 Wis. 336.

1. *Tudor's Lead. Cas.* 67; *Uvedall v. Uvedall*, 2 Rolle's Abr. 119, pt. 3.

2. *Rutherford v. Aiken*, 3 Thomp. & C. (N. Y.) 60.

3. *Shult v. Barker*, 12 S. & R. (Pa.) 272; *McCullough v. Irvine*, 13 Pa. St. 438; *Bellows v. McGinnis*, 17 Ind. 64; *Stevens v. Rose*, 69 Mich. 259; *Stetson v. Day*, 51 Me. 434; *Woodhouse v. Walker*, 5 Q. B. Div. 404; *Jefferson v. Jefferson*, 3 Lev. 131; *Bacon v. Smith*, 1 Q. B. 345; 4 P. & D. 651; *Green v. Cole*, 2 Saund. 252, n. 7; 4 Kent's Com. 81; 1 Washburn on Real Prop. (5th ed.), p. 162; *Yool on Law of Waste and Nuisance*, p. 5.

In *Dozier v. Gregory*, 1 Jones (N. Car.) 100, the court, by Battle, J., said: "The action of waste, which was founded upon privity of estate, and could only be brought by the owner of the inheritance against his immediate tenant for life or years, is now very seldom used, and has given way to a more easy and general remedy, to wit, an action on the case in the nature of waste."

An action on the case in the nature of waste, in *New Jersey*, is an action founded on the act for the prevention of waste, which is substantially the same as the statutes of *Marlbridge* and *Gloucester*. The action may be maintained, although the waste alleged might be the subject of an action for the breach of an express covenant con-

tained in an instrument of demise, or for the breach of a promise implied by law. *Moore v. Townshend*, 33 N. J. L. 284. In this case, the court, by Depue, J., said: "The action on the case in the nature of waste, has almost entirely superseded the common-law action of waste, as well for permissive as for voluntary waste, as furnishing a more easy and expeditious remedy than a writ of waste. It is also an action encouraged by the courts, the recovery being confined to single damages, and not being accompanied by a forfeiture of the place wasted."

Although the plaintiff cannot, in an action on the case, recover the place wasted, where the tenant is still in possession, as he may do in an action of waste, yet this latter action was found by experience to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff obtained little or no advantage from it. It has also this further advantage over an action of waste: it may be brought by him in the reversion or remainder for life or years as well as in fee, or in tail, and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste. *Green v. Cole*, 2 Saund. 233, note.

The technical action of waste is abolished, and an action according to the forms of pleading provided for by the code substituted in lieu thereof. *New York Code*, § 450; *Harder v. Harder*, 26 Barb. (N. Y.) 409. Under the provision of the *New York* code referred to, the remedies given are treble damages, and forfeiture of the particular estate, if the injury to the reversion equals the value of the tenant's unexpired term.

4. *Stetson v. Day*, 51 Me. 434.

In an action of damages for waste,

It is no defense to an action on the case in the nature of waste brought by the reversioner, that he purchased the estate of the particular tenant after the waste was committed,¹ or that the defendant purchased the interest of the reversioner, during the pendency against him of an action on the case for the waste which he had committed.²

Although the modern action on the case in the nature of waste may be maintained in all cases where the old writ of waste lay, yet it does not follow that it is confined to such cases.³

The earlier cases⁴ held that this action would not lie for permissive waste, whether there was any covenant on the part of the tenant to repair or not, but the rule seems now to be that it does lie, especially if there is an express covenant to repair.⁵

If a count in trover be added to a declaration in an action on the case in the nature of waste, the plaintiff may recover the value of the timber, even though it has been increased by the wrongdoer's labor.⁶

(1) *When and by Whom Maintainable*.—At the common law, an action on the case might be maintained against either the tenant or a stranger, by the reversioner,⁷ even if he had alienated his estate.⁸ In such an action it is not necessary that the owner of the intervening estate for life or years unite with the reversioner

the jury cannot allow damages for prospective waste, but damages can be assessed only up to the time of trial. And if the life tenant should allow the inheritance to sustain further injury after the time of trial, damages may be recovered in another action. *Sherrill v. Connor*, 107 N. Car. 630.

In an action to recover possession of real estate, during the term of the lease, on the ground of waste alleged to have been committed thereon by the lessees, it must be shown that the injury to the property, caused by the waste, was equal to the value of the unexpired term of the lessees thereof, or that the injury had been done in malice. *Bollenbacker v. Fritts*, 98 Ind. 50.

1. *Dupree v. Dupree*, 4 Jones (N. Car.) 387; 69 Am. Dec. 757.

2. The plaintiff, in an action on the case in the nature of waste, conveyed her interest in the property to the defendant during the pendency of the action. It was held that if she held the reversionary interest in the property at the time the act complained of was committed, she was entitled to recover for the same; her alienation of the property afterward, or during the pendency of the suit for damages, could not operate to defeat her right of recovery. *Dickinson v. Baltimore*, 48 Md. 583.

3. *Patterson v. Cunliffe*, 11 Phila. (Pa.) 564; *Dozier v. Gregory*, 1 Jones (N. Car.) 100.

4. *Herne v. Benbow*, 4 Taunt. 764; *Jones v. Hill*, 1 Moore 100; *Gibson v. Wells*, 1 N. R. 290; *Yellowly v. Gower*, 11 Exch. 294; *Turner v. Buck*, 22 Viner's Abr., tit. "Waste," p. 523.

5. *Dozier v. Gregory*, 1 Jones (N. Car.) 100; *Woodhouse v. Walker*, 5 Q. B. Div. 404; *Stevens v. Rose*, 69 Mich. 259; *Harnett v. Maitland*, 16 M. & W. 257; *White v. M'Cann*, 1 Ir. C. L. 205.

6. *Harris v. Goslin*, 3 Harr. (Del.) 340.

7. *Randall v. Cleaveland*, 6 Conn. 328; *Elliot v. Smith*, 2 N. H. 430; *Dozier v. Gregory*, 1 Jones (N. Car.) 30. See *Wilford v. Rose*, 2 Root (Conn.) 20.

An action of trespass will not lie by a reversioner, for an injury to the inheritance committed by a person who acts under the authority, or by the permission, of the tenant for life; such person not being a stranger within the meaning of the statute authorizing actions by reversioners. *Livingston v. Mott*, 2 Wend. (N. Y.) 605.

8. *Robinson v. Wheeler*, 25 N. Y. 252; *Dickinson v. Baltimore*, 48 Md. 583. See also, in this connection, *Co. Litt.*, p. 218; *Bacon's Abr.*, tit. "Waste," G.

or remainderman as plaintiff.¹ This action may be maintained also by one who enters upon and holds premises by permission of the owner,² by one claiming under a deed to own an interest in land, against one holding by reason of and claiming title adverse to him, even if the plaintiff is not in the actual possession of the land;³ and by a vendee out of possession.⁴ Possession by the owner of land is not necessary to enable him to sue one who is wrongfully in possession and committing waste.⁵

But the action on the case cannot be maintained by one who has a contingent remainder, or who is entitled upon a contingency to an executory devise,⁶ nor by the devisee of a contingent remainder.⁷

Neither can it be maintained against a tenant who cuts up and converts trees which have been blown down by the wind.⁸

It differs from the action of waste in that it may be brought by the person in remainder or reversion for life or years, as well as in fee.⁹

1. Van Deusen v. Young, 29 N. Y. 9; Bouton v. Thomas, 46 Hun (N. Y.) 6.

2. One who is entitled to the inheritance may recover in an action on the case for an injury to the inheritance by the tenant in dower, though there is an intermediate life estate. Short v. Piper, 4 Harr. (Del.) 181.

3. In an action of tort in the nature of waste, all the owners of the premises wasted must join as plaintiffs. Bullock v. Hayward, 10 Allen (Mass.) 460.

4. Freeman v. Headley, 33 N. J. L. 523.

5. Dodge v. Davis, 85 Iowa 77.

By the Michigan law of 1875, properly recorded certificates of a sheriff's execution sale are entitled to the same record privileges with other conveyances of land, as to establishing priority of title. It was held that a grantee of land by deed can maintain a suit for waste as against a subsequent purchaser of the land on an execution sale before the above act took effect, even though the said grantee did not record his deed before the execution sale. Drake v. McLean, 47 Mich. 102.

Where one, who has bid off lands at a sale under execution upon a judgment, between the time of the sale and redemption, cuts and carries away timber from the land with the consent of the judgment debtor who was in possession, an action on the case in the nature of waste, to recover damages for the waste, will lie against him in favor of a junior judgment creditor who redeemed the land from the sale

and received the sheriff's deed. Thomas v. Crofut, 14 N. Y. 474.

4. Where A and B entered into a contract for an exchange of lands, and subsequently passed the deeds of conveyance and delivered possession before which time, and after the contract of sale, A committed waste on the land sold by him, it was held that B might maintain an action on the case against him for the injury. Marsh v. Current, 6 B. Mon. (Ky.) 493.

5. Achey v. Hull, 7 Mich. 423.

6. Hunt v. Hall, 37 Me. 363.

7. Sager v. Galloway, 113 Pa. St. 500.

8. Shult v. Barker, 12 S. & R. (Pa.) 272.

9. Dozier v. Gregory, 1 Jones (N. Car. 100; Williams v. Lanier, Busb. (N. Car.) 30; Green v. Cole, 2 Saund. 252, n. 7; Cru. Dig. 124.

An action on the case in the nature of waste, may be brought as well by him in remainder for life or years, as in fee or in tail, but such action does not lie for one who has no interest either in remainder or reversion—the recovery being as for an injury done to the reversion—on no other ground can the action be maintained. M'Laughlin v. Long, 5 Har. & J. (Md.) 113.

The Revised Statutes of Indiana, 1881, give the right or cause of action for waste or trespass for injury to the inheritance, to the person seised of the estate in remainder or reversion. And when an infant shall have a right of action, such infant shall be entitled to

d. AGAINST WHOM ACTIONS OF WASTE AND OF CASE IN THE NATURE OF WASTE ARE MAINTAINABLE—(1) *Tenant for Life*.—The reversioner may sue, in an action on the case, the assignee of a life estate.¹ He may also sue one who purchases timber trees from the life tenant and severs them from the land; and the fact that the purchaser has already paid the life tenant for the timber so severed, will not bar a recovery from him by the reversioner of the value of the timber severed, or for the damage thereby done to the inheritance.²

bring suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age. It was held that an infant seised of an estate in remainder or reversion, must sue in his own proper name or by next friend, for waste, or trespass, or injury to the inheritance committed by the life tenant, and that a guardian of the infant cannot maintain an action. *Wilson v. Galey*, 103 Ind. 257.

1. In *Curtiss v. Livingston*, 36 Minn. 380, the court, by Gilfillan, C. J., said: "An assignee of an estate for life or for a term of years, is a tenant for life or for years. His estate is one for life or years, according to the nature of the interest granted to his assignor. Though there are very few decisions on the question whether the action for waste may be maintained against an assignee of the lessee for life or years (we have not found any case deciding that it cannot), it seems to have been considered in *England*, under the common law as enlarged by the statutes of Gloucester and Marlbridge, that the action will lie. Thus Coke says (1 Inst. 54a): 'If tenant for life grant over his estate upon condition, and the grantee doeth waste, and the grantor reëntereth for the condition broken, the action of waste shall be brought against the grantee.' See also *Sanders v. Norwood*, Cro. Eliz. 683; *Ward v. Waddington*, Clayt. 126; *Constance Foster's Case*, Goulds. 63; *Green v. Cole*, 2 Saund. 252, and note. So, in *New York*, an action on the case in the nature of waste lay against the assignee. *Short v. Wilson*, 13 Johns. (N. Y.) 33. The assignee is as much within the reason for the rule as the lessee before assigning. Succeeding to the entire interest of the lessee, and standing in his estate, he owes the same duty, so far as privity of estate is concerned, to preserve the reversion."

Under the *Michigan Comp. Laws*, §§

4698, 4699, where a tenant for life conveys his estate absolutely without retaining possession, an action on the case in the nature of waste cannot be maintained against such tenant for waste committed by his grantee. *Beers v. Beers*, 21 Mich. 464.

If a tenant for life takes timber growing on the farm for the purpose of erecting a new building in the place of one destroyed by the act of God, he is liable to the reversioner in an action of waste and may be enjoined from continuance. *Miller v. Shields*, 55 Ind. 71.

A tenant, being liable to the landlord or reversioner for waste done by a stranger, has his remedy over against such stranger, but the tenant's recovery against the stranger, for injuries to the freehold or reversion, depends upon his first having done something by way of repairs or towards satisfying the landlord for the injury to the inheritance; and such remedy ought not to be for more than he pays in satisfaction, or necessarily expends in repairs. *California Dry Dock Co. v. Armstrong*, 17 Fed. Rep. 216.

A reversioner may maintain an action of waste to recover damages of the tenant for life, for felling timber trees on the premises for the purpose of sale, although the tenant acted in good faith or under the claim of right, or was in possession claiming title in fee to the land upon which the waste was committed; and such reversioner is not debarred from his remedy at law or in equity for waste, because the proceedings may involve the determination of a disputed title. *Robinson v. Kime*, 70 N. Y. 147.

One of several remaindermen, who merely acquiesces in the commission of waste by the tenant for life, does not thereby become liable for such waste, to those entitled jointly in remainder. *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281.

2. *Dorsey v. Moore*, 100 N. Car. 41.

Tenants in common for life are liable to the reversioner or remainderman, in an action on the case, for injury to the inheritance, whether committed by themselves or a stranger, or by some only of such tenants; but until they have first satisfied the remainderman or reversioner, they can recover from a stranger only damages for the injury to their possession.¹

Under the statutes of some of the states,² the assignee of the reversioner may maintain an action of waste, against the subtenant of the tenant for life.

The pleadings must definitely allege waste against a tenant for life, or there can be no recovery.³ A statute restricting tenants for life from committing waste, has been construed to include tenancies for life created by will.⁴

(2) *Tenant in Dower*.—Some states in which the penalties of the statute of Gloucester have been retained, have modified those penalties in respect to the tenant in dower;⁵ and under the statutes of some states no action of waste will lie against the tenant in dower, although an action on the case will lie.⁶

If a tenant in dower assigns her estate to a third person who commits waste, the heir may maintain against her the action of waste, on account of the privity between them.⁷ But if the tenant in dower assigns her estate and the heir also assigns his reversion, neither the action of waste, nor case in the nature of waste, can be maintained against the tenant in dower by the assignee of the heir, for there is no privity of estate between them.⁸

While the husband of a tenant in dower is not liable for mere permissive waste after the death of his wife, and after the surrender of his possession, he will be liable in an action on the case

1. *Wood v. Griffin*, 46 N. H. 230; *Fay v. Brewer*, 3 Pick. (Mass.) 203.

2. In an action for waste, by the assignee of the reversioner, against the subtenant of the tenant for life, it was held that an action for waste was maintainable under 2 *New York Rev. Stat.* 334, § 1, against the subtenant; that the cause of action was one that would survive to the personal representatives of the reversioner, and was assignable; that the fact that the waste was committed without malice, and under the belief, on the part of the defendant, that he had a right to do the acts constituting it, did not affect the right of the plaintiff to treble damages. *Rutherford v. Aiken*, 3 *Thomp. & C.* (N. Y.) 60.

3. A complaint against a life tenant for waste alleged that he sold and destroyed timber, but there was no description of the timber sold, nor any statement of the attending circum-

stances. It was held that the complaint was too indefinite to show waste. *Stout v. Dunning*, 72 *Ind.* 343.

4. The act restricting tenants for life from committing waste, passed in 1840 (*Connecticut Rev. Stat.*, tit. 1, ch. 15, § 284), embraces tenancies for life created by will. *Hamden v. Rice*, 24 *Conn.* 350.

5. An action of waste will not lie against a dowress for mere ill-husbandry. *Richards v. Torbert*, 3 *Houst. (Del.)* 172.

By the *Massachusetts Act of 1783*, ch. 40, § 3, a tenant in dower, committing waste, forfeits the place wasted and single damages only. *Padelford v. Padelford*, 7 *Pick. (Mass.)* 152.

6. *Smith v. Follansbee*, 13 *Me.* 273. But see *Crocker v. Fox*, 1 *Root (Conn.)* 323.

7. *Comyn's Dig.*, "Waste," ch. 4; *Bacon's Abr.*, "Waste," L.

8. *Foot v. Dickinson*, 2 *Met. (Mass.)* 611.

for voluntary waste, such as pulling down buildings, although they may have been erected by himself.¹

Proof of waste by the dowress is not sufficient to authorize a recovery in ejectment by the reversioner, and the forfeiture of the thing wasted is enforceable by no other remedy than the action of waste;² nor can an action of trespass *quare clausum fregit* be maintained by the reversioner, for waste committed by a person acting under the authority of a tenant in dower.³

(3) *Tenant by the Curtesy*.—An action of waste does not lie by the heir against the assignee of the tenant by the curtesy, but only against the tenant himself.⁴

(4) *Tenant in Common*.—One tenant in common can maintain an action on the case in the nature of waste against his cotenant, if the waste committed amounts to a destruction of the property held in common.⁵ Under the statutes of some states, one tenant

1. McCullough v. Irvine, 13 Pa. St. 438.

The husband of a tenant in dower, who removes a house from the premises, is liable in an action on the case in the nature of waste, even after the death of his wife, though he may have built the house himself. Dozier v. Gregory, 1 Jones (N. Car.) 100.

2. Robinson v. Miller, 2 B. Mon. (Ky.) 284.

3. Shattuck v. Gragg, 23 Pick. (Mass.) 88. But it was stated in this case that, although trespass *quare clausum fregit* would not lie, the action of waste, or of case in the nature of waste, would lie.

4. In Bates v. Shraeder, 13 Johns. (N. Y.) 260, the court, by Yates, J., said: "At common law, the assignee of the tenant by the curtesy cannot be sued in waste. The action ought to have been brought against the tenant himself by the heir; and the books state that thereby he shall recover the lands against the assignee, for the privity which is between the heir and tenant by the curtesy. (Walker's Case, 3 Co. 23.) So, if tenant in dower, or tenant by the curtesy, grant over their estate, yet the privity of action remains between the heir and them, and he shall have an action of waste against them for waste committed after the assignment; but if the heir grant over the reversion, then the privity of action is destroyed, and the grantee cannot have any action of waste, but only against the assignee, for between them is privity in estate."

5. Darden v. Cowper, 7 Jones (N. Car.) 210; 75 Am. Dec. 461.

The action on the case in the nature

of waste, allowed by North Carolina Rev. Stat., ch. 119, § 4, to one tenant in common against his cotenant, is limited to cases where there is a permanent injury done to the property held in common. Smith v. Sharpe, Busb. (N. Car.) 91; 57 Am. Dec. 574.

The Maine Act of March 15, 1821, ch. 35, § 2, which punishes waste committed by one tenant in common without notice to the others, by treble damages, applies only to cases where the tenancy in common is admitted, and not to cases where the entirety is claimed by title or disseisin, although it turns out defective as to a moiety. Prescott v. Nevers, 4 Mason (U. S.) 326.

But this rule seems to be different in other states. See Childs v. Kansas City, etc., R. Co. (Mo. 1891), 17 S. W. Rep. 954; Dodge v. Davis, 85 Iowa 77.

The extraction of ore from a mine, and the cutting of timber on the claim to be used in the operation, by a tenant in common, is not waste, within California Code Civ. Proc., § 732, providing that, if a tenant in common of real property commit waste thereon, any person aggrieved by the waste may bring an action against him for treble the damages. McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134; 49 Am. Rep. 686.

If one tenant in common destroys houses or trees, or does any act amounting to waste or destruction in woods or other such property, the other tenant may have an action on the case against him, but he can never, in any event, have an action of trespass *quare clausum fregit* against his cotenant,

in common may recover in trespass treble damages for strip and waste committed by a cotenant during the pendency of a suit between them for partition.¹

(5) *Tenant for Years*.—The tenant for years is liable in an action on the case to the reversioner or remainderman, both for waste committed by himself² and by strangers;³ and this is the case even if the reversioner has alienated his estate at the time the

nor against any person entering by his authority. *Anders v. Meredith*, 4 Dev. & B. (N. Car.) 199; 34 Am. Dec. 376.

1. *Maxwell v. Maxwell*, 31 Me. 184.

2. *Moore v. Townshend*, 33 N. J. L. 284; *Machen v. Hooper*, 73 Md. 342.

If a tenant for life or years commits waste, he forfeits the place wasted and treble damages; and yet, if by the terms of his lease it appears that improvements were to be made by the lessee, no action of waste could be sustained, although he makes such alterations as, at common law, would have been waste. *Hasty v. Wheeler*, 12 Me. 434.

An action will lie against a tenant from year to year for permissive waste. *Newbold v. Brown*, 44 N. J. L. 266.

Where waste has been committed by a person under a lease, such as making extensive alterations, taking out partitions, removing chandeliers, etc., the lessor is not bound to wait until the expiration of the tenancy before bringing his action. *Agate v. Lowenbein*, 57 N. Y. 604.

Where the tenant in possession of real estate under a lease, and after the death of the lessor, wrongfully cut therefrom a large quantity of wood and converted the same to his own use, it was held that such cutting was clearly waste for which the parties entitled to the reversion, and not the administrator, would be entitled to recover in trespass for waste. *Howard v. Patrick*, 38 Mich. 795.

A tenant for years demised to the remainderman, to have and to hold, during the term, reserving to the lessor the right to erect buildings on the demised premises, without hindrance, the lessee yielding and paying a yearly rent, and engaging to keep the fences in repair, and to pay all taxes; "it being understood that in case the lessor should use any part of the land for buildings and their appendages, a proportionate amount shall be deducted from the rent which the lessee is to pay." It

was held that the term merged in the remainder, and that the lessee could not maintain an action of waste against the lessor. *Pyncheon v. Stearns*, 11 Met. (Mass.) 304; 45 Am. Dec. 207.

In an action of waste by a landlord against a tenant for years, parol evidence of a license for the commission of such waste from the landlord to the tenant, on condition of the performance by the tenant of the certain subsequent acts, is not admissible. *McGregor v. Brown*, 10 N. Y. 114.

3. A tenant is generally responsible for all waste done to the premises, not caused by the act of God, or the public enemy, or the act of the lessor himself. Where a house, which a lessee for a year held under a lease without special covenants, was destroyed by an armed mob, which the lessee had reason to believe would attack the house on account of his using the same for the purpose of distributing a certain newspaper, it was held that the lessee was liable in an action on the case in the nature of waste. *White v. Wagner*, 4 Har. & J. (Md.) 373; 7 Am. Dec. 674.

The reversioner may maintain an action on the case for damage to the freehold, caused by the erection of a dam by a lower proprietor, whereby the water of a stream is so backed up as to clog the plaintiff's mill. *Ripka v. Sergeant*, 7 W. & S. (Pa.) 9; 42 Am. Dec. 214.

The landlord cannot recover for mere wrongful ouster of his tenant by a stranger, where the wrong done is to the tenant alone. To authorize him to recover, it must appear that he has sustained a loss of his rents, which he would have received if the tenant had continued in possession, or that he has sustained damages in the destruction of the premises or in the dilapidation of them, injurious to the reversion, by reason of their being vacant and unoccupied. In that case he may, by an action in the nature of a special action on the case, recover such damages. *Walden v. Conn*, 84 Ky. 312; 4 Am. St. Rep. 204; *McConnel v. Kibbe*, 33 Ill. 175.

suit is brought ;¹ or permits the tenant to retain possession after the commission of the waste, and accepts rent for the full term for which the premises are let ;² or if the waste is committed by a stranger after the tenant leaves the premises, but before his term has expired.³ The action on the case may be maintained, even though the tenant for years is also liable in an action for a breach of an express covenant against waste.⁴

In an action of waste, it is for the jury to determine whether acts done without the permission of the landlord, amount to waste.⁵ If the pleadings in an action of waste set out the premises by metes and bounds, a variance in the proof will be fatal.⁶

A tenant in possession under a lease containing a clause conferring upon him the privilege of purchasing the demised premises within a specified time, and having failed to exercise it, is liable in an action for damages for waste committed on the premises during his possession.⁷

(6) *Mortgagor and Mortgagee*.—A mortgagee cannot maintain an action on the case in the nature of waste against a mortgagor before a forfeiture of the mortgage ;⁸ but he may maintain it for waste

1. *Robinson v. Wheeler*, 25 N. Y. 252.

2. *Chalmers v. Smith*, 152 Mass. 561.

3. *Moore v. Townshend*, 33 N. J. L. 284.

A lessee of a house from year to year removed therefrom before the expiration of the year, securely closing the premises; but, within a few days thereafter, the plumbing work was cut out and stolen by persons unknown. It was held that this, even though the act of strangers, constituted commissive waste for which the tenant was liable. *Regan v. Luthy* (C. Pl.), 11 N. Y. Supp. 709.

Case in the nature of waste will lie against the tenant for years, after the expiration of his term, *Kinlyside v. Thornton*, 2 W. Bl. 1110; or after notice to quit, *Burchell v. Hornsby*, 1 Campb. 360.

4. If the lessee or his assigns cut down wood in such a manner as to injure the inheritance, it is waste, and the lessee is liable to an action for a breach of the covenant against waste. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; 5 Am. Dec. 258. In this case, it was also held that if the lease contains a clause of reëntry for a breach of the covenants and conditions in the lease, the lessor may maintain ejectment. *Kinlyside v. Thornton*, 2 W. Bl. 1110.

5. *Jackson v. Tibbits*, 3 Wend. (N. Y.) 341.

6. In an action of waste, the plaintiff need not set out his title particularly; only that he is entitled to the immediate estate of inheritance. If he states in what character he holds, he must state it truly, whether as a reversioner or remainderman; and if he sets out the premises by metes and bounds, a variance in the proof will be fatal. *Greenly v. Hall*, 3 Harr. (Del.) 9.

7. *Powell v. Dayton, etc.*, R. Co., 16 Oregon 33; 8 Am. St. Rep. 251.

8. *Peterson v. Clark*, 15 Johns. (N. Y.) 205, criticised in *Southworth v. Van Pelt*, 3 Barb. (N. Y.) 347. In the latter case, the court, by Mason, J., said: "I am inclined to think that in the case of *Peterson v. Clark* (15 Johns. (N. Y.) 205), the court did not show proper respect to the case of *Yates v. Joyce* (11 Johns. (N. Y.) 136). In that case it was expressly decided that the assignee of a judgment, who had no other interest in the land than the lien of his judgment for the security of his debt, could maintain this action against a person for wrongfully taking down and removing a building upon the land on which the judgment was a lien, and converting it to his own use. And still, it seems to me that all the reasons stated by the court in the case of *Peterson v. Clark* (15 Johns. (N. Y.) 205), against the recovery in that case, apply with full force to the case of *Yates v. Joyce* (11 Johns. (N.

committed upon the mortgaged premises after forfeiture of the mortgage, and after a decree for the sale of the mortgaged premises has been obtained.¹ The mortgagee may also maintain an action on the case against a stranger,² and against a tenant for life who commits waste before the mortgagee of the reversion enters.³

A mortgagee in possession is chargeable with waste in an action of ejectment.⁴ But treble damages, given by a statute in cases of waste committed by him during the pendency of a suit, may not be recovered, unless the plaintiff proceeds in the manner provided by the statute.⁵

(7) *Vendor and Vendee*.—Vendees in possession who commit

Y.) 136). The assignee of the judgment had not the inheritance, and he may never come into the possession of the land; for his interest may be defeated at any time by the payment of the judgment. It seems to me to be difficult to reconcile the two cases; and it strikes me as somewhat singular that in the case of *Peterson v. Clark* (15 Johns. (N. Y.) 205), the court did not so much as notice the case of *Yates v. Joyce* (11 Johns. (N. Y.) 136)."

A mortgagee, after condition broken, and before foreclosure, may maintain an action on the case in the nature of waste, against the mortgagor in possession, for cutting timber on the land and selling it. *Langdon v. Paul*, 22 Vt. 205.

An action on the case will lie by the holder of a mortgage on land, against the mortgagor or a purchaser of the equity of redemption, for acts of waste committed with the knowledge that the value of the security will be thereby impaired. *Van Pelt v. McGraw*, 4 N. Y. 110.

In an action by a second mortgagee of realty, against the mortgagor or his assigns, for an injury to the security resulting from the removal of fixtures or other waste, the damages recoverable are to be measured by the injury to the mortgage as a security. And if it be doubtful whether the damages should not go to the first mortgagee, the court will exert its equitable powers to control the disposition of the fund so that no injustice may be done. *Jackson v. Turrell*, 39 N. J. L. 329.

1. A mortgagee may maintain an action on the case against the mortgagor, or a person claiming under him, for waste committed upon the mortgaged premises after forfeiture of the mortgage, and after a decree for the sale of the mortgaged premises, where the mortgagor is insolvent; and the mort-

gaged premises are inadequate security for the mortgage debt. *Southworth v. Van Pelt*, 3 Barb. (N. Y.) 347. See also *Cooper v. Davis*, 15 Conn. 556.

Where a mortgagor in possession procures the removal of a building from the premises, without the consent or knowledge of the mortgagee, it seems that the person removing the same with a knowledge of the existence of the mortgage, as well as the mortgagor, is legally responsible in damages to the mortgagee. *Dorr v. Dudderar*, 88 Ill. 107.

A purchaser of real estate at a mortgage sale, acquires an inchoate right to the land, subject to be defeated by redemption. If not so redeemed, his title becomes absolute and relates back to the time of purchase. Therefore, after his title is thus perfected, he may maintain an action on the case, for injury done to the estate by cutting and carrying away growing timber between the time of sale and the expiration of the time for redemption. *Stout v. Keyes*, 2 Dougl. (Mich.) 184; 43 Am. Dec. 465.

2. *Patterson v. Cunliffe*, 11 Phila. (Pa.) 564.

3. A mortgagee of a reversion of an estate in dower, who enters after condition broken, may maintain an action against the tenant for life for waste committed before his entry. *Fay v. Brewer*, 3 Pick. (Mass.) 203.

4. *Givens v. M'Calmont*, 4 Watts (Pa.) 460.

5. The treble damages, provided for by *Massachusetts Rev. Stat.*, ch. 105, § 9, where a tenant in possession of land, for the recovery of which an action is pending against him, commits waste thereon during the pendency of the action, can be recovered only in the manner provided by the statute, and cannot be made an item of charge by

waste are liable to the vendor in an action of waste, but only such vendees are liable as were connected with or had knowledge of the waste committed.¹

In an exchange of land, one of the parties who commits waste between the time of the contract of exchange and the delivery of possession, is liable to the other in an action on the case, even if there is no covenant against waste in the deed of exchange.²

(8) *Tenant at Will*.—Trespass on the case in the nature of waste will not lie against a tenant at will for merely permissive waste,³ but it will lie for voluntary waste.⁴ The tenant at will is also liable for waste committed by him, in an action *ex contractu* for

the mortgagor against the mortgagee, in an account stated between them by a master in chancery, on a bill in equity to redeem. *Boston Iron Co. v. King*, 2 Cush. (Mass.) 400.

1. In an action of waste by a county auditor, the complaint alleged that the trustees of *Indiana University* had owned the land, and that the plaintiff, as auditor, had sold it to the defendants, and that the latter had forfeited it. It was held that where a forfeiture is shown and it appears that one of the defendants has committed waste on the land, the auditor is entitled to judgment against him for the amount of damages done. But he cannot recover against one of such purchasers who is not connected with the waste, and who is not shown to have had knowledge of it. *State v. Gramelspacher*, 126 Ind. 398.

Where a purchaser of mills, being in possession, negligently suffers them to be burned, he is responsible to his vendor for the loss, upon a rescission of the contract, deducting the amount paid by him. *Cornish v. Strutton*, 8 B. Mon. (Ky.) 586.

When a contract for the sale of land, which the purchaser has paid for and is put in possession of, is rescinded for causes free of fraud, the purchaser is not answerable for the natural wear and tear, or such deterioration only as may have resulted in the prudent and ordinary use of the land, but should be held responsible for waste or any damage or deterioration caused by gross neglect, wantonness, or mismanagement. *Williams v. Rogers*, 2 Dana (Ky.) 374.

2. *Marsh v. Current*, 6 B. Mon. (Ky.) 493.

Where a vendee of land is in possession under a contract sale, remaining open and in force between the parties,

the vendor has not such a reversionary interest in the estate, as, in the event of waste being committed by the vendee, will support an action for such damages in the nature of an action for waste. *Stauffer v. Eaton*, 13 Ohio 322.

3. *Harnett v. Maitland*, 16 M. & W. 256; *Yool on Law of Waste and Nuisance*, p. 62.

4. The complaint alleged that the defendant, a tenant at will, wrongfully turned a lot of hogs upon a meadow, by which it was rooted up and injured, and also that he dug up and carried away a large number of fruit trees. It was held that the injury charged amounted to waste, for which an action on the case in the nature of waste would lie. *Bellows v. McGinnis*, 17 Ind. 64.

In an action for use and occupation of certain premises, under an agreement that the defendant should hold the premises as tenant at will of the plaintiff, and should keep the fences, buildings, and improvements in good repair, an allegation that the defendant had cut large amounts of wood and timber on the premises is insufficient to admit evidence of waste, as it would not be waste to cut wood for the tenant's own use, or timber with which to make the repairs which he was bound to make. *Wright v. Roberts*, 22 Wis. 161.

Any entering upon and holding the premises by permission of the owner, and subservient to his title, constitutes a tenancy sufficient to enable the owner to maintain, against the tenant at will, an action on the case in the nature of waste. *Freeman v. Headley*, 33 N. J. L. 523.

An action of trespass on the case is maintainable, by the owners of the fee against the tenant at will, for acts prejudicial to the inheritance. *Files v. Magoon*, 41 Me. 104.

the breach of an implied agreement to use the premises in a tenantlike manner.¹

(9) *Possessor or Trespasser*.—An action for damages for waste may be maintained against one in possession who claims title to all of the land on which waste is alleged to be committed, by one who claims to be a tenant in common with the party committing the waste.²

But such an action cannot be maintained against a mere trespasser who is in no way related to the title or possession.³

(10) *Executors and Administrators*.—The action of waste, as given by statute, does not apply to cases of wasteful management by executors and administrators.⁴

(11) *Guardians*.—At common law, guardians are liable in an action of waste to their wards.⁵

(12) *Tenant by Elegit*.—An action of waste is not maintainable against a tenant by *elegit*.⁶

1. *Action Ex Contractu*.—A tenant who negligently causes a barn to fall, by putting into it a weight apparently and really excessive, is liable *ex contractu* for a breach of an implied agreement to use it in a tenantlike manner. *Chalmers v. Smith*, 152 Mass. 561.

2. *Dodge v. Davis*, 85 Iowa 77.

3. *Lander v. Hall*, 69 Wis. 326. In this case, the court held that at common law the relation of tenancy was what distinguished waste from trespass to the realty; and that the statute of *Wisconsin*, which gives to the holder of a certificate of the sale of lands for taxes, a right to recover damages from any one who commits waste on said lands, does not apply to cases of waste committed by a mere trespasser, but applies only to cases where the action of waste would lie at the common law.

The action of trespass does not lie for waste committed upon land by permission of a person actually in possession, though the possession be unlawful. The remedy is an action of unlawful detainer, in which the party lawfully entitled may recover as well for the waste and injury committed, as for the possession. *Hawkins v. Roby*, 77 Mo. 140.

4. The *Massachusetts* Act of 1841, ch. 55, which gives to the supreme judicial court exclusive jurisdiction of all actions of waste, and all actions of the case in the nature of waste, does not apply to an action against an executor or administrator for wasteful management of the property of his testator or intestate, but is limited to those technical

actions against tenants of real estate, which are authorized by *Massachusetts* Rev. Stat., ch. 105, §§ 1-6. *Wilbur v. Wilbur*, 7 Met. (Mass.) 249.

5. Where a guardian cut the trees upon land belonging to his wards, it appearing that they were of no great value, and that the cutting of them did not diminish the value of the land, and the guardian accounted for what he received for the wood, it was held that he was not chargeable with waste. *Bond v. Lockwood*, 33 Ill. 212.

Where an action was brought by a ward against her guardian, in the circuit court, alleging waste and fraud, it was held error to dismiss the action for failure to prove fraud. The circuit court should have retained jurisdiction of the cause, and should not only have required the guardian to account for his general management of the estate of his ward, the rents and profits thereof, but should also have compelled him to make good all damages caused to the estate by waste committed or suffered by him. *Willis v. Fox*, 25 Wis. 646.

6. An action of waste is not maintainable against a tenant by *elegit*, either upon the principles of the common law or under the statute of *Virginia*. *Scott v. Lenox*, 2 Brock. (U. S.) 57.

A husband has no right by the marriage to cut down the timber on his wife's land, or to do those acts which, in the case of a tenant for life or years, would be waste. But the wife is destitute of the usual remedy by action for damages against the husband for this or any other injury to her inheritance,

e. PENALTIES AT LAW—(1) *Treble Damages*.—One of the penalties given by virtue of the statute of Gloucester, for the commission of waste, was the recovery of an amount three times in excess of the damages actually found to have been suffered by the plaintiff by reason of the waste committed.¹ This penalty is still retained by virtue of the statutes of several states,² although by some of them the giving of such damages is made discretionary with the court.³

because a wife can in no case sue her husband. And if a judgment creditor of the husband extend his execution on the land of the wife, he thereby succeeds to the husband's legal right to the rents and profits of the land, but not to his legal impunity for waste. If the creditor in such case injure the inheritance of the wife, as by cutting down and selling the trees, an action on the case lies against him in which the husband must join. *Babb v. Perley*, 1 Me. 6.

1. Statute of Gloucester, 6 Edw. 1, ch. 5; *Sackett v. Sackett*, 8 Pick. (Mass.) 309.

2. *Smith v. Sharpe*, 1 Busb. (N. Car.) 91; 57 Am. Dec. 574; *Rutherford v. Aiken*, 3 Thomp. & C. (N. Y.) 60.

The *New York* code does not abrogate the right to recover treble damages in actions of the character of the former action of waste. It is not necessary for the complaint in such an action to contain a reference to the statute or provision for treble damages, to entitle the plaintiff to such damages. The recovery is limited to the amount of damage to the freehold; and the statute will not excuse a defendant from treble damages, because he had good reason to believe the land to be his own. *Robinson v. Kinne*, 1 Thomp. & C. (N. Y.) 60.

By *New York* Code, §§ 450-452, the action of waste is abolished, and the remedies substituted are judgment for damages, and forfeiture, when the injury to plaintiff's estate equals the value of the tenant's estate, or unexpired term. The relative value of the land with wood on or off, the depreciation of the wood if left standing, and the amount of woodland left on the farm, become material in determining the amount of damage done. *Harder v. Harder*, 26 Barb. (N. Y.) 409. But treble damages must be recovered as provided by the statute, and not as part of the remedies under a bill in equity to redeem mortgaged property. *Boston Iron Co. v. King*, 2 Cush. (Mass.) 400.

Where an action was brought in the justices' court, under the statute giving treble damages for trespass on lands, and cutting and carrying off timber, etc., and the declaration referred to the chapter of the statute by the wrong number, but otherwise cited it correctly, and it was not demurred to, it was held that it was sufficient to support a verdict for the plaintiff. This statute was not framed to protect mere possessory rights, but to give the owner of the fee the right to sue under the form of trespass, for injuries to his inheritance; and it is, therefore, not a defense to the action that the defendant had disseised the plaintiff, though it may prevent treble damages. Where the proof given in such action, without objection, only shows the plaintiff to own one undivided half of the premises, but no plea in abatement has been interposed, the nonjoinder of the other owner as plaintiff only goes to apportion the damages; and in error, where it is not claimed or objected that entire damages were assessed, the court will not presume that they were not apportioned. *Achey v. Hull*, 7 Mich. 423.

The remedy for waste, in *California*, is confined to treble damages and does not include a forfeiture of the estate. *Chipman v. Emeric*, 3 Cal. 273.

The statute of Gloucester, giving an action of waste against the tenant for life, for the recovery of the place wasted and treble damages, has been adopted in *Massachusetts*, though modified in respect to the tenant in dower. *Sackett v. Sackett*, 8 Pick. (Mass.) 309.

3. The giving of treble damages in case of waste is discretionary with the court, under the *North Carolina* Code, § 629, providing that "the court may give judgment for thrice the amount of damages assessed by the jury, and that the plaintiff recover the place wasted, if the said damages shall not be paid on or before a day to be named in the judgment." *Sherrill v. Connor*, 107 N. Car. 543.

Where, in an action for waste, no

Treble damages cannot be recovered, however, if the action is on the covenants of a lease, for damages caused by permissive rather than voluntary waste.¹ And the courts have shown a disposition not to apply the penalty of treble damages to cases in which waste has been committed by tenants in common.²

(2) *Forfeiture*.—Another penalty provided by the statute of Gloucester was the forfeiture of the land wasted.³ Although this penalty has been retained in several of the states,⁴ it seems not to be favored by the law.⁵

claim for treble damages is made in the complaint nor before the taxing officer, and the judgment is entered for single damages only, and the plaintiff does not ask to have it set aside for the reason that he has not been awarded treble damages, it is too late to raise that question upon appeal. *Cleveland v. Wilder*, 78 Hun (N. Y.) 591.

1. In an action by a lessor against his tenant for waste, which is merely the result of neglect to repair, in violation of the covenants of the lease, and the complaint does not charge any voluntary or tortious acts on the part of the tenant, treble damages cannot be recovered. *Danziger v. Silberthau*, 21 Civ. Pro. Rep. (N. Y. Super. Ct.) 283.

2. *Smith v. Sharpe*, Busb. (N. Car.) 91; 57 Am. Dec. 574.

The excavation and removal of cinabar from a quicksilver mine, or the cutting of timber trees used in working the mine, by one tenant, does not constitute waste for which his cotenant may recover treble damages under *California* Code Civ. Proc., § 732. Nor does such excavation and cutting and conversion constitute waste which should be enjoined. But the cotenants may be entitled to an accounting. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686.

The *Massachusetts* Act, March 15, 1821, ch. 25, § 2, providing for the punishment of waste committed by one tenant in common, without notice to the others, by treble damages, applies only to cases where the tenancy in common is admitted, and not to cases where the entirety is claimed by title or *disseisin*, although it turns out defective as to a moiety. *Prescott v. Nevers*, 4 Mason (U. S.) 326.

Where one of several children and heirs at law is in occupation of the estate, as administrator, without objection from the other heirs, and while in such occupation cuts and carries away

timber trees from the land, though liable to account for its value, under the provision of the *Massachusetts* Rev. Stats., ch. 67, § 6, he would not be liable to treble damages under *Massachusetts* Rev. Stats., ch. 105, § 7, as one entering upon the estate and committing waste without notice to the other heirs or persons interested therein. *Adams v. Palmer*, 6 Gray (Mass.) 338.

3. *Smith v. Sharpe*, Busb. (N. Car.) 91; 57 Am. Dec. 574; Statute of Gloucester, 6 Edw. I, ch. 5; *Sackett v. Sackett*, 8 Pick. (Mass.) 309; *Richards v. Noble*, 3 Meriv. 673.

4. *State v. Gramelspacher*, 126 Ind. 398; *Woodward v. Gates*, 38 Ga. 205; *Hickman v. Irvine*, 3 Dana (Ky.) 121; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *Padelford v. Padelford*, 7 Pick. (Mass.) 152.

In *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621, the court, in its charge by Greene, C. J., said: "You will perceive that there are various portions claimed to be wasted. Waste in any particular place forfeits the place, as, waste in the woods forfeits the woods, in the meadow forfeits the meadow. A destruction of the dwelling house forfeits the whole place. You are to find the place forfeited where the waste was committed. And in addition you are also to assess the damages for the place wasted, over and above the value of the place."

If waste be committed in one acre or one room, it is a forfeiture of that acre or room only. But if it be committed promiscuously, it is a forfeiture of the whole tract or house. *Waples v. Waples*, 2 Harr. (Del.) 281.

No exception lies to a refusal to permit a declaration in waste to be amended so as to make the action for damages and not for forfeiture. *Wolcott v. Buck*, 97 Mass. 36.

5. *Williard v. Williard*, 56 Pa. St. 119.

A reversioner who takes possession under a lease from the tenant of the particular estate, waives all claim of forfeiture for waste committed by the latter.¹

f. WRIT OF ESTREPEMENT. — The writ of estrepement lay at the common law after judgment obtained in a real action, before possession was delivered by the sheriff, to prevent any waste which the defeated party might be tempted to commit. But by the statute of Gloucester, 6 Edw. I., ch. 13, the use of the writ was extended to all cases in which waste was being committed *pendente lite*.² By virtue of the writ of estrepement, the sheriff may resist those who commit waste, or offer to do so; and he may use sufficient force for the purpose.³ It is sometimes directed to the sheriff and also the party in possession of the lands, in order to make the latter amenable to the court as for a contempt in the event of his disobedience of the injunction of the writ.⁴

In an action of waste, the jury returned a general verdict, and assessed damages against the defendant. It was held that the finding was not sufficient to sustain a judgment of forfeiture. *Sackett v. Sackett*, 5 Pick. (Mass.) 191.

If waste has been committed simply by removing a stone wall which did not inclose any land, this will not be cause for a forfeiture of any land. *Thacher v. Phinney*, 7 Allen (Mass.) 146.

Under *Indiana* Rev. Stat. 1881, § 286, providing that waste shall be punishable by an action "in which there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises," but that forfeiture and eviction shall not be adjudged, except when the injury to the estate in reversion shall be adjudged equal to the unexpired term or to have been done in malice, a forfeiture will not follow a judgment for possession before a justice of the peace, in which there is no such finding. *Sullivan v. O'Hara*, 1 Ind. App. 259.

Prior to the adoption of the code, on January 1, 1863, there was no law in *Georgia*, it has been held, which operated a forfeiture of the life estate by the commission of waste. *Woodward v. Gates*, 38 Ga. 205.

In an action of waste, the plaintiff will not be allowed to amend his declaration so as to make the action for damages, and not for forfeiture. *Wolcott v. Buck*, 97 Mass. 36.

Under the laws of *Wisconsin*, a judgment for waste is not attended by forfeiture of the estate of the tenant. *Phelan v. Boylan*, 25 Wis. 679.

1. Where dower lands are leased to the reversioner, and he takes possession under the lease, he thereby waives all claim of forfeiture on account of waste committed by the dowress. *Hickman v. Irvine*, 3 Dana (Ky.) 121.

2. 3 Bl. Com. 225, 226; High on Injunctions (3d ed.), § 649.

In *Jones v. Whitehead*, 1 Pars. Eq. Cas. (Pa.) 304, the court, by Parsons, J., said: "Hence, we find this word [estrepement] is used for the name of a writ which lay at the common law after judgment obtained in an action real, as on a writ of right, before possession was delivered by the sheriff, to stop waste which the defeated party might be tempted to commit, in lands which were determined no longer to be his. 2 Inst. 328. But by the statute of Gloucester, 6 Edw. I., ch. 13, it was provided that this writ might be issued by any person having an action depending, as a formed writ of right, etc., to prohibit the tenant from committing waste during the pendency of the suit, lest, knowing the weakness of his title, he might be tempted to injure the land of the rightful owner."

3. 3 Bl. Com. 225, 226.

The writ of estrepement does not command the sheriff to take the body of the defendant, but authorizes him to do so, if necessary to prevent waste, and other means are evidently insufficient. *Com. v. White*, 9 Lanc. Bar. (Pa.) 41.

4. At common law, the proper process used to bring the tenant into court is a *venire facias*, and thereon an attachment. Upon the coming in of the defendant the plaintiff declares against him. The defendant generally pleads

Although the remedy has been superseded largely by the equitable remedy of injunction,¹ it seems to be still in use in *Pennsylvania*.² In that state, application for the writ may be made during the continuance of a lease without giving notice to quit, if there is sufficient ground for it;³ and it may be opened and dissolved upon conditions by the courts which have general equitable powers.⁴

2. In Equity—*a*. INJUNCTION—(See also INJUNCTIONS, vol. 10, p. 817).—The remedy by injunction is so peculiarly adapted to

that "he has done no waste contrary to the prohibition of the writ." The issue on this plea is tried by a jury, and in case they find against the defendant they assess damages which the plaintiff recovers. But since this verdict convicts the defendant of a contempt, the court proceeds against him for that cause as in other cases. 2 Coke's Insts. 329; 5 Coke's Insts. 119; *Jefferson v. Bishop of Durham*, 1 B. & P. 121; *Playstow v. Bacheller*, More 100.

In *New Jersey*, a writ of attachment may be issued against the defendant in an ejectment suit who is committing waste, and upon whom a rule to stop it has been had. A foundation for the attachment must be laid by affidavits, of the taking of which the defendant or his attorney should have notice. *Flommerfelt v. Zellers*, 7 N. J. L. 31.

1. *Loudon v. Warfield*, 28 Ky. 196.

2. *Heil v. Strong*, 44 Pa. St. 264; *Hensal v. Wright*, 10 Pa. Co. Ct. Rep. 416.

Lien creditors are entitled to a writ of estrepement to stop the removal of timber and minerals from the land of the debtor. *Duff's Appeal*, 21 W. N. C. (Pa.) 491.

Writs of estrepement, like injunctions, are means of preserving property that is in litigation, from spoil or injury, until the rights in relation to it can be settled, and the statutes of *Pennsylvania* allowing them are simply declaratory of the common-law authority of the courts. *Byrne v. Boyle*, 37 Pa. St. 260.

A writ of estrepement does not issue of course, but must be grounded on an affidavit of actual waste done or permitted. *Dickinson v. Nicholson*, 2 Yeates (Pa.) 281.

In *Delaware*, the writ of estrepement is grantable only in real actions, and in ejectment since the act of 1829. *Burbage v. Dazy*, 5 Harr. (Del.) 324.

3. Under the *Pennsylvania* act of March 29, 1822, to prevent waste on

leased lands or tenements, an application for a writ of estrepement may be made during the continuance of the lease, without previous notice to quit the demised premises. Where a lease was for coal-mining purposes, and the waste complained of was the "mining of coal without payment of the rent, the erection of houses on the land, driving faults on different tracts without the knowledge of the heirs of the lessor, and with rents which should have been paid to them," and other acts, none of which were injurious to the premises or unwarranted by the lease, it was held, that no sufficient ground for awarding a writ of estrepement was laid, and that it was error to award it. *Neil v. Strong*, 44 Pa. St. 264.

4. Both under the act of May 4, 1869, *Pennsylvania* Laws 1251, and under the general equitable powers, the court of common pleas has power to dissolve the writ of estrepement upon conditions. *Hensal v. Wright*, 10 Pa. Co. Ct. Rep. 416. In this case a writ of estrepement was issued at the suit of one tenant in common against another, to prevent the cutting and removal of timber. The defendant then petitioned to have the writ opened, so as to permit him to remove certain timber cut on land which he claimed was not owned jointly. The plaintiff claimed that the timber was cut on the land owned in common, and the preponderance of the testimony showed that this was the case. It was held that the court had power to open the writ so far as to permit the defendant, upon entering security, to remove the timber which had been cut.

By common law, and by statute in *Pennsylvania*, the writ of estrepement may be dissolved by the court on hearing, with or without security, as the case may seem to require. If security be ordered, a bond to the plaintiff is not an improper form of giving such security. *Byrne v. Boyle*, 37 Pa. St. 260.

the redress of injuries which constitute waste, that it has supplanted to a large extent the remedies at law.¹

In some states it will be granted upon an *ex parte* application,² and in others almost as a matter of course.³ But it seems that

1. In *Duvall v. Waters*, 1 Bland (Md.) 569; 18 Am. Dec. 350, the court, by Bland, C., said: "Waste is a wrong which cannot always be duly estimated and remunerated in damages; it is an injury which requires to be met, in its onset, or earliest approaches, by a strong and decisive preventive remedy, acting with a promptness almost amounting to surprise; and yet affording to the party restrained a speedy hearing. No adequate remedy of this kind, it is evident, can be obtained from a court of common law, open only at short intervals during the year, acting from term to term, and limited to a given set of technical forms of proceeding. Hence it is that the remedy has been so constantly, in modern times, sought in the court of chancery, which is always open, constantly accessible, and is capable of moving with an energy and despatch called for by the emergency, and suited to the peculiar nature of the case."

The law is with us, as in *England*, that such cutting of trees or timber as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber, is waste for which an action will lie, in equity, for the prevention of such injury by injunction, before it is committed. *McCay v. Wait*, 51 Barb. (N. Y.) 225.

Where several adjoining lots are the distinct and several property of the respective owners, subject, however, to a right of way to the rear of the lots and to the use of water from a certain well, which are common to the several owners, a preliminary injunction will not be granted to restrain one of these several owners from erecting an improvement, merely on the ground of inconvenience and temporary injury to the others. *Shaver v. Cohn*, 40 How. Pr. (N. Y. Supreme Ct.) 129.

An injunction to stay waste is generally the proper subject of jurisdiction of a court of equity, notwithstanding an act of assembly gives a remedy at law. *Harris v. Thomas*, 1 Hen. & M. (Va.) 18.

Where a bill is filed merely for the purpose of preventing waste on mort-

gaged premises, an injunction answers the purpose, and a receiver should not be appointed under such bill. *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 246.

Equity takes jurisdiction to stay waste by injunction; and in some particular cases, as the conversion of timber or the proceeds of mines, to obtain a discovery and account, but will not entertain a bill that seeks simply to recover possession of the place wasted, with damages for the waste committed, without praying an injunction or discovery and account. Case under the statute would, it seems, be the proper action. *Lefforge v. West*, 2 Ind. 514.

An attachment of an equity of redemption is a lien upon the property attached, and equity will restrain the cutting and removing of wood, or other waste, if it impairs the security. *Moulton v. Stowell*, 16 N. H. 221.

2. In *New York*, an order to stay waste will be granted by the supreme court, on an *ex parte* application. *People v. Alberty*, 11 Wend. (N. Y.) 160. But see *Denning v. Corwin*, 4 Wend. (N. Y.) 208, in which case it was decided that an order to stay waste will not be granted without notice to the party to be affected by it, where it is not shown that the party is a trespasser. See also *Bush v. Phillips*, 3 Wend. (N. Y.) 428.

An injunction to stay waste will be denied where there appears no impediment to the action of waste at law. *Cutting v. Carter*, 4 Hen. & M. (Va.) 424.

Where the plaintiff has been guilty of negligence in not bringing on the trial, the court will discharge the rules to stay waste. *Denn v. Driver*, 1 N. J. L. 109. See also *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

3. *Markham v. Howell*, 33 Ga. 508. In *People v. Marquette County*, 38 Mich. 244, it was held that the granting of an application for an order to stay waste is discretionary and will not be compelled by mandamus.

The complainant in a bill in equity to restrain waste, like the plaintiff in an action of trespass *quare clausum fregit*, must aver and prove, either actual possession or a valid and subsisting title in himself to the premises

when equity jurisdiction is given to particular courts in cases of waste, it is confined to cases of technical waste.¹

(1) *When Maintainable*—(a) **Lands in Foreign Country.**—A defendant may be enjoined from committing waste upon, or otherwise impairing the value of, property in which a complainant may be interested, even though the property is located abroad;² but he will not be enjoined on the ground that the acts of the government of a foreign country, in granting a concession on which he bases his claim of right, are void.³

(b) **Timber Already Cut.**—In case of waste, the court will not, unless under very special circumstances, grant an injunction to prevent the removal of timber which has been already cut, but only to prevent future waste.⁴ But a court which has jurisdiction to enjoin the wasteful cutting of timber, may decree an account and satisfaction for what has been already cut.⁵

in dispute. Constructive possession is not sufficient to maintain an action without proof of title. *Walker v. Fox*, 85 Tenn. 154.

The destruction of forest and other trees is an irreparable injury, from which parties may be enjoined, and such injunction cannot be dissolved under *Louisiana Code Civ. Proc.*, § 307, by bond. There are some things which bonds will not cover—of whose value dollars and cents are not the exponents—and which, if powerless to protect, the law is powerless indeed. *De La Croix v. Villere*, 11 La. Ann. 39.

1. **Jurisdiction.**—*Lander v. Hall*, 69 Wis. 326; *Leighton v. Leighton*, 32 Me. 399.

The equity jurisdiction given to the supreme court, in cases of waste, is confined to cases of technical waste. *Leighton v. Leighton*, 32 Me. 399. *Attaquin v. Fish*, 5 Met. (Mass.) 140.

The supreme court of *New York* has the same jurisdiction which the court of chancery formerly possessed, to restrain waste upon a bill filed, stating the facts. *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595.

2. *Marshall v. Turnbull*, 32 Fed. Rep. 124.

3. *Marshall v. Turnbull*, 34 Fed. Rep. 827.

4. *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169.

Where A purchased of B one of several parcels of land, which were subject to a mortgage, and subsequently B became insolvent and made an assignment of his property, including a part of the land mortgaged, to the trustees in trust for the payment of his debts,

the land assigned being first chargeable with the payment of the mortgage, and being a slender security for the debt, interest and costs; and A's parcel being chargeable in case the land assigned should prove insufficient, it was held that A was in legal effect surety for the land assigned, that when sold, upon the foreclosure of the mortgage, it should satisfy the mortgage, and that he had a right to see that the principal fund was not impaired by any waste committed thereon by the assignees. It was held also that A was entitled to an injunction to prevent the commission of waste by cutting timber, etc., upon the land, but not to prevent the removal of timber already cut. *Johnson v. White*, 11 Barb. (N. Y.) 194.

5. *Fleming v. Collins*, 2 Del. Ch. 230; *Weatherby v. Wood*, 29 How. Pr. (N. Y.) 404.

An account for waste done is incidental to relief by injunction against future waste, and is directed on the principle of preventing multiplicity of suits. *Ackerman v. Hartley*, 8 N. J. Eq. 476.

The chancellor will restrain waste on a bill filed for that purpose, but so far as the bill seeks to recover for waste committed, it cannot be sustained. *Downing v. Palmateer*, 1 T. B. Mon. (Ky.) 64.

Where a bill is filed to prevent future waste, and an account of the waste done being prayed—waste having been already committed and the defendant enjoined from its future commission—the court, to prevent a double suit, should decree an account and satisfaction for the waste that has been done. *Armstrong v. Wilson*, 60 Ill. 226.

(c) **Privity of Parties.**—The granting of injunctions to stay waste was formerly confined to those cases where there was some subsisting privity of title or contract between the parties; but it has been extended to stay trespass against strangers in strong cases of destruction or irreparable mischief,¹ and to protect real estate from waste and injury pending a controversy about the title.²

In an action of partition, where one tenant in common has committed waste by cutting and carrying away timber from the lands sought to be partitioned, equity has the power to ascertain the amount of damages for the waste, and the commissioners can be directed to make the proper allowance therefor in the division. *Jefferson v. Beach* (N. J. 1886), 2 Cent. Rep. 263.

One who was instrumental in obtaining title to certain land from the county, the equitable title to which was already in others, is not necessarily a participant in waste committed thereafter on the land by those whom he had assisted to obtain title. And unless he took part in the commission of the waste, or was to share the profits therefrom, the mere fact that he thus assisted in obtaining the title does not make him responsible, and damages for the waste will not be decreed against him, in a suit in equity to compel the conveyance of the legal title to the party having the equitable title. *Carrington v. Lentz*, 40 Fed. Rep. 18.

1. *Duvall v. Waters*, 1 Bland (Md.) 569; 18 Am. Dec. 350; *High on Injunctions* (3d ed.), vol. 1, § 656.

2. **Title in Litigation.**—Although the legal title to land is in litigation, equity will enjoin acts threatening irreparable mischief and going to the destruction of the substance of the estate, such as the removal of ore. *Erhardt v. Boaro*, 113 U. S. 537. See also *Snyder v. Hopkins*, 31 Kan. 557; *Lanier v. Alison*, 31 Fed. Rep. 100.

Where the plaintiff, claiming the ownership of certain land, brings an action to recover the same, and (as auxiliary to the main relief) seeks to enjoin the defendant in possession from cutting timber and turpentine trees thereon, for building and fencing, he must show the defendant's inability to respond in damages for such injury. *McCormick v. Nixon*, 83 N. Car. 113.

An injunction against waste will not be allowed where the title is in doubt, with the probabilities in favor of the defendant having the better title, and

where the defendant, for all that appears, is solvent. *Nethery v. Payne*, 71 Ga. 374.

The court of chancery of *Maryland* will grant an injunction to stay waste, pending a suit at law to try the title to the land.

But an injunction to stay waste, pending a suit respecting the title, does not prohibit the defendant from cultivating the land, and using it in the ordinary manner. *Duvall v. Waters*, 1 Bland (Md.) 569; 18 Am. Dec. 350.

Pending an action to try titles to land, the main value of which consists in the timber growing thereon, an injunction will be granted to restrain the defendant from cutting off the timber, where it appears that he will not probably be able to respond in damages in case of a recovery by the plaintiff. *Kinsler v. Clarke*, 2 Hill Eq. (S. Car.) 617. See *Shubrick v. Guerard*, 2 Desaus. (S. Car.) 616.

A court of equity, upon affidavit that the complainant in a bill praying an injunction against a writ of possession in ejectment is committing waste, will, at the instance of the defendant, make an order in the cause staying the waste. *Howze v. Green*, Phil. Eq. (N. Car.) 250.

An injunction for waste will be denied if the plaintiff's title is doubtful. *Field v. Jackson*, Dick. 599; *Lowe v. Lucey*, 1 Ir. Eq. Rep. 93; *Davies v. Lee*, 6 Ves. 784; *Smith v. Collyer*, 8 Ves. 89; *Beatty v. Beatty*, 2 Moll. 541. But see *Fingal v. Blake*, 2 Moll. 50; *Storm v. Mann*, 4 Johns. Ch. (N. Y.) 21; *Preston v. Smith*, 26 Fed. Rep. 884.

An injunction will be granted to stay waste by a defendant, who insists on his own title, but admits that he received possession from the plaintiff's tenant without the plaintiff's knowledge, in breach of the tenant's duty. *Norway v. Rowe*, 19 Ves. 154.

Where the complaint and evidence show that a defendant is in possession of land, and claiming under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted, on the application of a

Therefore, in all cases where an action of waste would lie at common law, and in a variety of others in which no such action could be brought, an injunction to stay waste may be obtained.¹

party claiming title to the land, to prevent the defendant from cutting timber thereon. *Smith v. Wilson*, 10 Cal. 528. See also *Poindexter v. Henderson*, 1 Walker (Miss.) 176; 12 Am. Dec. 550; *Nevitt v. Gillespie*, 2 How. (Miss.) 108; 26 Am. Dec. 696; *Eskridge v. Eskridge*, 51 Miss. 522.

Where there is a controversy pending in equity involving the title to land, an injunction restraining the commission of waste upon it may be applied for by petition in the cause. Such application looks to the preservation of the property until the title can be ascertained. *Green v. Keene*, 4 Md. 98.

Courts of equity will interfere by injunction to restrain waste or trespass, and to prevent injury to land, even where the title is in dispute and the right is doubtful; if the waste or trespass will be attended with irreparable mischief, or from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law. Such interference is placed upon the ground of preventing irreparable mischief and the destruction of the substance of the inheritance. So an injunction was sustained where the plaintiff alleged that he was owner of the premises, but the defendant was committing waste by cutting down timber, etc., which would be an irreparable injury, and that he was insolvent, notwithstanding the defendant was in possession as tenant under a decision in summary proceedings to recover possession of the land, by a county judge, which the plaintiff defended, but had carried by *certiorari* to the supreme court for review, and which was pending and undetermined. *Spear v. Cutter*, 2 Code Rep. (N. Y.) 100.

In a contest between two for a tract of land, each claiming the legal title, and the one in possession is cutting down timber and building in the ordinary course of agriculture, the court of equity will not stay the operation of him in possession, upon the ground merely that he is insolvent. *Thompson v. Williams*, 1 Jones Eq. (N. Car.) 176.

An injunction against waste will not be granted where the complainant's title is denied in the answer; it will be refused before answer if the defendant

has had no notice of the motion. *Morse v. O'Reilly*, 4 Pa. L. J. Rep. 75.

Where a bill for an injunction to prevent the commission of waste showed no title in the plaintiff to the land, nor interest therein other than as an applicant to purchase the same as mineral land from the *United States*, and that his claims to acquire title were being contested in the *United States* land office, it was held that such bill did not state a case sufficient to justify a departure from the time-honored rule that such relief will be granted only for the protection of an existing right and only in favor of one in whom an estate of inheritance is shown to be vested by unquestioned proof. *McBride v. Pierce County*, 44 Fed. Rep. 17.

Under the *Washington* statute, a claimant to land under the laws of the *United States* may have an injunction against another claimant who "is threatening to commit, upon such land, waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages." The removal of trees from land still the property of the government, is one injury which would tend to materially lessen the value of the inheritance, and damages will not compensate their loss in the sense meant by the statute. *Arment v. Hensel*, 5 Wash. 152.

1. *Duvall v. Waters*, 1 Bland (Md.) 569; 18 Am. Dec. 350.

An injunction should be granted against waste, on land of which the plaintiff and his privies have been in possession for thirty-eight years under color of title, although the defendant who is committing waste claims under an older patent. *Basore v. Henkel*, 82 Va. 474.

Where a defendant in an ejectment suit, has been in possession of land for many years, claiming the premises in fee, in his own right, and adverse to the plaintiff, he should, until he is legally evicted, be permitted to remain in the full enjoyment thereof, to the extent that he would be, were no adverse claim set up, subject to the restriction that he shall not commit a permanent and lasting injury to the inheritance; and the cutting down of such trees as it is necessary to cut down for the regular clearing up and improvement of the lot,

If the facts do not show either privity of title, or irremediable injury, however, it has been held that an injunction may be dissolved if it has already been granted.¹

so as to put it in proper farming condition according to the rules of good husbandry, is not to be held to constitute waste; but should the defendant continue to cut down timber or other wood, so as to encroach upon what should be left and preserved, as necessary for repairs of fences and other erections, and for firewood, he would be guilty of waste, and, upon application, would be restrained and punished. *People v. Davison*, 4 Barb. (N. Y.) 109.

In the case of waste, where there is a privity of title, as between tenants for life or years and the reversioner, it is not necessary for the plaintiff to show irreparable injury or destruction to the estate, to entitle him to the remedy by injunction. *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. Ch. 371.

In *Wisconsin* Rev. Stat., § 3177, providing that the holder of a certificate of tax sale may have an action to restrain the commission of waste during the period of redemption, and that after obtaining a deed he may recover damages against any person for any waste committed by such person after the sale, the word "waste" is used to signify an act which amounted to waste at common law; and, under the said section, an action for waste cannot be maintained by the tax-title claimant against a mere trespasser, who is a stranger to the title and possession. *Lander v. Hall*, 69 Wis. 326.

Where a complaint alleged that the plaintiff was the owner and entitled to the possession of lands, that there were improvements on the demanded premises, that the defendants were in possession, that they threatened to destroy, and would, if not enjoined, destroy, such improvements, and that they were insolvent, and unable to respond in damages, it was held that it was sufficient to support an order enjoining the defendants from removing improvements or committing waste on the premises in dispute, pending the trial. *Meadow Valley Min. Co. v. Dodds*, 6 Nev. 261.

Where a suit to enforce forfeiture is pending, an injunction will lie to preserve the property sought to be forfeited during the pendency of the suit, as equity will restrain the commission of waste of every kind until the rights

of the parties are determined. *Fletcher v. New Orleans, etc., R. Co.*, 20 Fed. Rep. 345.

A bill in equity to restrain waste lies ordinarily only when the complainant's title is undisputed and the party committing the waste is in rightful possession; but may be maintained in other cases on special grounds, such as to quiet possession, to prevent multiplicity of suits, to prevent irreparable mischief, and when the defendant is insolvent. *Walker v. Fox*, 85 Tenn. 154.

1. *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. Ch. 371.

In a bill for a special injunction to stay the cutting of timber, it is necessary that the plaintiff should set forth, not only that the threatened injury would be irreparable, but he must show how it would be so. *Thompson v. Williams*, 1 Jones Eq. (N. Car.) 176.

A motion for an order to restrain the defendant from the commission of waste upon land or premises, for the recovery of which an action of ejectment is pending, will be denied on the defendant's fully denying the commission of waste. *Martin v. Odell*, 1 How. Pr. (N. Y.) 108.

An injunction against a mortgagor, restraining him from quarrying on a quarry lot, half of which was conveyed, as such, to him by the mortgagee, to secure the consideration for which conveyance the mortgage was given, was dissolved on answer denying the charges in the bill, from which it might be inferred that the defendant was improperly impairing the value of the mortgaged premises and endangering the complainant's security; the court holding that as the land was sold for quarrying purposes, the proper use of it as such could not be considered waste. *Vervalen v. Older*, 8 N. J. Eq. 98.

Where, in an action against one in possession of real estate, to restrain the alleged commission of waste thereon, the court found that no waste had been committed nor was contemplated, the plaintiff's petition for an injunction was properly dismissed by the said court. *St. Clair v. Sedgwick*, 39 Neb. 562.

As a general rule, in the practice of courts of equity, nothing can be read on a motion to dissolve an injunction

(2) *By Whom Maintainable*—(a) **Owner of Inheritance or Remainderman.**—The application for an injunction to restrain a tenant for life or for years from committing waste is usually made by the owner of the inheritance, but it may be made by a remainderman for life as well.¹ The intervention of an intermediate estate for life does not deprive the owner of the inheritance, or a remainderman for life, of his right to an injunction.²

The remainderman of an undivided share of the inheritance may have an injunction and an account.³

Contingent remaindermen, whose estate has not vested by the happening of the event, cannot maintain a bill against the life tenant in possession to recover damages for past waste, but may enjoin him from future voluntary waste.⁴

One tenant in common in remainder may also maintain a bill to enjoin the commission of waste.⁵

(b) **Reversioner.**—A reversioner is entitled to an injunction to

but the answer. If the writ has issued and the answer when filed denies the equity of the bill, the injunction will be dissolved. But there are many cases where this rule does not prevail. Waste is one of them, and the exception to the rule is upon the ground that irreparable mischief would ensue, and the court will prevent irreparable mischief by its interposition. Hence, an affidavit to prove waste is admissible even after answer filed. *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

Distinction Between Injunctions to Stay the Collection of Money on a Judgment Recovered at Law, and Injunctions to Stay Waste or Injuries in the Nature of Waste.—The rule in injunctions of the first class is that the injunction is dissolved unless the equity of the bill is confessed by the answer, or unless the answer is unfair, evasive, and so defective as to be subject to exception. It is otherwise as to injunctions to stay waste, and inasmuch as to dissolve such injunction would be to allow the injury to be done, where the plaintiff fails to elicit from the defendant a discovery which admits the allegation of the bill, the bill is allowed to be read as an affidavit on the part of the plaintiff. *Capehart v. Mhoon*, Busb. Eq. (N. Car.) 30. See also *Lloyd v. Heath*, Busb. Eq. (N. Car.) 39.

1. *Kane v. Vanderburgh*, 1 Johns. Ch. (N. Y.) 11; *Freeman v. Reagan*, 26 Ark. 373; *Van Syckel v. Emery*, 18 N. J. Eq. 387; *Camp v. Bates*, 11 Conn. 51; 27 Am. Dec. 707; *Smith v. Daniel*, 2 McCord Eq. (S. Car.) 143; *Frank v. Brunneman*, 8 W. Va. 462;

U. S. v. Parrott, 1 McAll. (U. S.) 271; *Dickinson v. Jones*, 36 Ga. 97; *Powers v. Henry*, R. M. Charl. (Ga.) 523.

Where waste is committed by the holder of a life estate, in land charged with the payment of a legacy on the termination of the life estate, the remedy of the remainderman is in equity, where the commission of further waste may be restrained and damages awarded for the waste already committed. In such a case, equity will hold the damages collected for the benefit of the legatee who must be paid before the remaindermen take. *Dawson v. Tremaine*, 93 Mich. 320.

An injunction will be granted, in favor of a remainderman, against a tenant for life, or his grantee, to stay the waste being committed in the destruction of growing timber and in clearing up woodlands to put them in cultivation. *Dickinson v. Jones*, 36 Ga. 97.

2. *Roswell's Case*, 1 Roll. Ab. 377; *Tracy v. Tracy*, 1 Vern. 23; *Perrot v. Perrot*, 3 Atk. 94; *Robinson v. Litton*, 3 Atk. 210; *Farrant v. Lovel*, 3 Atk. 723; *Davies v. Lee*, 6 Ves. 784; *Mayo v. Feaster*, 2 McCord Eq. (S. Car.) 137.

Though waste at common law lies in favor of the first estate of inheritance only, in chancery a bill lies for any party in remainder whose estate is injured. *Dennett v. Dennett*, 43 N. H. 499.

3. *Co. Litt.* 53b; *Whitfield v. Bewit*, 2 P. Wms. 241.

4. *Cannon v. Barry*, 59 Miss. 289; *University v. Tucker*, 31 W. Va. 621.

5. *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362.

prevent the commission of waste, even if there be an intervening estate for life or years.¹

(c) *Devisees and Owners of Executory Bequests and Other Contingent Interests.*—Devisees,² and owners of executory bequests and other contingent interests,³ are entitled to have their interests protected from threatened waste or destruction by injunctive relief.

(3) *Against Whom Maintainable*—(a) *Tenant for Life.*—A tenant for life may be restrained by injunction from committing either voluntary⁴ or equitable⁵ waste, but not from committing permissive waste, it would seem,⁶ unless under special circumstances.⁷

(b) *Tenant in Dower.*—An injunction lies against a tenant in dower

1. *Robertson v. Meadors*, 73 Ind. 43; *Gwaltney v. Gwaltney*, 119 Ind. 144.

2. An injunction will lie in behalf of a devisee, and against the son of the testator, on the showing that the son is collecting the rents of the estate pending a decision as to the probate of the testator's will, and that waste is being committed by him. *Piatt v. Piatt*, 2 Disney (Ohio) 408.

3. *Gordon v. Lowther*, 75 N. Car. 193. One who has an equitable contingent interest in lands may maintain an action to restrain waste. *Lee v. Whalton*, 20 N. Y. Wkly. Dig. 366.

One whose claim to land depends on a contingent event may sustain a bill to enjoin waste, that being his only remedy against waste, because, his interest not being vested, no action at law will lie. But he cannot recover damages for waste which has been committed. *Brashear v. Macey*, 3 J. J. Marsh. (Ky.) 93.

Where a testator devises land to his wife for life, remainder to his daughters, provided she shall have lawful heirs of her body, and there is a remainder over in fee, the daughter, upon the death of the mother, takes a life estate to be enlarged into a fee upon birth of issue, and the remainderman, until issue born as aforesaid, has such an interest in the estate as will entitle him to an injunction to restrain the devisee for life from committing unauthorized waste. *Cowand v. Meyers*, 99 N. Car. 198.

4. *Smith v. Poyas*, 2 Desaus. (S. Car.) 65; *Williams v. Peabody*, 8 Hun (N. Y.) 271.

A life tenant or his lessee will be enjoined and restrained, on the petition of the owners of the fee, from committing waste. *Hughes v. Burress*, 85 Mo. 660.

Devisees having a life interest in

land, with a possibility of shares in the fee, may be enjoined from committing waste. *Farabow v. Green*, 108 N. Car. 339.

A tenant for life will be restrained, at the suit of the remainderman, from killing timber preparatory to cultivating the soil, and from cutting wood for sale. *Dickinson v. Jones*, 36 Ga. 97.

5. On a bill to restrain the life tenant from committing waste, it appeared that he had conveyed the estate in fee to the person from whom the plaintiff derived title, and had then taken back a lease for life, wherein it was provided that he was to have as full and complete control of the premises during his life as if the conveyance had not been made. Of one hundred and sixty acres there were only nine of timber, from five of which the defendant had already cut and sold the timber. It was held to be waste destructive of the inheritance, and to be perpetually enjoined. *Duncombe v. Felt*, 81 Mich. 332.

6. *Powys v. Blagrove*, 4 De G. M. & G. 448; *Lansdowne v. Lansdowne*, 1 Jac. & W. 522; *Cannon v. Barry*, 59 Miss. 289; *Yool on Law of Waste and Nuisance*, p. 57.

7. *Yool on Law of Waste and Nuisance*, p. 58.

In *Caldwall v. Baylis*, 2 Meriv. 408, copyholds were devised to A for life, and after his decease to B in fee; but if he should die in the lifetime of A, then to the plaintiffs as tenants in common. A permitted the premises to go to decay during the life of B, who had intended to commence proceedings against him in consequence of his neglect, but desisted upon his promise to repair forthwith. B died, and A having neglected to perform his promise, either during B's lifetime, or since his death, the buildings grew ruinous for want of the needful repairs. An

provided the acts complained of constitute waste.¹ On the other hand, she herself may have a rule against the heir to stay waste, if he is committing it on the premises in which dower is demanded.²

(c) *Tenant by the Curtesy*.—A tenant by the curtesy may also be enjoined from the commission of waste.³

(d) *Tenant in Common*.—As a general rule, equity will not interfere to restrain waste as between joint tenants, tenants in common, or coparceners, since their right is equal in the use and enjoyment of the estate.⁴ But an injunction will lie by one against the other, if the one committing the waste is insolvent,⁵ or a suit for the partition of the premises is pending and waste is being committed by one of the tenants in common;⁶ or if the waste is destructive of the estate and not according to the usual and legitimate enjoyment thereof;⁷ or if one of the parties by agreement

injunction was granted to restrain A from permitting or suffering any further waste.

In *Marsh v. Wells*, 2 Sim. & Stu. 87, a person entitled to leasehold property subject to a previous life interest therein, renewed the lease with the consent of the tenant for life, and covenanted to repair; the tenant for life having neglected to keep the premises in repair, his estate was held liable to indemnify the covenantor, because, as the court held, the covenantor had made the covenant for the benefit of the tenant for life at his request, and the latter's estate ought therefore to be answerable for the tenant's permissive waste occasioned by failure to repair.

1. *Dalton v. Dalton*, 7 Ired. Eq. (N. Car.) 197.

The tenant in dower will not be enjoined from cutting timber for the purpose of making necessary repairs, even though the timber on the farm is very scarce, for it is the right and duty of the life tenant to reasonably use the timber for purposes of repair, and such use is no injury to the remainderman. *Calvert v. Rice*, 91 Ky. 533.

The objection to the jurisdiction of the court of chancery of *Maryland* to stay waste committed by a dowress on her dower lands, upon the ground that the remedy should be sought on the equity side of the county court, is untenable. *Childs v. Smith*, 1 Md. Ch. 483.

2. *Harker v. Christy*, 5 N. J. L. 717.

3. A husband, during the life of his wife, sold timber standing on his wife's land, in lots, to different purchasers. They began cutting during her life, and continued cutting after her death. A bill

was filed by her infant heir, and the cutting was enjoined. It was referred to a master to inquire and report how much of the timber had been cut after the wife's death, with a view to the question whether the husband should account for it; and also to inquire and report whether the interests of the infant required that the trees still standing should be felled. *Ware v. Ware*, 6 N. J. Eq. 117.

4. *Goodwin v. Spray*, Dick. 667; *Hole v. Thomas*, 7 Ves. 589; *Russell v. Merchants' Bank*, 47 Minn. 286; *Hihn v. Peck*, 18 Cal. 640.

5. *Stout v. Curry*, 110 Ind. 514; *Smallman v. Onions*, 3 Bro. C. C. 621.

6. *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122.

A tenant in common may, in a suit for partition, be enjoined from committing waste; and if the waste be committed by the husband of the tenant, there is enough in the practical community, if not actual identity, of interest between his wife and him, growing out of their marriage relation, to warrant joining him in the bill with his wife instead of instituting a separate suit against him, and so treating him as an entire stranger. *Weise v. Welsh*, 30 N. J. Eq. 431.

Although at common law, one tenant in common had no legal remedy against his cotenant for waste, since the statute of Westminster II., giving such redress, courts of equity have interposed to prevent waste and preserve the *corpus* of the estate until partition. *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

7. *Hole v. Thomas*, 7 Ves. 589; *Dodd v. Watson*, 4 Jones Eq. (N. Car.) 48;

with the other holds the common property as occupying tenant of the other.¹

One tenant in common in remainder may be made a party to a bill filed by his cotenant, to enjoin waste committed by the former, and tenants for life and lessees.²

(e) **Tenant for Years**—(1) **IMPROPER USE OF LEASED PREMISES.**—The term "waste" embodies improper use. Whenever, therefore, under the terms of a lease, a lessee is restricted to the use of the demised premises in a particular manner or for a specified purpose, a violation of the covenant by the use of the premises in a different manner, or for another purpose, affords ground for the interposition of equity by injunction.³

72 Am. Dec. 577; *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122; *Stout v. Curry*, 110 Ind. 514; 2 Story's Eq. Jur. (13th ed.), § 916.

In *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686, the court, by McKinstry, J., said: "At the common law, the tenant had no redress for acts of admitted waste committed by his cotenant. But the latter might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called 'equitable waste,' because allowable at law. By our statute, however, a tenant may recover damages of his cotenant in every case of waste."

Where a tenant in common, by cutting down and clearing woodland beyond his interest, injures his cotenant, he is liable for waste, and equity will afford relief. *Johnson v. Johnson*, 2 Hill's Eq. (S. Car.) 277; 29 Am. Dec. 72.

Pending a suit in equity, one tenant in common in possession will not be permitted to strip the land of its timber. It would greatly diminish the value of the estate, and, therefore, is an injury recognized by law, and the remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury. *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

1. *Twort v. Twort*, 16 Ves. 128.

2. *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362. But one tenant in common in remainder is not liable to his cotenant, if he merely looks at one who commits waste on the premises held in common and does not prevent the commission of such waste. *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281.

3. **Husbandry.**—The cultivating or using of land in a grossly unhusband-

like manner may be restrained by injunction. *Wilds v. Layton*, 1 Del. Ch. 226; 12 Am. Dec. 91.

An outgoing tenant will be enjoined from plowing up all the meadow land on the farm. *Chapel v. Hull*, 60 Mich. 167.

Where a farm of ninety acres contains but seventeen acres of woodland, and this is necessary to the proper use of the farm and for the shading of a contemplated house, many of the trees being large and old, a threatened cutting of such trees by a naked trespasser may be enjoined. *Powell v. Cheshire*, 70 Ga. 357; 48 Am. Rep. 572.

A tenant will be enjoined from sowing, or threatening to sow, land with mustard seed, *Pratt v. Brett*, 2 Madd. 373; from altering a fish pond, *Bathurst v. Burden*, 2 Bro. C. C. 64; and from polluting water, *Nicholson v. Rose*, 4 De G. & J. 10.

A tenant for years, with a covenant in the lease for perpetual renewal, cannot remove from the leased premises a building which has been erected thereon, so as greatly to impair and injure the security for the rent reserved. In such case, a bill in equity may be brought by the reversioner to enjoin such act as an equitable waste to the inheritance. *Crowe v. Wilson*, 65 Md. 479; 57 Am. Rep. 343.

Timber.—An injunction will be granted in cases where a tenant cuts down timber upon the demised premises, for the sake of the profit to be derived from the sale of the timber, upon the same principles on which an injunction is granted to stay what is called equitable waste. *Kidd v. Dennison*, 6 Barb. (N. Y.) 9.

An injunction will not be granted against a tenant for removing timber which has been thrown down upon

pasture land by a tempest, especially where the timber is valueless. *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281.

Where a lease required the tenant to reduce to cultivation uncleared portions of the premises, his cutting down trees on those portions will not be enjoined as waste. *McDaniel v. Callan*, 75 Ala. 327.

Entry on land and digging up and removing fruit trees thereon is waste which may be enjoined. *Silva v. Garcia*, 65 Cal. 591.

A owned certain land, and B agreed to work it on shares with him. B afterward assigned his contract to C, who entered upon the land, and began to cut and remove timber. About this time A sold the land, and his grantee filed a bill against C to stay waste. It was held that relief should be granted, as B had no right to assign his contract, which was of a personal nature, and was therefore unassignable. *Litka v. Wilcox*, 39 Mich. 94.

Buildings.—A lessor is not entitled to an injunction to restrain the lessee from committing an injury to the estate, unless such injury will 'probably be irreparable, or cannot be compensated in damages recoverable in a suit at law. *Atkins v. Chilson*, 7 Met. (Mass.) 398.

If the lessee covenants that the premises shall not be used for any purpose extra hazardous on account of fire, and that they shall not be sublet, and both covenants are broken, the infraction of either will be ground for relief by injunction. *Gillilan v. Norton*, 6 Robt. (N. Y.) 546.

A lease provided that the lessee might "make alterations in the building now on said lands, so as to adapt it to other business than that of a livery stable." It was held that to tear down the building would be waste, against which an injunction would issue, even though the erection of a better and more expensive building on the land was contemplated. *Davenport v. Magoon*, 13 Oregon 3; 57 Am. Rep. 1.

The tenant of a room in a one-story wooden building, being deprived of the use of a chimney, began to build another. It was held that this was waste, constituting sufficient ground for an injunction. *Brock v. Dole*, 66 Wis. 142.

The lessor of a hotel is entitled to an injunction to restrain the lessee from unlawfully subletting a part of the building for a business which will impair the value of the property as a

hotel. *Godfrey v. Black*, 39 Kan. 193; 7 Am. St. Rep. 544.

An injunction will also be granted against a tenant for committing the following acts: Pulling down and removing a brick building on the premises, *Jungerman v. Bovee*, 19 Cal. 354; pulling down a house and building another, to which the landlord objects, *Smyth v. Carter*, 18 Beav. 78; altering the front of a building and putting in a side door, *Baughner v. Crane*, 27 Md. 36; changing a dwelling into a shop or warehouse, *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; breaking up a meadow for the purpose of building, *Wilton v. Saxon*, 6 Ves. Jr. 106; letting premises for a barroom, against the known objection of the landlord, *Parkman v. Aicardi*, 34 Ala. 393; 73 Am. Dec. 457; preparing to conduct a coach-making business in premises covenanted to be used for private purposes, *Bonnett v. Sadler*, 14 Ves. 526; conducting an auction dry goods business instead of a regular dry goods business, as covenanted, *Stewart v. Winters*, 4 Sandf. Ch. (N. Y.) 587; attempting to establish a school, when the lessee of a dwelling covenants not to carry on any business or trade in it, *Kemp v. Sober*, 1 Sim. N. S. 520; leasing a building to another as a liquor establishment, which had been leased to the tenant for a postoffice, *Maddox v. White*, 4 Md. 72; 59 Am. Dec. 67; and for throwing down an inclosure, *London v. Hedger*, 18 Ves. 355.

A court of equity has jurisdiction to entertain an action brought by the owner of the reversion against the tenant, whether for life or for years, to stay waste threatened or being committed, and to interpose its injunction to prevent such threatened waste. And a complaint showing that certain machinery, the property of the plaintiff, and part and parcel of the realty, was about to be taken down and removed by the defendant (who were in possession of the premises as tenants), to the great and irreparable mischief and injury of the plaintiff and his property, is sufficient to give the court jurisdiction to award an injunction, without further averment of the insolvency of the defendant. *Poertner v. Russell*, 33 Wis. 193.

The rule that a tenant for life or years is answerable to the owner for any waste committed on the land, even though it be the act of a stranger, and giving him the right to protect the

A receiver is entitled to an injunction to restrain tenants or undertenants from committing waste,¹ or using the premises to the detriment of the owners.²

But equity will not interfere by injunction against a lessee in possession, who is using the premises in accordance with the terms of the lease, working no destruction or injury to the reversion other than that contemplated and authorized by the lease itself.³

(2) INJUNCTION GRANTED TO LESSEE.—An injunction will be granted also to the lessee, in case the lessor interferes with his proper use of the demised premises, and commits or threatens waste, to the detriment of the lessee's estate.⁴

The lessee may also secure an injunction to prevent the commission of waste by his underlessee.⁵

(f) **Mortgagor and Mortgagee**—(1) WASTE BY MORTGAGOR IN POSSESSION.—The appropriate remedy for a mortgagee against a mortgagor in possession, who is impairing the security by committing waste, is by bill in chancery for an injunction;⁶ and it is not necessary to

leased premises against waste, is not applicable, where not an estate, but a mere incorporeal hereditament, is transferred, and the owner remains in possession. *Baker v. Hart*, 26 Abb. N. Cas. (N. Y.) 194.

1. *Mason v. Mason, F. & K.* 429; *Dorman v. Dorman*, 3 Ir. Eq. Rep. 385.

2. *Parkman v. Aicardi*, 34 Ala. 393; 73 Am. Dec. 457; *Beckwith v. Howard*, 6 R. I. 1.

3. *McDaniel v. Callan*, 75 Ala. 327.

A defendant in possession, claiming as lessee, will not be enjoined from using the premises for purposes not illegal, upon the ground that complainant has not authorized the lease, but the complainant will be left to his legal remedy in order to recover possession. *Bodwell v. Crawford*, 26 Kan. 292; 40 Am. Rep. 306. Nor can a tenant be enjoined from removing from the premises a building erected thereon by himself, if the injunction is sought by a landlord who is not entitled to the reversion. *Perrine v. Marsden*, 34 Cal. 14.

4. Where a lessee is entitled to the oil or gas contained in, or obtainable through, the land demised, equity has jurisdiction to restrain the lessor from drilling on the leasehold, the rights granted to the lessee being necessarily exclusive, and the damage to arise from the threatened waste being entirely incapable of measurement at law, even if not irreparable. *Westmoreland, etc., Natural Gas Co. v. De Witt*, 130 Pa. St. 235.

Proceedings by a lessor to recover possession of the premises having been instituted, he may be enjoined, pending such proceedings, from interfering with the rights of the tenants by threats and menaces, and by driving away their employees; the bill averring the total insolvency of the lessor. *Walker v. Walker*, 51 Ga. 22.

5. A termor who holds land at a ground rent is as much entitled to an injunction to stay waste by his underlessee as if he had an estate of inheritance. *Farrant v. Lovel*, 3 Atk. 723.

6. *Cooper v. Davis*, 15 Conn. 556; *Brady v. Waldron*, 2 Johns. Ch. (N. Y.) 148; *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467; *Gray v. Baldwin*, 8 Blackf. (Ind.) 164; *Brown v. Stewart*, 1 Md. Ch. 87; *Salmon v. Clagett*, 3 Bland (Md.) 125. See also *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

A removal, by the mortgagor's alienee, of old building planks and half-decayed fences—the whole not worth over \$50—was held not to warrant the issuance of an injunction against future waste. But in granting a mortgagee's prayer to enjoin future commission of waste, the court cannot oust an alienee of the mortgagor. *Coker v. Whitlock*, 54 Ala. 180.

A filed a bill in equity alleging that he had sold certain land to B, taking a mortgage for the purchase-money; that the understanding between the parties was that the land was to be sold out in lots for building purposes; that, instead of doing so, B was selling the

allege or prove the mortgagor's insolvency;¹ nor is it generally necessary to prove that the injury threatened is literally irreparable, it is sufficient if there be no adequate remedy by an action for damages.²

Although the commission of waste by a mortgagor in possession will not be enjoined, unless the acts complained of may so impair the value of the property as to render it insufficient, or of doubtful

soil of the land, and had opened quarries, and was disposing of the sand and stone thereon; that, by reason of this waste, the security of his mortgage was lessened; and prayed for an injunction to stay this waste. A supported his bill by numerous affidavits. B filed counter-affidavits, alleging that he was not quarrying the land with the intention of committing waste, but that he was merely grading the same, in order to make it more suitable for disposition as building lots. The court, having found the facts as alleged by A, granted the injunction. It was held there was no error in the decree. *Martin's Appeal* (Pa. 1887), 9 Atl. Rep. 490.

Parties.—The owner of land, and the holder of a mortgage thereon, are properly joined in a suit for an injunction to stay waste thereon. *Beebe v. Coleman*, 8 Paige (N. Y.) 392.

The mortgagee of land is the owner of the fee, as against the mortgagor and all claiming under him, and is entitled to an injunction to prevent waste on the mortgaged land. *Nelson v. Pinegar*, 30 Ill. 473.

A mortgagor who is insolvent will be restrained from committing waste upon the land mortgaged, such as cutting of timber, where such cutting will render the mortgagee's security inadequate. *Bunker v. Locke*, 15 Wis. 702.

The mortgagor and his grantees may be enjoined from committing waste, though not liable to account in equity for waste already committed. *Selden v. Mann*, 2 N. Y. Leg. Obs. 328.

A mortgagee may obtain an injunction to restrain waste by the mortgagor, where it is such waste as may render unsafe the debt secured by the mortgage. *Gray v. Baldwin*, 8 Blackf. (Ind.) 164.

The defendant, H., being owner of one undivided eighth part of certain land, took a tax deed of an undivided three-fourths of the same land, and he quit-claimed said undivided three-fourths to one C., who mortgaged the same to one A. When the mortgage was executed, there was a large quantity of

valuable pine timber on said land, constituting its main value, and H. and his cotenants, who claimed under a license from the owner of the other undivided one-eighth, entered into possession of the land and cut off most of the timber, and threatened to cut off and remove the remaining timber. In an action by the mortgagee to restrain them from further cutting the timber (to the destruction of the plaintiff's security), it was held that none of the defendants had an interest in the question whether C.'s mortgage to H. was a valid lien upon an undivided two-thirds, or only an undivided one-eighth of the land, and that the mortgagee was entitled to the injunction sought, especially as C., his mortgagor, was shown to be insolvent. *Atkinson v. Hewitt*, 51 Wis. 275.

Removal of Fixtures.—Fixtures are embraced in a mortgage, and a bill may properly be filed by the mortgagee for an injunction to prevent the commission of waste by their removal. *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 246.

1. Jones on Mortgages (4th ed.), § 684; *Dorr v. Dudderar*, 88 Ill. 107; *Bagnall v. Villar*, L. R., 12 Ch. Div. 812; *Harris v. Bannon*, 78 Ky. 568; *Scott v. Webster*, 50 Wis. 53; *Taylor v. Collins*, 51 Wis. 123.

2. Kerr on Injunctions (2d ed.), pp. 16, 17.

Duty of Mortgagee.—It is not the duty of either a mortgagee, or purchaser of the equity of redemption of a part of the land mortgaged (although they have a right), to enjoin the committing of waste. Nor will the failure of the mortgagee to enjoin the commission of any acts affecting the permanent value of the property mortgaged, release from the mortgage the property so purchased. Nor can the purchaser have an account taken of the depreciation in the value of the other land embraced in the mortgage, and treat the same as a satisfaction *pro tanto* of the mortgage. *Knarr v. Conaway*, 42 Ind. 260.

sufficiency, as security for the debt, still the value of the property should remain largely in excess of the debt secured by it.¹

The mortgagor in possession cannot be enjoined from using the premises in the same manner as they were used before the mortgage was executed; hence mines and mineral deposits may be legitimately worked,² nursery stock sold,³ and timber cut if a license has been given, either impliedly or expressly,⁴ provided in each case the premises remain sufficient security for the debt.

1. *Moriarty v. Ashworth*, 43 Minn. 1; 19 Am. St. Rep. 203.

The meaning of the term "insufficient security" is explained in *King v. Smith*, 2 Hare 244. In this case, the court, by Wigram, V. C., said: "I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."

The mortgagor in possession of the mortgaged premises, though he may exercise all acts of ownership, even to the extent of committing waste which does not impair the security, will, nevertheless, even though the debt be not yet due, be restrained from such unauthorized acts of waste as depreciate the value of the premises and render the security insufficient. *Cowgill v. Milburn Land Co.*, 25 N. J. Eq. 90.

2. A mortgagee of an undivided interest in land is not entitled to an injunction restraining the tenants in common in possession of the land from removing the clay deposits thereon, where works for the manufacture of brick have been constructed, and clay deposits worked before the execution of the mortgage. *Russell v. Merchants' Bank*, 47 Minn. 286.

But a quarry company will be restrained from removing or disposing of stone quarried on the mortgaged lands after a decree of foreclosure. *American Trust Co. v. North Belleville Quarry Co.*, 31 N. J. Eq. 89.

3. *Hamilton v. Austin*, 36 Hun (N. Y.) 138.

But the removal of growing nursery stock may be enjoined, if there is an averment of the mortgagor's insolvency. *Robinson v. Russell*, 24 Cal. 467.

4. Whether the cutting of wood and timber is wrongful or not depends upon

the question whether a license has been given, or may be implied; and this is a question for the jury. *Searle v. Sawyer*, 127 Mass. 491; 34 Am. Rep. 425; *Smith v. Moore*, 11 N. H. 55; *Page v. Robinson*, 10 Cush. (Mass.) 99.

A mortgage of land, given as security with a note payable in wood, provided that the mortgagor was "not to cut wood or timber upon the said estate, except for the payment of said note, to reduce the value below the amount secured with interest annually." It was held that the mortgagor had the right to cut timber to any extent, even after a breach of the condition of the mortgage, provided he did not so strip the land as to leave it of less value than the amount then due upon the note. *Ingell v. Fay*, 112 Mass. 451.

A large tract of pine land owned in connection with a glass factory, for the ordinary uses and purposes of which the owner from time to time cut wood from the pine land, was mortgaged. After the mortgage was given, a fire swept over a large portion of the tract, killing the timber standing on it. The mortgagors commenced cutting down the burnt timber, proposing to cut it all down, alleging that it was necessary to do so, as well to save the wood from rotting, as for the permanent benefit of the estate in reference to new growth. The mortgagees filed a bill to restrain the mortgagors from cutting down or removing from the premises any wood or timber growing thereon, or from removing from the premises any of the wood or timber already cut down, and from committing any other waste. They obtained an injunction. The bill did not pray a foreclosure; the whole money not being then payable. On answer stating the fact as to the burning and the propriety of felling the burnt timber, and offering to give other security for an amount equal to the value of the burnt wood which the mortgagors proposed to cut, a reference

The mortgagor may be enjoined from committing waste pending a bill for foreclosure,¹ after a decree has been entered,² or even after a sale of the premises.³

(2) WASTE BY MORTGAGEE IN POSSESSION.—A mortgagee in possession with a sufficient security may be enjoined by the mortgagor from committing waste.⁴ The mortgagor may also enjoin the vendee of his equity of redemption from committing waste,⁵ unless it is done under a special license.⁶

(g) Vendor and Vendee.—The same principles which apply in respect to injunctions against waste committed by a mortgagor in

was ordered to ascertain such value, with a view to directing such security to be given. In this case, it was said, by the chancellor, that if a large proportion in value of pine woodland, mortgaged, be burnt over, and it be proper, to save the burnt wood from rotting and for the permanent benefit of the estate in reference to the new growth, that the burnt wood be cut off, the land being worth but little without wood on it, it would be right that the burnt wood so cut should be applied towards paying the mortgage. *Brick v. Getsinzer*, 5 N. J. Eq. 391.

1. Pending a bill to foreclose a mortgage against the mortgagor and his grantee in fee, the grantee sold standing timber on the land; an injunction was granted against the mortgagor and his grantee, but was refused as against the purchasers, they not being parties to the bill, and having a right to be heard. *Van Derveer v. Tallman*, 1 N. J. Eq. 9.

Where, during the pendency of an action to foreclose a mortgage, waste is being committed on the mortgaged premises by the cutting down and removal of timber thereon, an order may be obtained, under *New York Code Civ. Proc.*, § 1681, to restrain the commission of further waste, but not to restrain the disposition of the timber or wood already cut, especially where there is no allegation that the parties removing it are insolvent. *Trustees of Episcopate v. Matteson*, 12 N. Y. St. Rep. 370.

2. A mortgagor in possession, committing waste after a decree of foreclosure has been rendered, but before it has been executed, may be restrained by injunction. *Malone v. Marriott*, 64 Ala. 486.

3. After a sale of mortgaged premises under decree and execution, the mortgagor in possession will be re-

strained from committing waste. *Phoenix v. Clark*, 6 N. J. Eq. 447.

W. sold and conveyed a tract of land to H., and took a deed of trust to secure certain notes given for the purchase-money. Default was made in the payment of the notes, and during the pendency of an advertisement of sale by the trustee, H., the mortgagor, confessed a judgment to his father, who afterward bought the mortgaged premises at the trustee's sale, but refused to pay for them, because he claimed title by virtue of the confession of judgment. Upon a bill, filed by the trustee, setting forth these facts, and alleging that the mortgagor was insolvent and had been allowing the farm to run down, and was cultivating it in a wasteful and destructive manner, a proper case was presented for the appointment of a special receiver to take charge of the property until the conflicting claims could be adjusted. *Dunlap v. Hedges*, 35 W. Va. 287.

4. *Mitchell v. Amador Canal, etc.*, Co., 75 Cal. 464; *Farrant v. Lovel*, 3 Atk. 723; *Hardy v. Reeves*, 4 Ves. 479; *Sandon v. Hooper*, 6 Beav. 246; 14 L. J. Ch. 120.

5. It seems that a mortgagor, who has sold his equity of redemption in the mortgaged premises without taking any indemnity against his liability upon his bond, can have an injunction against his vendee to stay waste, on the ground that he would be answerable for the amount of the mortgage which the proceeds of the sale of the land might fail to satisfy. *Hurst v. Elliott*, 52 Hun (N. Y.) 273; *Brumley v. Fanning*, 1 Johns. Ch. (N. Y.) 501.

6. But the mortgagor cannot restrain the vendee of the mortgaged premises, if the latter buys in reliance upon an oral license to cut timber, and proceeds to cut it in accordance with the license. *Hurst v. Elliott*, 52 Hun (N. Y.) 273.

possession, are also applicable as between a purchaser who has obtained possession before the payment of the purchase-money, and the vendor.¹

But the vendor is not entitled to an injunction, if the waste alleged does not impair the security of the vendee;² or is justified by good husbandry;³ or by special agreement between the

1. *Crockford v. Alexander*, 15 Ves. 138; *Casamajor v. Strobe*, 1 Sim. & Stu. 381; *Petley v. Eastern Counties R. Co.*, 8 Sim. 483; *Webster v. South-eastern R. Co.*, 1 Sim. N. S. 272. A vendor who retains title as security for the purchase-money, may have the purchaser enjoined from cutting timber on the land. *Moses v. Johnson*, 88 Ala. 517; 16 Am. St. Rep. 58.

In an action to foreclose a contract for the purchase of land, an injunction may issue against the purchaser to prevent the removal of structures which have become a part of the realty, without showing the purchaser's insolvency. *Taylor v. Collins*, 51 Wis. 123.

Voidable Contract of Sale.—An injunction was granted restraining waste on a farm conveyed by the complainant to the defendant, on a bill alleging that a deed was procured by the defendant from the complainant by undue means, the complainant being addicted to intemperance, and praying that the deed might be declared void; and after answer, the injunction was retained to the hearing. *Staats v. Freeman*, 6 N. J. Eq. 490.

An injunction to stay waste ought to be granted to a vendor against a vendee, to whom he has sold a tract of land in fee simple, retaining the title as a security for the purchase-money, who brings his suit to subject the land to the payment of the purchase-money, and the bill charges the defendant with cutting timber on the land in a manner calculated to render it an incompetent security for the payment of the purchase-money. In such a bill, it is not necessary to allege the insolvency of the defendant. *Core v. Bell*, 20 W. Va. 174.

In a suit by the vendor in a contract for the sale of land, to foreclose the interest of the purchaser, to recover a judgment for the debt, and to subject the interest of the purchaser to sale, where the vendee is insolvent, is in possession, has committed waste, and threatens to materially impair the value of the property by cutting down

and removing timber, the court may grant an injunction to restrain the commission of such waste, and appoint a receiver to take charge and possession of the land. *McCasin v. State*, 44 Ind. 151.

A court of equity will not permit a vendee of land in possession, with the bulk of the purchase-money due and unpaid, to diminish the security of his vendor by cutting and removing timber from the land. *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

2. An injunction to stay waste, at the instance of a vendor in fee, against his vendee, will not be allowed, unless he brings suit to subject the land to his lien for the purchase-money, and charges the defendant with acts of waste calculated to render the land an incomplete security for the amount due him. *Scott v. Wharton*, 2 Hen. & M. (Va.) 25.

Where a vendor received part of the purchase-money, put the purchaser in possession, and retained the legal title, and then the purchaser, in the absence of an agreement with the vendor, built houses on the land and sold them to a third person to be removed, it was held that, in the absence of proof that the vendor's security would be impaired by the removal, such removal would not be enjoined at his instance. *Miller v. Waddingham*, 91 Cal. 377.

An owner of land, who contracted to sell the same to a purchaser who caused houses to be built thereon, under an agreement with the building contractor that he should own them until paid for, cannot maintain an injunction for waste against the vendee of the contractor, after such vendee has removed the houses from the premises on to the street, although when deprived of the buildings the land constitutes insufficient security for the money still due the owner upon his contract for the sale of the land. *Stowell v. Waddingham*, 100 Cal. 7.

3. Where a vendor of land remained in possession for a time, by agreement, and cleared a portion of the land, and

vendor and vendee.¹ Likewise, the vendee may enjoin the vendor who remains in possession from committing waste.²

(h) *Mere Possessor or Trespasser*—(See also *infra*, this title, *Who May Commit Waste—Mere Possessor or Trespasser*).—The owner of premises is entitled to an injunction to restrain the commission of waste by one who is a stranger or trespasser.³

But under a statute giving the remedy of injunction for waste committed, acts of waste, and not merely of naked trespass, must be alleged and proved.⁴

sold the timber cut thereon, it was held that he was not chargeable, in favor of the vendee, either with the waste or the value of the timber, such clearing being reasonable, and in accordance with the usage of the country. *Crawley v. Timberlake*, 2 Ired. Eq. (N. Car.) 460.

1. Under a contract for the sale and purchase of land, by which time is given for the payment of the purchase-money, and the purchaser is to have the possession of the premises in the meantime, the court will not grant an injunction to prevent the purchaser from cutting timber, where it is stipulated in the contract of sale that he should be allowed to convert the timber upon the premises into lumber, for the payment of the purchase-money, and there is no allegation in the bill, nor proof, that the land would not be an adequate security for the payment of the purchase-money without the timber. *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507.

Where, by A's contract of sale to B, B is to have possession of the land and the use of a mill thereon, and the right to sell timber to a certain limit, B is not, on a strict foreclosure of the contract, liable for the use of the mill or for the timber cut according to the contract, but is liable in damages for all timber cut in excess of the contract, except so far as the proceeds of such timber have been paid upon the contract. But C, an equitable mortgagee of B, is not liable for any waste committed by B before C took possession under the mortgage, though before that time, having the legal title, he had executed a lease to B, this never having been acted upon. *Hoile v. Bailey*, 58 Wis. 434.

2. A purchaser who pays part of the purchase-money down, the vendor remaining in possession, for the purpose of using the land for a term of years, is entitled to an injunction against the commission of waste by quarrying or

the removal of trees. *Holmberg v. Johnson*, 45 Kan. 197.

3. The cutting down of trees along a river bank fronting one's premises, by which his property is protected from the encroachments of the water, is waste destructive of the inheritance, and will be enjoined, such waste being committed by parties who were without right or title to the premises. *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756.

A bill in equity was filed by tenants in fee, alleging that the defendants, confederating together, entered upon their land, cut down large quantities of wood, quarried large quantities of limestone, are continuing to do so, and design to remove the same; and that they have instituted actions of trespass *quare clausum fregit* for the said acts, which are now pending; but they did not allege that the trespass was to the destruction of the inheritance, or the mischief irreparable, nor state such facts as would show that the apprehension of further acts of trespass was well founded; nor did they charge insolvency in the defendants. It was held that an injunction would not be granted, upon such a bill, to restrain further acts of trespass or waste. *Hamilton v. Ely*, 4 Gill (Md.) 34.

An injunction may issue to restrain the destruction of an osage hedge fence, by a stranger to the inheritance. *Sapp v. Roberts*, 18 Neb. 299.

One owning to the center of a bayou may maintain a bill for an injunction against one who, claiming under an agreement with the plaintiff's grantor, obstructs the bayou by using it as a booming ground for saw logs. *Turner v. Holland*, 54 Mich. 300.

Persons who have removed timber from lands can be compelled to account for that taken, and can be enjoined from removing the remainder. *Porch v. Frees*, 18 N. J. Eq. 204.

4. A complaint which discloses a

(i) **Tenant in Qualified Fee.**—Although a devisee in fee, subject to an executory devise over, is not impeachable for waste, he may be restrained by injunction from committing equitable waste.¹

(j) **Tax Delinquents.**—The statutes of some states provide that governmental officials may sue out an injunction to prevent the commission of waste on lands on which the taxes are delinquent.²

(k) **Judgment Debtor.**—If the land of an insolvent debtor has been attached in a suit at law, the debtor may be enjoined from the commission of waste during the pendency of the suit.³ The statutes of some states give to the holder of a certificate of sale of lands upon execution, the right to enjoin the commission of waste upon the premises covered by the lien of the judgment,⁴ but this right appears to exist at common law, irrespective of statutory provisions.⁵

mere naked trespass, by one in no way related to the title or possession, is bad. *Lander v. Hall*, 69 Wis. 326.

A bill for an injunction to restrain waste, alleging that a trespasser was about to commit irreparable injury by boxing and working turpentine trees, and by cutting timber and making staves on land fit only to be cultivated for these products, without an averment of the defendant's insolvency, will be dismissed on motion. *Gause v. Perkins*, 3 Jones Eq. (N. Car.) 177; 69 Am. Dec. 728.

1. *Turner v. Wright*, 29 L. J. Ch. 598; 2 De G. F. & J. 234; 6 Jur. N. S. 809; 8 W. R. 675; *Farabow v. Green*, 108 N. Car. 339. See, *contra*, *Matthews v. Hudson*, 81 Ga. 120; 12 Am. St. Rep. 305.

2. Under *Michigan* Pub. Acts 1889, act 223, providing that a township treasurer "shall be entitled to an injunction to restrain waste" on land principally valuable for its timber, when its owner neglects or refuses to pay any tax assessed thereon, it is no defense that the tax can be collected by other process; that the owner does not intend to commit waste; and that, should waste be committed, the land would still be sufficiently valuable to pay the tax. *Rossman v. Adams*, 91 Mich. 69.

Under the aforesaid statute, a bill may be filed for such injunction, against one who refuses to pay taxes when lawfully demanded, at any time after such refusal, though the tax list may still be in the hands of the township treasurer, and the defendant may have until he has returned the tax roll to the county treasurer within which to pay. *Caldwell v. Ward*, 83 Mich. 13.

3. *Camp v. Bates*, 11 Conn. 51; 27 Am. Dec. 707.

4. *Boyd v. Hoyt*, 5 Paige (N. Y.) 65; *Bank of Utica v. Messereau*, 7 Paige (N. Y.) 517; *Talbot v. Chamberlin*, 3 Paige (N. Y.) 219.

Where a judgment is a lien upon one piece of land only, and from which alone satisfaction can be obtained (the judgment debtor being dead), and where such land is inadequate security for the payment of the judgment, a person in possession of such land may be restrained from the commission of waste thereon, by cutting and removing timber and wood, where such acts diminish the value of the premises, and thereby impair the only security the creditor has for payment of his debt. *Vandemark v. Schoonmaker*, 9 Hun (N. Y.) 16.

5. A purchaser of land at a sheriff's sale, the sale having not been returned, nor a legal title acquired, has nevertheless a remedy by injunction to stay waste of the premises purchased. *Thompson v. Lynam*, 1 Del. Ch. 64.

But the party committing the waste is not liable in equity to account for waste committed prior to a purchase of the premises, by a judgment creditor who had obtained an injunction to prevent the commission of waste, and pending the injunction, purchased the premises at a sheriff's sale in execution of the judgment, for title at the time of the commission of waste is regarded as necessary to sustain a right to an accounting in equity. *Hughlett v. Harris*, 1 Del. Ch. 349.

In 1844, A took possession of land under a patent and held exclusive possession thereof, and paid the taxes for

The judgment debtor and preferred judgment creditors may also be enjoined from the removal of fixtures from the insolvent debtor's premises, at the suit of another judgment creditor whose rights are thus sought to be defrauded.¹

more than the statutory period, the county record showing no other claim to the land. In 1882, after the land had been purchased and paid for at a judicial sale from A, the defendant, B entered forcibly, under claim of title under an older patent, and committed waste thereon. It was held that the purchaser was entitled to a perpetual injunction restraining waste. *Basore v. Henkel*, 82 Va. 474.

In *Jones v. Britton*, 102 N. Car. 166, it was held that a judgment is a lien upon land to which the debtor is entitled as a homestead, under the law of *North Carolina*, and when the land is not worth more than \$1,000, and much of its value consists in timber trees, the debtor, or other person to whom he has sold them, may be enjoined from cutting such trees for profit. In this case, the court, by Merrimon, J., said: "Obviously the creditor having such lien is entitled to have the property to which it attaches protected against the destruction or unreasonable impairment of it prejudicial to that lien. As it cannot be enforced while the exemption of the property from sale lasts, the property will be properly protected during that time, so that the creditor may, in the end, have the benefit of his lien. A court of equity will not hesitate, in a proper case, to interfere by injunction, or in any other proper way, for such purpose. Otherwise, the creditor would have no remedy during the exemption. *Webb v. Boyle*, 63 N. Car. 271; *Gordon v. Lowther*, 75 N. Car. 193; *Braswell v. Morehead*, Busb. Eq. (N. Car.) 26; 57 Am. Dec. 586; *Camp v. Bates*, 11 Conn. 51; 27 Am. Dec. 707."

Per Contra.—In *Law v. Wilgees*, 5 Biss. (U. S.) 13, it was held that, under the *Wisconsin* Rev. Stat. of 1849, the holder of a certificate of sale of land on execution cannot maintain a bill to restrain waste. The case was decided on the ground that a judgment creditor or attaching creditor has no title to the land; that the holder of a certificate of purchase has no right or title to the possession of land until he obtains his deed, after the expiration of the time for redemption; that they do

not stand in the light either of mortgagees or mortgagors (who are entitled to injunctive relief to preserve their security); and that, therefore, as the statutes of *Wisconsin* did not then authorize such a proceeding in behalf of the holder of a certificate of sale, an injunction would not be granted.

But an opposite course of reasoning was adopted in *Camp v. Bates*, 11 Conn. 51; 27 Am. Dec. 707, in which waste on the lands of an insolvent debtor was enjoined by an attaching creditor. The court, by Williams, C. J., said: "The case, in principle, seems much like that of a mortgage. In both cases the land is appropriated as security for the debt. In both cases the creditor has the right to take the land, or resort to other property, if it can be found. In both cases the debtor may remove the lien by payment of the debt. In both cases the debtor may deny or disprove the existence of the debt. Why, then, should not a court of chancery have the same power to prevent waste upon this property, in the one case as well as the other? If it is done in the one case, that the security given by the party should not be destroyed, it should be done in the other, that the security given by the law should not be destroyed. Surely the law must be as anxious to guard its own enactments, as the provisions of the parties themselves."

1. *Witmer's Appeal*, 45 Pa. St. 455; 84 Am. Dec. 505. In this case, the court, by Woodward, J., said: "The other argument of the plaintiffs in error is akin to the former, that before a creditor can question the disposition of a debtor's property, he must have completed his title by judgment and execution. This is true as to personal property, and for this reason, that the execution only, and not the judgment, is a lien on chattels. English cases were cited to show that it is true also as to real estate in *England*, and for precisely the same reason, that a judgment there is no lien on land. It is the execution which establishes the legal relation between the creditor and the debtor's land, as here it is the execution which establishes the legal relation

(1) **Copyholder.**—An injunction may be had by the lord of a manor to restrain copyholders from the commission of waste, a forfeiture at law being in many cases a very inadequate remedy.¹

(m) **Municipality.**—An injunction will be granted against a city to restrain it from using rock on land granted to it merely as a right of way.²

(n) **Executrix.**—An executrix who is the principal legatee, and is authorized to use and occupy the premises until she shall make a sale thereof, for the payment of her own and minor legacies, will not be enjoined from committing waste, since the minor legacies can be secured by an accounting.³

b. **ACCOUNTING.**—In all cases in which a bill for an injunction will lie to restrain future waste, a court of equity, upon the ground of preventing a multiplicity of suits, will give an account of past waste.⁴ But if the party committing waste has parted with his estate, or for any other reason there happens to be nothing on which an injunction can operate, and complete relief can be had in an action at law, a bill for an account will not lie, as a general rule.⁵ But if the waste is of such a kind that an action at law will not afford adequate relief, equity will give the remedy of an account, even if an injunction may not be had.⁶

The account is limited to moneys actually received and profits actually made by the tenant committing the waste; there can be no account in respect of acts unattended by profit.⁷

A bill for an accounting must charge waste and pray for relief

between the creditor and the debtor's goods. But our statutes bring judgment creditors, as the contract of mortgage brings mortgagees, into direct relation with the debtor's lands, and because the law creates the relation, equity will protect it—will protect it, not from such reasonable use and enjoyment of the lands by the owner as are usually incident to unincumbered ownership, but will protect it from such wanton and injurious acts as are of the nature of waste."

1. *Richards v. Noble*, 3 Meriv. 673.

2. *Smith v. Rome*, 19 Ga. 89; 63 Am. Dec. 298.

3. *Keller v. Ogsbury*, 121 N. Y. 362.

4. *Jesus College v. Bloom*, 3 Atk. 263; *Parrott v. Palmer*, 3 M. & K. 632.

5. *Lippincott v. Barton*, 42 N. J. Eq. 272; *Jesus College v. Bloom*, 3 Atk. 263; *Smith v. Cooke*, 3 Atk. 381; *Gent v. Harrison*, Johns. 517; *Pulteney v. Warren*, 6 Ves. 89; *Grierson v. Eyre*, 9 Ves. 346; *Parrott v. Palmer*, 3 M. & K. 632.

6. An accounting will be granted in a case where an action to stay waste and recover damages fails, if the re-

lations of the cotenants, being *sui generis*, demand it, as where one of the tenants in common may be in a position to appropriate the whole profits of the estate to his own individual use. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686. In this case, a rebate was allowed to the defendant tenant for buying in an outstanding title because it was necessary to protect the common possession.

A decree for an account of timber will be made against the assets of a remainderman in fee, who colludes with the tenant for life in cutting timber before the birth of a contingent remainderman. *Garth v. Cotton*, 3 Atk. 751; 1 Ves. 524; *Dick*. 183.

In cases of equitable waste, a bill for an account will lie against the assets of a deceased wrongdoer, though an injunction cannot be had. *Lansdowne v. Lansdowne*, 1 Madd. 73; *Leeds v. Amherst*, 2 Ph. 117; *Morris v. Morris*, 3 De G. & J. 323; *Blake v. Peters*, 1 De G. J. & S. 345.

7. *Lee v. Alston*, 1 Ves. Jr. 78; *Colburn v. Simms*, 2 Hare. 560; *Powell v. Aiken*, 4 K. & J. 343.

against it, or evidence of waste may be disregarded, and no recovery for it had under that bill.¹

(1) *Who Entitled to*—(a) *Tenant in Common*.—The proper remedy for a tenant in common, whose cotenant has wasted the estate, but not wasted it to destruction, is a bill in equity for an account.²

(b) *Mesne Remainderman for Life*.—A mesne remainderman for life, although entitled to an injunction to protect his enjoyment, has not such an interest as to enable him to call for an account.³

(c) *Executor*.—An executor cannot maintain a bill for account if an injunction will not lie, so that the account may be incidental to it.⁴

(d) *Legatee or Devisee*.—A sole legatee or devisee is entitled to relief by an accounting, for the commission of waste on the premises devised.⁵

(e) *Tenant for Life*.—A tenant for life is also liable to an account for waste.⁶

1. *Graham v. Pierce*, 9 Gratt. (Va.) 28; 100 Am. Dec. 658.

2. *Darden v. Cowper*, 7 Jones (N. Car.) 210; 75 Am. Dec. 461; *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 49 Am. Rep. 686; *Co. Litt.* 200; *Martyn v. Knowleys*, 8 T. R. 145; *Bentley v. Bates*, 4 Y. & C. 182.

3. *Pigot v. Bullock*, 1 Ves. Jr. 479; 3 Bro. C. C. 589.

4. *Lippincott v. Barton*, 42 N. J. Eq. 272.

5. If the sole legatee and devisee of a deceased wife files a bill in equity against the surviving husband, for an account of waste committed during coverture, by the removal of houses from his wife's land to his own, the complainant succeeds only to the rights of the wife, and can recover only the damages which accrued to her; the indirect injury to adjacent river lands belonging to the complainant himself, which were not suitable for residence or cultivation, is not an element for the recovery of damages; the houses having been removed with the consent of the wife, the measure of damages is not the value of the houses, but the actual injury to the land, that is, the difference in its market value before and after the removal. *Stoudenmire v. De Bardelaben*, 85 Ala. 85.

6. Where a tenant in common, by cutting down and clearing woodland beyond his interest, has greatly injured the interest of his cotenant, he is liable for waste; and where a tenant for life cuts down more than is necessary for the enjoyment of his estate, and has

injured the remainder, he will be guilty of waste, and liable to an account in equity. *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277; 29 Am. Dec. 72.

In a bill against a life tenant, for waste of timber, it is no justification that firewood and timber were furnished by him for the farm, from other premises; but in an account decreed against him for such waste, he may be allowed in mitigation for what he so furnished. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601. But *Phillips v. Allen*, 7 Allen (Mass.) 115, holds that a tenant for life is liable to account for the value of trees wrongfully cut by him from the estate, with interest from the time when they were cut; and is not entitled, when held to account for their value, to deduct sums expended in procuring from other sources wood to be used for fuel upon the premises, and the fact that the new growth upon the land is as valuable as the increased growth of the trees which were cut would have been immaterial. Here the court, by Dewey, J., said: "If the party elects to supply himself with firewood from other sources, he waives all claim for any supply for the time being from the premises. Finding no necessity to use the same, or preferring to be supplied elsewhere, his right to firebote for that period is lost. All, therefore, that he cuts and carries from the premises and sells is without right, and he is chargeable therefor. The result is, that no deduction can be made from the estimated damages for wood obtained by the tenant from other sources."

WATERCOURSES.—(See also ACCRETION, vol. 1, p. 136; BOOM COMPANIES, vol. 2, p. 469; BOUNDARIES, vol. 2, p. 495; BRIDGES, vol. 2, p. 540; DAM, vol. 4, p. 971; DRAINS AND SEWERS, vol. 6, p. 2; EMINENT DOMAIN, vol. 6, p. 509; FERRIES, vol. 7, p. 941; FISH AND FISHERIES, vol. 8, p. 23; FLOODS, vol. 8, p. 67; ICE AND ICE COMPANIES, vol. 9, p. 852; INJUNCTIONS, vol. 10, p. 842; IRRIGATION, vol. 11, p. 846; LAKES AND PONDS, vol. 12, p. 610; NAVIGABLE WATERS, vol. 16, p. 236; PRESCRIPTION, vol. 19, pp. 20, 27; SURFACE WATERS, vol. 24, p. 896; UNDERGROUND WATERS, vol. 27, p. 423; WATER WORKS AND WATER COMPANIES, vol. 29; WHARVES.)

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I. DEFINITION.—A watercourse is a stream of water usually flowing in a definite channel having a bed and sides, or banks, and discharging itself into some other stream or body of water.¹ The flow of water need not be constant, but must be something more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.²

1. In *Angell on Watercourses* (7th ed.), § 4, this definition is given: "A watercourse consists of bed, banks and water; yet the water need not flow continually, and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water, which, in times of freshet, or melting of ice and snow, descend from the hills and inundate the country. To maintain the right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not be shown to flow continually, as stated above, and it may at times be dry; but it must have a well-defined and substantial existence. A mere right of drainage over the general surface of land is very different from the right to the flow of a stream or brook across the premises of another." This definition has been approved in *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473, and many later cases.

2. *Weis v. Madison*, 75 Ind. 241; 39 Am. Rep. 135; *Schlichter v. Phillipy*, 67 Ind. 201; *Rice v. Evansville*, 108 Ind. 7; 58 Am. Rep. 22; *Hill v. Cincinnati*, etc., R. Co., 109 Ind. 511; *Robinson v. Shanks*, 118 Ind. 133; *Benson v. Connors*, 63 Iowa 670; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Ashley v. Wolcott*, 11 Cush. (Mass.) 192; *Stanchfield v. Newton*, 142 Mass. 110; *Munkers v. Kansas City*, etc., R. Co., 60 Mo. 334; *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Morrison v. Bucksport*, 67 Me. 353; *Greeley v. Maine Cent. R. Co.*, 53 Me. 200; *Shields v. Arndt*, 4 N. J. Eq. 234; *Eulrich v. Richter*, 41 Wis. 318; *Pryor v. Vaughn*, 29 Wis. 514; *Eulrich v. Richter*, 37 Wis. 226; *Barnes v. Sabron*, 10 Nev. 219; *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep.

158; *Chicago*, etc., R. Co. v. *Morrow*, 42 Kan. 339; *Gillett v. Johnson*, 30 Conn. 180.

The word watercourse is applied only to inland waters, which are commonly denominated rivers, rivulets, or brooks, according to their magnitude; as defined in law it means a living stream with defined banks and channels, not necessarily running all the time but coming from more permanent sources than mere surface water. *Joliet*, etc., R. Co. v. *Healy*, 94 Ill. 416. *Gillett v. Johnson*, 30 Conn. 180.

A river is a considerable stream of water that has a current of its own, flowing from a high level, which constitutes it from its source to its mouth. *The Garden City*, 26 Fed. Rep. 766.

"It is a river or watercourse from the point where the water comes to the surface and begins to flow in a channel, until it mixes with the sea, arm of the sea, lake, or other water. It may sometimes be dry, but in order to be within the above definition it must appear that the water usually flows in a particular direction and has a regular channel, with beds, banks or sides." *Dudden v. Clutton Union*, 1 H. & N. 627.

In *Jeffers v. Jeffers*, 107 N. Y. 651, a watercourse is defined as a living stream with defined banks and channels, not necessarily running all the time, but fed from other and more permanent sources than mere surface water.

A spring on the defendant's land, sixteen rods from the land of the plaintiff, supplied a small stream of water that ran to the plaintiff's land; the water, as it came from the spring, being sufficient to fill a half-inch pipe, and the flow being constant and nearly uniform, except in very dry times, when it failed to run. For seven rods the stream descended rapidly, in a well-defined course, to a piece of marshy ground, where it spread so that its flow was slight, and not sufficient to break the turf, but was generally sufficient to form a continuous sluggish current along the

Where water has a definite source, as a spring, and takes a definite channel, it is a watercourse, and the size and length of the stream are immaterial.¹ It is a watercourse from its

surface in a natural depression, to a watering place within the plaintiff's line. This was held to be a watercourse within the meaning attached in law to that term. *Gillett v. Johnson*, 30 Conn. 180.

Depressions in the soil, to which the surface water from adjacent lands naturally finds its way and is discharged into some natural outlet, are not thereby made watercourses. *Barkley v. Wilcox*, 86 N. Y. 140; 40 Am. Dec. 519; *Chicago, etc., R. Co. v. Morrow*, 42 Kan. 339.

A mere ravine in which grass is grown and hay cut, and through which mere surface water flows during a portion of the year in consequence of rain and the melting of snow, without a regular ravine or bank, is not a watercourse. *Shields v. Arndt*, 4 N. J. Eq. 246.

So, in *Wagner v. Long Island R. Co.*, 5 Thomp. & C. (N. Y.) 163, it was held that water flowing through a hollow or ravine only in times of rain or melting of snow, was not, in contemplation of law, a watercourse. See also *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473.

In *Murphey v. Wilmington*, 5 Del. Ch. 281, it was held that a small stream, which passed through a city in an adverse course, collected foul matter from manufactories and dwellings, and therefore being prejudicial to the public health and comfort, was not subject to the common-law doctrine against the diversion of a natural watercourse in such sense as to debar the city from the right to straighten the course of such stream and conduct it in a covered culvert.

In *England*, to constitute a watercourse in which rights may be acquired by user, under 2 and 3 William IV., ch. 71, § 2, the flow of the water must possess that unity of character which, though on one person's land, can be identified with that on his neighbor's land. *Briscoe v. Drough*, 11 Ir. C. L. R. 250. Water passing from the opening of a canal lock does not constitute a watercourse within the meaning of the act. *Staffordshire Canal Co. v. Birmingham Canal Co.*, L. R., 1 H. L. Cas. 254; 35 L. J. Ch. 757.

28 C. of L.—60

A claim by the owner of a copper mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating copper contained in such water, and afterward to let off such water impregnated with metallic substances into a watercourse upon the land of another, is a claim of a watercourse within the act aforesaid. *Wright v. Williams*, 1 M. & W. 77.

The right to the flow of water along an artificial cut, over the soil of another, cannot be acquired under this act, unless the circumstances under which the cut was made show that it was intended to be of a permanent character. *Gaved v. Martyn*, 19 C. B. N. S. 732.

Sluiceway.—A sluiceway between the parts of a bridge extending above, below, and between the filling by which flats have been reclaimed, through which the tide ebbs and flows, but which has no water in it at low tide, is not a watercourse, which can be the basis of riparian rights. *Chamberlain v. Hemmingway* (Conn.), 22 L. R. A. 45.

Private Streams.—A stream of water which is not susceptible of use as a highway in its natural state, is absolutely private, and though made floatable by the owner by artificial means, it is not subject to public use. *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525; *Hubbard v. Bell*, 54 Ill. 121; 5 Am. Rep. 98. But if sufficiently large to be of public use in transporting property, they are highways over which the public have a common right in subservience to which the private ownership of the soil is to be enjoyed. *Palmer v. Mulligan*, 3 Cai. (N. Y.) 307; 2 Am. Dec. 270; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; 11 Am. Dec. 249.

1. *Pyle v. Richards*, 17 Neb. 180; *Hinkle v. Avery* (Iowa, 1893), 55 N. W. Rep. 77; *Van Orsdol v. Burlington, etc., R. Co.*, 56 Iowa 470; *Union Pac. R. Co. v. Dyche*, 31 Kan. 120.

The right of the owner of land to have a well-defined watercourse continue to flow, does not depend upon the length of the stream above him, nor is his right affected by the fact that the source of the stream is a spring upon the adjoining land of another, nor is it

source;¹ and if lost in a swamp or lake, and for a time spread over a meadow, it is still a watercourse if it emerges therefrom and can be identified as the same stream.²

The presence or absence of spring water is not the decisive test of a watercourse;³ but where water, owing to the hilly or mountainous condition of the country, accumulates in large quantities from the rain and melting snow, and at regular seasons descends through long gullies or ravines, and in its flow carves a distinct and well-defined channel which bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is considered a watercourse.⁴

material to trace the source of the spring itself, in an action to restrain such diversion. *Chauvet v. Hill*, 93 Cal. 407.

A creek which has a channel one half mile long, with a definite bed and banks of varying width and depth, through which water is conveyed and discharged into low lands adjacent to a running stream, though it be dry most of the time, but running when there is water to be carried off by it, was held to be a watercourse, with all the incidents thereof. *Ferris v. Wellborn*, 64 Miss. 29.

1. *Dudden v. Clutton Union*, 1 H. & N. 627. In this case, Martin, B., said: "A river begins at its source, when it comes to the surface, and the owner of the land on which it rises cannot monopolize all the waters at the source, so as to prevent its reaching the lands of other proprietors lower down." See also *Wood v. Waud*, 3 Exch. 748.

A body of water lying below the outlet of a lake, through which the waters of the lake pass, and in which there is a steady and uniform current, is a river. *State v. Gilmanton*, 14 N. H. 467.

2. *Briscoe v. Drought*, 11 Ir. C. L. R. 250; *Case v. Hoffman*, 84 Wis. 438; *Robinson v. Shanks*, 118 Ind. 125; *Munkres v. Kansas City, etc., R. Co.*, 72 Mo. 514.

In *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349, in an action for diverting a brook from the plaintiff's land, it appeared that, at a point on the defendant's land below the place of the alleged diversion, the water ceased to flow between defined banks, spread itself out several rods wide, and ran so, over the surface of the ground, for five rods, to the plaintiff's land, across which it spread and ran for seven

rods in like manner, and then began to flow again in a defined channel, which conducted it into a river. It was held that the brook did not cease to be a natural watercourse on the plaintiff's land, and that he could maintain the action. *Chapman, C. J.*, said: "If the whole of the stream had sunk into defendant's soil, and none would remain to pass into the plaintiff's land except under the surface, it would have ceased to be a watercourse, and the plaintiff would have had no right to it." See also *Broadbent v. Ramsbotham*, 11 Exch. 602.

In *Spelman v. Portage*, 41 Wis. 144, the streams held to be watercourses were across the low grounds of considerable extent between two rivers. They had no well-defined channels or banks, but spread widely over the intervening ground. They came from one unquestionable watercourse and passed into another, and, therefore, did not lose their character as watercourses by passing and spreading over intervening low grounds. See also *Mohr v. Gault*, 10 Wis. 513; 78 Am. Dec. 687.

3. *Kelly v. Dunning*, 39 N. J. Eq. 482; *Eulrich v. Richter*, 41 Wis. 320.

4. *Simmons v. Winters*, 21 Oregon 35; *Earl v. DeHart*, 12 N. J. Eq. 280; 72 Am. Dec. 395; *McClure v. Red Wing*, 28 Minn. 186; *West v. Taylor*, 16 Oregon 172; *Lambert v. Alcorn*, 144 Ill. 313; *Peck v. Herrington*, 109 Ill. 611; 50 Am. Rep. 627; *Rhoads v. Davidheiser*, 133 Pa. St. 226; 19 Am. St. Rep. 630; *Conniff v. San Francisco*, 67 Cal. 45; *Wharton v. Stevens* (Iowa), 15 L. R. A. 630.

In *Earl v. DeHart*, 12 N. J. Eq. 280; 72 Am. Dec. 395, the Chancellor said: "A watercourse is defined to be 'a channel or canal for the conveyance of water, particularly in draining lands,'

II. RIPARIAN RIGHTS—1. Nature of.—Riparian rights to be considered here are the correlative rights of adjoining proprietors upon the banks of watercourses with respect to the waters thereof.¹ These rights are incident to the ownership of the banks of the watercourses, and it is necessary to the existence of a riparian right that the land should be in contact with the flow of the stream;² but lateral contact is as good as vertical so far as concerns

It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in the case of a ditch or other artificial means, used to divert the water from its natural channel or to carry it from lowlands from which it will not flow, in consequence of the natural formation of the surrounding land. It is an ancient watercourse, if the channel through which it naturally runs has existed from time immemorial. Whether it is entitled to be called an ancient watercourse, and, as such, legal rights can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water, which, if dammed off, would inundate a large region of country, are dry for a great portion of the year." See also, as adopting this definition, *McKinley v. Chosen Freeholders of Union Co.*, 29 N. J. Eq. 171; *Bowlsby v. Speer*, 31 N. J. L. 351; 86 Am. Dec. 216. So, in *Palmer v. Waddell*, 22 Kan. 352, it was held that where surface water, having no definite source, is supplied from falling rain and the melting snow from a hilly region, and, owing to the natural formation of the surface of the ground, is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite form or natural channel, escaping through such channel regularly during the spring months of every year and in seasons of heavy rains, this having been always the case as far as the memory of man runs, such an accustomed channel may fairly be said to possess the attributes of a natural watercourse.

But in *Gibbs v. Williams*, 25 Kan. 214, it was held that in order to create the exception in the above case, it was not sufficient that the conformation of the surface be such that water falling on a large tract of land naturally flows upon and over a depression, which would have been the end of that tract,

but that there must be a necessity for the flow over this depression, in order to prevent the flooding of a considerable body of land; there must be a distinct channel with well-defined banks, cut through the turf and into the soil by the flowing of the water, the bed of a stream, or something which will present casually to every eye the unmistakable evidences of running water.

1. In *Stockport Water Works Co. v. Potter*, 3 H. & C. 326, Pollock, J., said: "The rights which the riparian proprietor has with respect to water are entirely derived from his possession of land abutting on the river; if he grants away a portion of his land so abutting, then the grantee becomes the riparian proprietor and has the same rights."

In *Bardwell v. Ames*, 22 Pick. (Mass.) 333, Shaw, C. J., defines a riparian owner as follows: "By this designation I understand an owner of land bounding generally upon a stream of water, and, as such, having a qualified property in the soil to the thread of the stream, with the privileges annexed thereto by law."

2. *Miner v. Gilmour*, 12 Moore P. C. C. 131; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Jones v. Johnston*, 18 How. (U. S.) 150; *Johnston v. Jones*, 1 Black (U. S.) 209; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406; 8 Am. St. Rep. 679.

A canal company owning a strip of land along the banks of a stream, contiguous to and touching the flow of the stream, is a riparian proprietor upon the stream, although the mere right of way along the bank would not make him such a proprietor. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970.

Riparian rights are an appurtenance to the land, running with it as a corporeal hereditament. They may be segregated by grant or condemnation, or extinguished by prescription, but cannot be defeated by simple appropriation. *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217.

these rights.¹ Owners of land in the neighborhood, but not upon the line of a watercourse, have no right to invoke the rules of law applicable to those who have easements as riparian owners.² One entitled to the exclusive possession of land abutting on a watercourse, although he does not own the fee, is entitled to enjoy riparian rights incident to the land.³ The mere grant of a right of way along the banks of a stream will not deprive the grantor of his riparian rights,⁴ nor confer any on the grantee,⁵ although it seems that the dedication of a strip of land, along the banks of a watercourse, for a street or public highway, confers upon the public equal rights with the owner of the soil.⁶

As stated above, the rights of riparian owners exist, not by virtue of a presumed grant or long acquiescence, but *ex jure nature*, as incident or appurtenant to the land through which the water flows; they are vested rights, and even before they have been in

1. In *Lyon v. Fishmongers' Co.*, L. R., 1 App. Cas. 682, Lord Selden said: "The rights of a riparian owner, so far as they relate to any natural stream, exist *juri nature*, because his land has, by nature, the advantage of being washed by the stream. I am unable to see why the law did not recognize and allow the course of nature in every part of the same stream. . . . With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so-called, because the word riparian is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream, depends, not upon nature, but upon grant or presumption of law. . . . The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of a stream, which can only be appropriated by severance, and may be lawfully so appropriated by everyone having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream, but lateral contact is as good, *juri nature*, as vertical."

So, in *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 974, it was said that, "the ownership of the bed of the river is not the foundation of riparian rights properly so-called, because the word riparian is relative to the bank, and not to the bed, of the stream; and the connection, when it exists, of property on the banks with property in the bed of the

stream, depends, not upon nature, but upon grant or presumption."

Who Are Not Riparian Owners.—A mere possessor of unsurveyed government land has no riparian rights to the use of a stream of water flowing through it. *Lake v. Tolles*, 8 Nev. 285.

A mere intruder on land is limited to his actual possession, and the rights of riparian proprietors do not attach to him. *Watkins v. Holman*, 16 Pet. (U. S.) 25.

2. *Schlag v. Jones*, 131 Pa. St. 62.

3. *Hanford v. St. Paul, etc., R. Co.*, 43 Minn. 104.

4. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 974; *Hagan v. Campbell*, 8 Port. (Ala.) 9; 33 Am. Dec. 267.

In the absence of any reservation or incompatible grant, the laying out of a street in front of uplands does not deprive the owner of his general riparian rights. *Prior v. Comstock*, 17 R. I. 1.

5. *Potter v. Indiana, etc., R. Co.*, 95 Mich. 389.

6. *New Orleans v. U. S.*, 10 Pet. (U. S.) 662; *St. Paul, etc., R. Co. v. Schurmeier*, 7 Wall. (U. S.) 272; *New Orleans Water Works Co. v. Ernst*, 32 Fed. Rep. 5; *Godfrey v. Alton*, 12 Ill. 29. But see *Brisbane v. St. Paul, etc., R. Co.*, 23 Minn. 114.

In *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, the fee of the street was in the *United States*.

In *Barney v. Keokuk*, 94 U. S. 324, it was held that a street bordering on the river must be regarded as intended to be used for purposes of access to the river and the easy accommodation of

any way exercised will be recognized and protected by law.¹ Such rights are not lost by nonuser; it is not nonuser by the owner, but the adverse enjoyment by another, which destroys the right.²

2. **Extent of**—*a.* IN GENERAL.—The rights of riparian proprietors are correlative; that is, the right of each proprietor to the use and enjoyment of the water in running streams is not absolute and exclusive, but is subject to similar rights in all the other proprietors along the stream,³ save when qualified by grant or

communication in such connection, to be used by the public in contradiction to the exclusive rights of one claiming riparian rights as the owner of the soil.

1. Angell on Watercourses (7th ed.), § 134; Mason v. Hill, 5 B. & Ad. 11; Crossley v. Lightowler, L. R., 3 Eq. 279; L. R., 2 Ch. 478; Nuttall v. Bracewell, L. R., 2 Exch. 1; Yates v. Milwaukee, 10 Wall. (U. S.) 497; Bell v. Gough, 23 N. J. L. 624; Brisbane v. St. Paul, etc., R. Co., 23 Minn. 114; Carli v. Stillwater St. R., etc., Co., 28 Minn. 373; 41 Am. Rep. 290; Hanford v. St. Paul, etc., R. Co., 43 Minn. 110; Delaplaine v. Chicago, etc., R. Co., 42 Wis. 214; 24 Am. Rep. 386; Adams v. Barney, 25 Vt. 225; Corning v. Troy, 40 N. Y. 191; Crooker v. Bragg, 10 Wend. (N. Y.) 260; 25 Am. Dec. 555; Vansickle v. Haims, 7 Nev. 249; Pope v. Kinman, 54 Cal. 3; Riverside Water Co. v. Gage, 89 Cal. 410; Lux v. Haggin, 69 Cal. 390.

In Sampson v. Hoddinott, 1 C. B. N. S. 590, Cresswell, J., said: "It appears to us that all persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not."

And in Bealey v. Shaw, 6 East 208, Lord Ellenborough said: "The general rule of law, as applied to this subject, is that, independent of any particular enjoyment used to be had by another, every man has the right to have the advantage of a flow of water in his own land."

In Pugh v. Wheeler, 2 Dev. & B. (N. Car.) 50, Ruffin, C. J., said: "The argument of the counsel, however, assumes that the right to water can be acquired only by use, and therein, we think, consists its error. The *dicta* on which he relies had reference to the cases of prescriptive title, or where the party had only the rights of a possessor. But it is not true that the right to the water is acquired only by its use, and

that it cannot exist independent of any particular use of it. That doctrine is correctly applied to the air and the sea, or such bodies of water as from their immensity cannot be appropriated by individuals, or ought to be kept as common highways for the constant use of the country and the enjoyment of all men. In such cases, particular persons cannot acquire a right, that is, a several and exclusive right, by use or any other means; but with smaller streams it is otherwise. They must still be *publici juris* so far as to allow all persons to drink the water and the like; and also, so far as to prevent a person to whose land it comes, from thus consuming it entirely, by applying it to other purposes than those for which it is conceded to everyone *ad lavandum et potandum*, as to divert or corrupt it."

2. Eddy v. Chace, 140 Mass. 471; Whitney v. Wheeler Cotton Mills, 151 Mass. 406; Johnson v. Jordan, 2 Met. (Mass.) 234; French v. Braintree Mfg. Co., 23 Pick. (Mass.) 216; Pillsbury v. Moore, 44 Me. 154; 69 Am. Dec. 91.

The owner of an easement may abandon it, but mere nonuser must originate in, or be accompanied by, some decided and unequivocal acts of the owner, inconsistent with the continued existence of the easement, and showing an intention on his part to abandonment. Eddy v. Chace, 140 Mass. 471.

3. Wright v. Howard, 1 Sim. & Stu. 190; Mason v. Hill, 5 B. & Ad. 1; 27 E. C. L. 1; Sampson v. Hoddinott, 1 C. B. N. S. 590; Wood v. Waud, 3 Exch. 748; Bickett v. Morris, 14 L. T. N. S. 835; Bealey v. Shaw, 6 East 208; Duncombe v. Randall, Hetley 32; Williams v. Morland, 2 B. & C. 910; 9 E. C. L. 269; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162; 7 Am. Dec. 526; Canal Com'rs v. People, 5 Wend. (N. Y.) 423; *Ex p.* Jennings, 6 Cow. (N. Y.) 518; 16 Am. Dec. 447; Platt v. Johnson, 15 Johns. (N. Y.) 213; Elliott v. Fitchburg, etc., R. Co., 10 Cush.

prescription, or by right of prior appropriation, as recognized in some of the states, especially those on the Pacific coast.

The property in the water is indivisible, and all the proprietors are entitled to an equality of rights therein. They must use it as an entire stream in its natural channel, for there can be no severance into parts without consent.¹

In consequence of the common right of riparian proprietors to the benefits of water flowing through their land, the general rule is, that no proprietor has a right to use the water to the prejudice of another. This principle, however, does not restrain the use of the waters so that there can be no diminution or impediment whatever, but the true measure and standard of the use which a riparian owner may make of his right is the reasonableness thereof; each is entitled to a reasonable use for domestic, agricultural, and manufacturing purposes.² Whether the use complained of is a

(Mass.) 191; *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Mass. 420; 7 Am. Dec. 160; *Cook v. Hull*, 3 Pick. (Mass.) 269; 15 Am. Dec. 208; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *McCord v. High*, 24 Iowa 342.

In *Embrey v. Owen*, 6 Exch. 353, Parke, B., said: "The law as to flowing water is now put on its right footing. . . . The right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right in each proprietor of the adjacent land to the flow of all the water in its natural state; but it is a right only to the flow of the water and a reasonable enjoyment of the same gift of providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie."

In *Liggins v. Inge*, 7 Bing. 682; 20 E. C. L. 287, Tindal, C. J., said: "Water flowing in a stream, it is well settled by the law of *England*, is *publici juris*. By the Roman law, running water, air, and light, were considered as some of those things which had the name of *res communes*, and which were defined 'things, the property of which belonged to no person, but the use of all.'"

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or deviation. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no

property in the water itself, but a simple usufruct while it passes along. *Aqua currit, et debet currere, ut currere solebat*, is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction; and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietor, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietor below, nor throw the back water upon the proprietor above, without a grant or an uninterrupted enjoyment of twenty years which is evidence of it." 3 Kent's Com. (13th ed.) 439.

1. *Tourtellot v. Phelps*, 4 Gray (Mass.) 376; *Plumleigh v. Dawson*, 6 Ill. 544; 41 Am. Dec. 199; *Evans v. Merriweather*, 4 Ill. 492; 38 Am. Dec. 106.

The grant of an undivided moiety or share in a stream of water does not authorize the grantee to appropriate or use the stream to the injury of others jointly interested in it. The property in a stream of water is indivisible. *Vandenburgh v. Van Bergen*, 13 Johns. (N. Y.) 212.

2. *Kensit v. Great Eastern R. Co.*, 27 Ch. Div. 122; *Embrey v. Owen*, 6 Exch. 353; *Mason v. Hill*, 5 B. & Ad. 1; 27 E. C. L. 1; *Miner v. Gilmour*, 12 Moore P. C. C. 131; *Nuttall v. Bracewell*, L. R., 2 Exch. 1; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Tyler v. Wilkinson*, 4 Mason (U. S.) 400; *Union Mill, etc., Co. v. Daugberg*, 2 Sawy. (U. S.) 450; *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453; *Stein v. Burden*, 29

reasonable one, is a question of fact, to be determined by the circumstances of the particular case.¹ The question is not to

Ala. 127; 65 Am. Dec. 394; Ulbricht v. Eufaula Water Co., 86 Ala. 587; 11 Am. St. Rep. 72; Chandler v. Howland, 7 Gray (Mass.) 350; 66 Am. Dec. 487; Gould v. Boston Duck Co., 13 Gray (Mass.) 442; Haskins v. Haskins, 9 Gray (Mass.) 390; Tourtellot v. Phelps, 4 Gray (Mass.) 376; Pitts v. Lancaster Mills, 13 Met. (Mass.) 156; Hinckley v. Nickerson, 117 Mass. 213; Morrill v. St. Anthony Falls Water Power Co., 26 Minn. 222; 37 Am. Rep. 399; Pinney v. Luce, 44 Minn. 367; Davis v. Getchell, 50 Me. 602; 79 Am. Dec. 636; Bullard v. Saratoga Victory, etc., Co., 77 N. Y. 525; Merritt v. Brinkerhoff, 17 Johns. (N. Y.) 306; 8 Am. Dec. 404; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53; Williamson v. Canal Co., 78 N. Car. 156; State v. Pottmeyer, 33 Ind. 402; 5 Am. Rep. 224; Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 230; Evans v. Merriweather, 4 Ill. 492; 38 Am. Dec. 106; Wadsworth v. Tillotson, 15 Conn. 366; 39 Am. Dec. 391; Parker v. Hotchkiss, 25 Conn. 321; Woodin v. Wentworth, 57 Mich. 278; Dumont v. Kellogg, 29 Mich. 420; 18 Am. Rep. 102; Red River Roller Mills v. Wright, 30 Minn. 249; 44 Am. Rep. 194; Jones v. Adams, 19 Nev. 78; 3 Am. St. Rep. 788; Snow v. Parsons, 28 Vt. 459; 67 Am. Dec. 723; Dickson v. Carnegie, 1 Ont. 110; Ellis v. Clemens, 21 Ont. 227.

In *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373, Grover, J., approving the doctrine as laid down in *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 443, said: "When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by the riparian proprietor in the use of the water as it flows, for that would be to deny any valuable use of it. . . . The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or retardation, or acceleration of the natural current, indispensable for the general and valuable use of the water, properly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively or sensibly injurious, by diminishing the value of the common

right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into narrow strictness, subversive of common sense, nor into extravagant looseness which would destroy private rights."

And in *Merrifield v. Worcester*, 110 Mass. 219; 14 Am. Rep. 592, Wells, J., explained the qualification of the riparian right. He said: "The right of which the plaintiff alleges a violation, is not that of acquired property in possession. It is not an absolute right, but a natural one, qualified and limited like all natural rights, by the existence of like rights in others. It is incident merely to his ownership of land through which the stream has its course. As such owner, he has a right to enjoy the continued flow of the stream, to use its force, and to make limited and temporary appropriation of its waters. These rights are held in common with all others having lands bordering upon the same stream; but his enjoyment must necessarily be according to his opportunity, prior to those below him, subsequent to those above. It follows that all such rights are liable to be modified and abridged in the enjoyment, by the exercise by others of their own rights; and, so far as they are abridged, the loss is *damnum absque injuria*. The only limit that can be set to this abridgment, through the exercise by others of their natural rights, is in the standard or measure of reasonable use."

In *Cary v. Daniels*, 8 Met. (Mass.) 466; 41 Am. Dec. 532, the rule is thus stated, by Shaw, C. J.: "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream, above and below."

1. *Phillips v. Sherman*, 64 Me. 171; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373; *Prentice v. Geiger*, 74 N. Y. 341; *Pollitt v. Long*, 3 Thomp. & C. (N. Y.) 232; *Hetrich v. Deachler*, 6 Pa. St. 32; *Hartzall v. Sill*, 12 Pa. St. 248; *Hoy v. Sterrett*, 2 Watts (Pa.)

be determined by what would be deemed a reasonable use for business or other purposes for which the water is appropriated, but what would be reasonable with respect to the rights of others;¹ and a variety of conditions, such as the character and size of the stream, and the uses to which it always can be applied, are to be considered.² The jury may con-

327; 27 Am. Dec. 313; *Elliott v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191; 57 Am. Dec. 85; *Holden v. Lake Co.*, 53 N. H. 332; *Hayes v. Waldron*, 44 N. H. 580; 84 Am. Dec. 105; *Hubbard v. Concord*, 35 N. H. 60; 69 Am. Dec. 520; *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526; *Hazeltine v. Case*, 46 Wis. 391; 32 Am. Rep. 715; *Learned v. Tangeman*, 65 Cal. 334.

In *Ellis v. Clemens*, 21 Ont. 227, it was stated, as a general rule, "that any user which inflicts positive, repeated, and sensible injury upon a proprietor, above or below, is not to be considered a reasonable user." An attempt to empty into a stream an artificial supply of water to the extent of ten million gallons a day, is a user inconsistent with the common enjoyment of the stream by all other riparian owners. *Baltimore v. Appold*, 42 Md. 442.

1. *Weiss v. Oregon Iron, etc., Co.*, 13 Oregon 496; *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 235; *Haskins v. Haskins*, 9 Gray (Mass.) 390; *Brace v. Yale*, 10 Allen (Mass.) 447; *Hayes v. Waldron*, 44 N. H. 583; 84 Am. Dec. 105.

In *Wheatley v. Chrisman*, 24 Pa. St. 302; 64 Am. Dec. 657, the defendant claimed that he had a legal right to use a reasonable quantity of water for the purposes of his business, but it was held that his business might reasonably require more than he could take consistently with the rights of the plaintiff, and that the reasonable use should be with respect to the rights of others. *Black, J.*, said: "We cannot see how or on what principle the correctness of this can be impugned. The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both. . . . The defendant had a right to such use as he could make of the water, without materially diminishing it in quantity or corrupting it in quality. If he needed more he was bound to buy it. However laudible his enterprise may be, he cannot carry it on at the expense of his neighbor."

In *Hoy v. Sterrett*, 2 Watts (Pa.) 327;

27 Am. Dec. 313, it was held that an upper mill owner was not answerable to one lower down the stream for detaining the water in his dam for several days, if this was necessary to the action of his mill, though the lower mill was thereby injured. This may seem to be inconsistent with the proposition of the text, but as was said in *Miller v. Miller*, 9 Pa. St. 76; 49 Am. Dec. 545, it arose from the necessity of the case and the impossibility of using the water beneficially in any other way.

The correct proposition was stated in *Springfield v. Harris*, 4 Allen (Mass.) 496, where it was said: "Such proprietor cannot be held responsible for any injurious consequences which result to others, if the water is used in a reasonable manner, and the quantity used is limited by, and does not exceed, what is reasonably and necessarily required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream and the quantity of water usually flowing therein." See also *Thurber v. Martin*, 2 Gray (Mass.) 394; 61 Am. Dec. 468.

2. *Hayes v. Waldron*, 44 N. H. 580; 84 Am. Dec. 105.

In determining this question, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and also the size of the stream, the fall of water, its volume, velocity, and prospective rise and fall, are important elements to be considered. *Timm v. Bear*, 29 Wis. 265.

So in *Baltimore v. Appold*, 42 Md. 457, *Robinson, J.*, said: "The limits which separate the lawful from the unlawful use of a stream, it may be difficult to define. It is, in fact, impossible to lay down a precise rule to cover all cases, and the question must be determined in each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil,

sider evidence of the general usage of the country in similar cases.¹

b. AS TO QUANTITY OF WATER USED—(1) For Domestic Purposes.—A distinction is observed, in the application of the general principle, between the appropriation for such uses as are natural, and those which are artificial. It is held that a riparian proprietor may appropriate and consume all the water which flows through his land, if this is necessary to satisfy his natural wants, such as general domestic wants,² and for watering

and a variety of other facts. It is entirely a question of degree, the true test being whether the use is of such a character as to effect materially the equally beneficial use of the stream by others."

1. *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102.

2. *Anderson v. Cincinnati Southern R. Co.*, 86 Ky. 45; 9 Am. St. Rep. 263; *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453; *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394; *Ferrea v. Knipe*, 28 Cal. 343; 87 Am. Dec. 128; *Swift v. Goodrich*, 70 Cal. 105; *Lux v. Haggin*, 69 Cal. 255; *Philadelphia v. Spring Garden*, 7 Pa. St. 348; *Rhodes v. Whitehead*, 27 Tex. 304; 84 Am. Dec. 631; *Davis v. Fuller*, 12 Vt. 178; 36 Am. Dec. 334. See also *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Shook v. Colohan*, 12 Oregon 239. This is a right of paramount necessity. *Philadelphia v. Collins*, 68 Pa. St. 106.

In *Evans v. Merriweather*, 4 Ill. 495; 38 Am. Dec. 106, the distinction is well explained. "Each riparian proprietor is bound to make such a use of running water as to do as little injury to those below him as is consistent with a valuable benefit to himself. The use must be a reasonable one. Now, the question fairly arises, is that a reasonable use of running water by the upper proprietor, by which the fluid itself is entirely consumed? To answer this question satisfactorily, it is proper to consider the wants of man in regard to the element of water. These wants are either natural or artificial. Natural are such as are absolutely necessary to be supplied, in order to his existence. Artificial, such only as, by supplying them, his comfort and prosperity are increased. To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water

for cattle is also necessary. These wants must be supplied, or both man and beast will perish. The supply of man's artificial wants is not essential to his existence, it is not indispensable; he could live if water was not employed in irrigating lands, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is absolutely indispensable to the cultivation of the soil, and, in them, water for irrigation would be a natural want. Here it might increase the products of the soil, but it is by no means essential, and cannot, therefore, be considered a natural want of man. So of manufactures, they promote the prosperity and comfort of mankind, but cannot be considered absolutely necessary to his existence; nor need the machinery which he employs be set in motion by steam. From these premises would result this conclusion: that an individual owning a spring on his land, from which water flows in a current through his neighbor's land, would have the right to use the whole of it, if necessary to satisfy his natural wants."

The manner of the consumption, however, must be considered, and the appropriation, in a negligent manner, resulting in total consumption to another riparian proprietor, cannot be justified. A riparian owner, in using the waters of a stream for domestic purposes and watering cattle, has no right to dam it and spread it over a large surface, thereby causing so much thereof to be lost by absorption and evaporation that the stream fails to flow through a lower owner's land. *Ferrea v. Knipe*, 28 Cal. 344; 87 Am. Dec. 128.

In *England*, this distinction is recognized, and a riparian proprietor is held to have a right to the ordinary use of water for domestic purposes, whatever the effect upon those below him.

In *Miner v. Gilmour*, 12 Moore P. C. C. 131, Kingsdowne, L. J., said:

stock.¹ In some cases, however, it seems that this distinction is not recognized.²

This right is a right to the use of the water and not to a quantity of it; therefore, a riparian owner cannot withdraw an equivalent amount for another purpose.³

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called ordinary use of water flowing past his land; for instance, the reasonable use of the water for domestic purposes and for his cattle, and this without regard to the effect which such use may have, in cases of a deficiency, to proprietors lower down the stream; but further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." See also *Nuttall v. Bracewell*, L. R., 2 Exch. 1; *Swindon Water Co. v. Wilts Canal Co.*, L. R., 7 H. L. 697.

If the use for ordinary domestic purposes consumes all the water there is, during dry seasons, it makes no difference. *Slack v. Marsh*, 11 Phila. (Pa.) 543.

What Are Domestic Uses.—In *Para Rubber Shoe Co. v. Boston*, 139 Mass. 155, it was held that grinding, washing, and cooling rubber, were not purposes for which the inhabitants had a right to appropriate and use the waters of a stream, under an act authorizing them to use such water as should be necessary "for all ordinary, domestic, and household purposes, and for the generation of steam."

The appropriation of water for watering a garden is for a domestic use. *Wilts, etc., Canal, etc., Co. v. Swindon Water Co.*, L. R., 9 Ch. 451.

Generation of Steam.—It is a reasonable use of a watercourse to use the water therefrom in the generation of steam. *Sandwich v. Great Northern R. Co.*, 10 Ch. Div. 707. But to withdraw so much for this purpose as to materially injure another in the exercise of his right, is a nuisance for which damages can be recovered, and which will be abated. *Garwood v. New York Cent., etc., R. Co.*, 83 N. Y. 400; 38 Am. Rep. 452. Such a use is not a use for a natural want. *Anderson v. Cincinnati Southern R. Co.*, 86 Ky. 44; 9 Am. St. Rep. 263; *Pennsylvania R. Co. v. Miller*, 112 Pa. St. 34; *Saunders v. Bluefield Waterworks, etc., Co.*, 58 Fed. Rep. 133.

Appropriation of Water for Domestic Purposes, on Land Not Riparian.—A riparian proprietor has a right, by means of machinery, to pump up water from a natural stream flowing past his land to a reservoir, and to convey it thence by pipes to his dwelling house upon another estate at a distance from the stream, and he may there apply such water to his domestic and other necessary purposes, provided he takes only a reasonable quantity with reference to the size of the stream and the rights of his neighbor; but he must not take more water, by means of the machinery, than he would have a right to take otherwise. *Norbury v. Kitchin*, 7 L. T. N. S. 685.

1. *Brown v. Best*, 1 Wils. 174; *Smith v. Adams*, 6 Paige (N. Y.) 435; *Arnold v. Foot*, 12 Wend. (N. Y.) 330; *Spence v. McDonough*, 77 Iowa 460.

In *Hazeltine v. Case*, 46 Wis. 391, where the defendant appropriating the water for his stock interfered with the appropriation, by a lower proprietor, of the water for domestic purposes, an instruction "that if, in its natural state, the stream was useful both for domestic uses and for watering stock, but the use for ordinary stock purposes was more valuable or beneficial for all the owners along the stream than the use for domestic purposes, then the less valuable must yield to the more valuable use; but that its reasonable use for all purposes should be preferred if possible," was held to be a proper one.

2. *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391; *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 504; *McElroy v. Goble*, 6 Ohio St. 187; *Hough v. Doylestown*, 4 Brew. (Pa.) 333. In these cases, however, the appropriation was not for domestic purposes, and the question was not directly involved.

3. *Atty. Gen'l v. Great Eastern R. Co.*, 23 L. T. 344.

And the fact that a stream rising on one's land is barely sufficient for his domestic purposes, does not justify him in diverting it from its natural channel. *Arnold v. Foot*, 12 Wend. (N. Y.) 330.

(2) *For Non-riparian Purposes.*—One not a riparian owner cannot, for any purpose, take or divert the waters of a non-navigable watercourse, to the injury of lower riparian proprietors;¹ and a riparian owner, as against lower owners, cannot sell the waters of a stream.² The supplying of water to cities and public institutions is not the exercise of a riparian right.³

c. AS TO MODE OF USE—(1) *Detention and Obstruction of the Flow*—(a) *In General.*—A riparian owner may, in the exercise of his rights, detain the waters of a stream by a reasonable use; but every detention, or other act changing the natural flow of a stream, and which is not a reasonable exercise of a right therein, is a nuisance as to him who is injured thereby.⁴ The reasonableness of the use

1. *Devonshire v. Eglin*, 14 Beav. 530; *Hayden v. Long*, 8 Oregon 244.

Diversion by Non-riparian Owner.—In *Hayden v. Long*, 8 Oregon 244, it appeared that the plaintiff was the owner of land through which a small stream of water ran which he used for propelling machinery; the defendant, who was not the owner of the land adjoining the stream, went above the land of the plaintiff and diverted a portion thereof from its natural channel, and conducted it over and across the lands of other persons, where it was used for irrigation and for other purposes. It was held that such diversion was unlawful, and that while the instruction of the court contained a correct statement of the law as to the requisite rights of riparian owners, it was inapplicable to the facts of this case, as the diversion was made by a party who was not a riparian owner.

Non-riparian Owner Using and Returning.—But in *Kensit v. Grand Eastern R. Co.*, 27 Ch. Div. 122, the taking, by non-riparian owners, of water from a river, and after using it to cool certain apparatus returning it to the river unpolluted and undiminished, was held no ground for an injunction, against the taker of the water or the riparian owner through whose land it was taken.

2. *Swindon Water Works Co. v. Wilts, etc., Canal, etc., Co.*, L. R., 7 H. L. Cas. 697; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538.

A riparian owner cannot, as against a lower owner, authorize a company to take water from the stream, to be conducted to a distant place. *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426; 7 Am. St. Rep. 183.

3. *Emporia v. Soden*, 25 Kan. 588; 37 Am. Rep. 265; *Medway Navigation Co. v. Romney*, 9 C. B. N. S. 575;

Harding v. Stamford Water Co., 41 Conn. 87.

In *Swindon Water Works Co. v. Wilts, etc., Canal, etc., Co.*, L. R., 7 H. L. Cas. 697, it was held that a water works company having the rights of riparian proprietors, could not collect the water in a reservoir, and supply the inhabitants of a distant town. See also *Haupts' Appeal*, 120 Pa. St. 211.

The fact that a city owns land on a stream, and that its inhabitants have been accustomed, from time immemorial, to use it for domestic purposes and for drinking, is no defense to an action by a riparian owner occasioned by the city taking the water, through its water works, to supply the inhabitants. *Aetna Mills v. Waltham*, 126 Mass. 422.

The owners of a projected reservoir had statutory authority to divert the waters of a river which discharged down the stream a fixed amount of water per day. They began the work but were prevented from completing it. They diverted the water and discharged down the river more than the natural flow, but less than the quantity required by statute. It was held that a riparian owner had a right of action for the diversion, but not for the failure to supply the statutory amount. *Waller v. Manchester*, 6 H. & N. 667.

4. *Miner v. Gilmour*, 12 Moore P. C. C. 131; *Hendricks v. Johnson*, 6 Port. (Ala.) 473; *Betts v. Davenport*, 3 Conn. 286; *Williams v. Gale*, 3 Har. & J. (Md.) 231; *Phillips v. Sherman*, 64 Me. 171; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minn. 222; 37 Am. Rep. 399; *Lawrence v. Fairhaven*, 5 Gray (Mass.) 110; *Sackrider v. Beers*, 10 Johns. (N. Y.) 241; *Oliver v. New York Bay Cemetery Co.*, 38 N. J. Eq. 109; *Dumont v. Kellogg*, 29

is a question of fact to be determined by the jury, from the circumstances of each particular case,¹ from a consideration of the capacity of stream, the adaptation of the machinery to it, and

Mich. 420; 18 Am. Rep. 102; *Davis v. Fuller*, 12 Vt. 178; 36 Am. Dec. 334; *Vliet v. Sherwood*, 38 Wis. 162.

The prescriptive rights of an ancient mill do not prevent the reasonable use of a stream by an upper owner, the effect of which is to modify or disturb the regularity of the flow. *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156; *Hinckley v. Nickerson*, 117 Mass. 213. In *Hinckley v. Nickerson*, 117 Mass. 213, the detention of the flow of the water of a stream, for six days at a time, twice a year, in order to flow the defendant's cranberry meadow, it being reasonably necessary to use the water for that purpose, was held not to be an unreasonable use against one, the operation of whose grist mill was thereby affected.

Where it appeared that the ditch making the channel of the stream, terminated ten feet from the defendant's land, and the water spread out upon the surface of his meadow, it was held that the defendant was not guilty of obstructing the watercourse in placing sods and sticks along the line of his own land, to stop the flow of water thereon. *Hawley v. Sheldon*, 64 Vt. 491.

Obstruction by City in Grading Streets.

—A city has no authority, in grading a street, to stop a natural watercourse by embankment, so as to detain the waters and force them back on to the lot of a private individual. *Conniff v. San Francisco*, 67 Cal. 45.

Failure to Cleanse Channel.—Though a riparian owner is not bound to remove the natural obstructions or improve the channel, it is an unlawful detention when, under a duty to cleanse the channel and keep it open, he fails to do so, and the water overflows or otherwise does injury to others. So, a company authorized to collect the water of several streams in a reservoir, and let them down when necessary through a channel into a certain river, having authority to keep a due supply of water at all seasons of the year, and to enter on lands, and to maintain, cleanse, etc., proper and sufficient channels, is liable for its failure to keep the channel clean, whereby the stream at

times overflows and damages lands of an adjoining owner. *Geddis v. Baun Reservoir, L. R.*, 3 App. Cas. 438.

Several Wrongoers.—In a suit to enjoin the obstruction of a watercourse, where it appeared that the obstruction was caused by several defendants, who owned marble mills on the river, it was held that each defendant was liable in damages in proportion only as his wrongful acts had contributed to obstructing the flow of the water, and to setting it back upon the complainant's land. They were not joint wrongoers in the sense that they joined in doing the same wrongful act, but only in the sense that their wrongful acts combined in causing damage to the plaintiff. *Ames v. Dorsett Marble Co.*, 64 Vt. 10.

Damages—Opinion of Witness.—The damages to be recovered for an alleged wrongful obstruction of a watercourse, forming the line between the lands, cannot be estimated by the mere opinion of a witness. *Noah v. Angle*, 63 Ind. 425.

1. *Thurber v. Martin*, 2 Gray (Mass.) 396; 61 Am. Dec. 468; *Springfield v. Harris*, 4 Allen (Mass.) 496; 81 Am. Dec. 715; *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526; *Holden v. Lake Co.*, 53 N. H. 552; *Mabie v. Matteson*, 17 Wis. 1.

In *Hetrich v. Deachler*, 6 Pa. St. 32, the plaintiffs, the owners of an ancient grist mill, complained of the defendant, the owner of a modern saw mill, that he detained the water from three to five days, and, besides using the water for driving his mill, applied it to irrigating his land; it was urged that such a detention must necessarily be objectionable, but the court declined to so hold, and submitted the question to the jury, referring, as a test of what might be done, to the "reasonableness of the detention depending as it must on the nature and size of the stream, as well as the business to which it is subservient, and on the ever varying circumstances of each particular case."

In *Denison Paper Mfg. Co. v. Robinson Mfg. Co.*, 74 Me. 116, in a proceeding in equity to restrain the defendants from a detention of the water flowing by their mill, the evidence showed the substance of the controversy to be

all attendant circumstances.¹ A wanton, vexatious, or unnecessary detention will render an owner liable in damages to those injured thereby;² but one whose rights are not affected cannot complain of the nuisance.³

A partial obstruction by the plaintiff will not prevent his recovery against one who obstructs the flow to his injury.⁴

(b) **By Dams.**—The right to a reasonable use of the water of a stream not navigable, that flows through one's land, includes the right to confine and obstruct its flow with dams, in order to utilize the water power; or, for other beneficial purposes, to detain the water for such length of time as is reasonably necessary for such use, notwithstanding the detention injuriously interferes with another's exercise of his right to a reasonable use of the stream in its natural state.⁵ The purpose for which the water is accumulated must be one which is reasonably adapted to the stream in

whether the defendants, at a period of unusual drouth, were or were not guilty of an unreasonable detention, the defendants maintaining that they did not obstruct the natural flow except so far as was necessary to enable them to make repairs to their mill, and the plaintiffs asserting the contrary. It was held that the issue was one to be tried at law, if, under all the circumstances during the drouth, the acts of the defendants were or were not legally justifiable; if not, what damage was there to the plaintiffs.

1. *Dilling v. Murray*, 6 Ind. 324; 63 Am. Dec. 385; *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526; *Davis v. Getchell* 50 Me. 602; 79 Am. Dec. 636.

What constitutes the reasonable use of the water by the upper mill owner depends upon the particular circumstances of each case, such as the nature, necessity, and extent of the use, the manner in which the water is applied, the previous usage, the nature and condition of the improvements upon a stream, the volume and velocity of the water and its prospective rise and fall, the nature and situation of the lower mill and pond, the capacity of the latter, and the practicability of enlarging it. *Timm v. Bear*, 29 Wis. 254.

In *Shrewsbury v. Smith*, 12 Cush. (Mass.) 177, which was an action by a town against the owners of a dam, which had broken away and injured the plaintiff's bridge, it was held that the maxim, *sic utere tuo ut alienum non lædas*, should be qualified to the extent that each proprietor, in exercising his own right on his own territory, should act with reasonable skill and care to avoid

injury to others, and, as an approximate rule for measuring that degree, it should be "that degree of ordinary skill, care, and diligence which men of ordinary prudence in relation to similar objects, would exercise in the conduct of their own affairs." See also *Davis v. Winslow*, 51 Me. 291; 81 Am. Dec. 573.

2. *Twiss v. Baldwin*, 9 Conn. 291; *Phillips v. Sherman*, 64 Me. 174; *Davis v. Winslow*, 51 Me. 264; 81 Am. Dec. 573; *Clapp v. Herrick*, 129 Mass. 292.

It is no justification of a detention that the one detaining the water has tapped new sources of supply, and the complainant receives more water than before. The justification must be a reasonable use; arbitrary and capricious detention is not such a reasonable use, and one whose rights are affected thereby has a cause of action without showing actual damage. *Ware v. Allen*, 140 Mass. 513.

3. *Groat v. Moak*, 26 Hun (N. Y.) 380, *affirming* 94 N. Y. 115.

4. *Brown v. Dean*, 123 Mass. 254; *Clarke v. French*, 122 Mass. 419.

5. See DAM, vol. 4, p. 971; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306; 8 Am. Dec. 404; *Housee v. Hammond*, 39 Barb. (N. Y.) 89; *Bullard v. Saratoga Victory Mfg. Co.*, 13 Hun (N. Y.) 43; *Drew v. Coles* (Cal. 1893), 32 Pac. Rep. 229; *Shaw v. Etheridge*, 7 Jones (N. Car.) 225; *Cooper v. Hall*, 5 Ohio 321; *Perrine v. Bergen*, 14 N. J. L. 335; 27 Am. Dec. 63; *Hetrich v. Deachler*, 6 Pa. St. 32; *Beissell v. Sholl*, 4 Dall. (Pa.) 211; *James v. Sterrett*, 137 Pa. St. 234; *Hartzall v. Sill*, 12 Pa. St. 248; *Curtice v. Thompson*, 19 N. H. 471; *Griffen v. Bartlett*, 55 N.

its normal state. An owner has no right to accumulate water for the operation of machinery requiring more than the usual flow.¹

The right to a reasonable use includes the right to release, let down, and discharge waters, in order beneficially to employ them; and the exercise of the right entails no liability for injuries necessarily caused thereby to others in regard to the rise of the stream;² yet, if the discharge withdraws from another the use of the waters to which he is entitled, or if it needlessly deprives another of his

H. 119; *Hayes v. Waldron*, 44 N. H. 580; 84 Am. Dec. 105; *Shoff v. Upper Connecticut River, etc., Imp. Co.*, 57 N. H. 110; *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156; *Oregon Iron Co. v. Trullenger*, 3 Oregon 1.

Each proprietor has the right to detain water, as it passes through his land, long enough for the proper and profitable enjoyment of it. *Platt v. Johnson*, 15 Johns. (N. Y.) 213; 8 Am. Dec. 233. But he must not detain it unreasonably or let it off in an unusual quantity, to the injury of his neighbor. *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189.

It is not an unreasonable use for the owners of a cotton mill, utilizing, by means of canals, certain reefs in the creek above their mill, and keeping the gates closed at night to allow this natural reservoir to refill, thereby being enabled to run without interruption during low water, as against a paper mill, the advantageous operation of which requires it to run night and day. *Bullard v. Saratoga Victory Mfg. Co.*, 77 N. Y. 525.

The use of the fall of water in an unnavigable stream that does not obstruct the flow of water above, and that restores the water to its natural course before it enters the lands of another proprietor, is not a nuisance. *Ewing v. Colquhoun, L. R.*, 2 App. Cas. 839.

The upper mill owner has the right to stop the natural flow of water until his pond is full, and to keep it full, although in consequence of the obstruction the lower mill owner suffers an impairment of his privilege. *Coldwell v. Sanderson*, 69 Wis. 62.

Harvesting Ice.—The using of a stream to harvest ice is a reasonable use, and a riparian owner may dam the stream and make a pond for ice, and may drain it and hold back the water a reasonable time so as to cleanse the pond in order that the ice may be pure. *DeBaun v. Bean*, 29 Hun (N. Y.) 236; See ICE AND ICE COMPANIES, vol. 9, p. 852.

Fish Ponds.—To retain the water by a dam for the purposes of a fish pond, constantly maintained, and therefore allowing the natural flow of water to pass unimpeded to the plaintiff's mill, is a just and reasonable exercise of the defendant's right to use the water as it passes through his land. *Wood v. Edes*, 2 Allen (Mass.) 580.

Overflow Caused by Dam for City Reservoir.—In *Brown v. Atlanta*, 66 Ga. 71, in a suit for the overflow of land below a reservoir of a city, it was held that the amount was similar to that in cases of damages for ordinary mill dams.

I. Clinton v. Myers, 46 N. Y. 511; 7 Am. Rep. 373. Where an upper mill wheel required fifty per cent. more than the natural flow, which was generally uniform, and the upper owner retained the water so that he could run his mill to the full capacity, and the lower owner had only a small pond available, the finding of the jury that this was an unreasonable detention was warrantable. *Timm v. Bear*, 29 Wis. 254.

But where one whose mill required, at a certain part of the year, more than the natural flow of the stream, and who, in order to run it at such time, held back the water in his mill pond and operated the mill by using a pondful at a time, and thereby the lower mill, which could be run by the natural flow was deprived of water during a portion of each day, it was held that this was not an unreasonable use of the water. *Pollitt v. Long*, 3 Thomp. & C. (N. Y.) 232.

In *Brace v. Yale*, 10 Allen (Mass.) 441, it was held that an owner of a mill, who erects a reservoir dam upon a small stream, detaining and storing up the water until he desires to use it, and drawing from the pond whenever he has occasion to use the water, makes a use of the stream adverse to the rights of the owners below.

2. Drake v. Hamilton Woolen Co., 99 Mass. 574.

beneficial use, or injures or destroys another's property, a case for damages is presented.¹ And although a riparian owner may raise the level of the waters on his own land, he is liable in damages if he causes the raising of the natural level of the water on or against another's land.² The backing of water causing an overflow of another's land entails liability for ensuing damages,³ as in

1. *McKee v. Delaware, etc., Canal Co.*, 125 N. Y. 353; 21 Am. St. Rep. 740; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Stevens v. Kelley*, 78 Me. 445; 57 Am. Rep. 13; *Toothaker v. Winslow*, 61 Me. 123; *Potter v. Howe*, 141 Mass. 357; *Thompson v. Moore*, 2 Allen (Mass.) 350.

A mill owner may be restrained from opening his gates and letting the water run to waste, as the opposite owner taking water from the same dam is entitled to all the water not needed by the former. *Fuller v. Daniels*, 63 N. H. 395.

Where a mill owner accumulates the water in the wet season and draws it off in summer, so as to cause a greater flow than usual, washing away the banks, drowning the land, and depreciating the grass of another riparian owner, an action will lie for damages. *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478.

In *Kelly v. Lett*, 13 Ired. (N. Car.) 50, where the defendant willfully and with intent injured the plaintiff, frequently shutting down his gates so as to accumulate a large head of water and then raising them, thereby causing an immense volume of water to go with great force against the plaintiff's dam, an action of trespass *vi et armis*, was the proper action.

2. *McGlove v. Smith*, L. R., 22 Ir. 559; *Dunklee v. Wilton R. Co.*, 24 N. H. 498; *Pixley v. Clark*, 35 N. Y. 520; 91 Am. Dec. 72; *M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84; 23 Am. Dec. 102; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Eagle, etc., Mfg. Co. v. Gibson*, 62 Ala. 369.

In an action of trespass for injuries alleged to have been caused by the obstruction of a natural watercourse, so that water was backed upon the land of the plaintiff, the evidence being conflicting, the question was for the jury to decide whether the alleged obstruction by the defendant caused the injuries complained of. *Bierer v. Hurst*, 155 Pa. St. 523.

3. *Eagle, etc., Mfg. Co. v. Gibson*,

62 Ala. 369; *Heath v. Williams*, 25 Me. 209; 43 Am. Dec. 265; *Stone v. Roscommon Lumber Co.*, 59 Mich. 24; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Hutchinson v. Coleman*, 10 N. J. L. 74; *Keller v. Stoltz*, 71 Pa. St. 356; *Neal v. Henry*, Meigs (Tenn.) 17; 33 Am. Dec. 125; *Allen v. McCorkle*, 3 Head (Tenn.) 181; *Taylor v. Keeler*, 50 Conn. 346.

In *Cooper v. Hall*, 5 Ohio 321, it was held that where, by erecting a dam, the water is flowed back in the bed of the stream and raised against the land of an adjacent proprietor, no action lies, unless some actual injury is sustained.

Rights as to Fall Controlled by Actual Visible Facts Rather than Instrumental Measurements.

—The water power of a riparian owner consists of the difference of level between the surface of the stream at its entry on, and the surface at its exit from, his land; but though instrumental leveling shows more fall on the land than the owner has height at his dam, yet, if the actual visible facts show a swelling back of the water upon the adjoining owner's land farther than before the erection of the dam complained of, the instrumental measurements must give way to the actual facts as shown on the ground. *Brown v. Bush*, 45 Pa. St. 61.

Municipal Corporation.—A city, in making improvements, has no right to dam up any watercourse, and thereby flood the land of others, even though the watercourse does not form a permanent stream. *Rose v. St. Charles*, 49 Mo. 509.

Who May Bring an Action.—When injured by an overflow of the spring of another, it is not necessary for the plaintiff, in order to recover damages, to show a title to the land, or possession by inclosure; an actual possession by the plaintiff, for the ordinary purposes of use by his family, is all that is necessary. *Allen v. McCorkle*, 3 Head (Tenn.) 181.

Acquiescence by the Plaintiff.—Where the evidence showed that the dam

the case of one raising the level of the water on another's land by a dam, thereby interfering with the operation of his mill,¹ or by raising the level of the water and interfering with the use of the same for the drainage of the lands of another.² And where a dam causes water to collect and become stagnant, to the injury of the health of riparian owners, its maintenance will be prevented by injunction.³

maintained by the defendants had been built, by their grantor, of such a height that it would injuriously flood the plaintiff's land, to the plaintiff's knowledge, and that the plaintiffs made no objection at the time, but kept silent, and, without putting the builder of the dam in equal knowledge of the fact, permitted him to incur large expense in creating the defendant's water power and building the structure connected therewith, and that in the following year the plaintiffs exchanged deeds with the builder of the dam, settling the boundary line between them upon the stream, without making any claim that the dam set back water upon their premises, it was held that the acquiescence of the plaintiffs in the erection of the dam to such a height as to cause the damages complained of, together with their silence at the time of the exchange of deeds, prevented a recovery by them. *Dean v. Benn*, 69 Hun (N. Y.) 519.

1. *Burnett v. Nicholson*, 86 N. Car. 99; *Lincoln v. Chadbourne*, 56 Me. 197; *Good v. Dodge*, 3 Pittsb. (Pa.) 557; *Webster v. Fleming*, 2 Humph. (Tenn.) 518.

A dam setting back water so as to interfere materially with the running of another's mill is a nuisance, and the owner thereof is entitled to an injunction restraining its continuance and directing the dam to be erected to a height that will abate the nuisance. *Rothery v. New York Rubber Co.*, 24 Hun (N. Y.) 172, *affirming* 90 N. Y. 30.

2. *Treat v. Bates*, 27 Mich. 390; *Bowman v. New Orleans*, 27 La. Ann. 501; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569; 82 Am. Dec. 179.

The owner of a mining claim on a creek has a right to have the tailings of his sluices carried off by the stream, and it is an unlawful detention for another, by the erection of a dam lower down, to prevent their being carried off. *Sims v. Smith*, 7 Cal. 149; 68 Am. Dec. 233.

3. Halb 499; *King v. Whorten*, 12

Mod. 510; *Treat v. Bates*, 27 Mich. 390; *White v. Forbes*, Walker Ch. Rep. (Mich.) 112; *Townsend v. People*, 3 Hill (N. Y.) 479; *Munson v. People*, 5 Park. Cr. Rep. (N. Y.) 16; *Commonwealth v. Webb*, 6 Rand. (Va.) 726; *Spencer v. Com.*, 2 Leigh (Va.) 751; *Miller v. Truehart*, 4 Leigh (Va.) 570; *Luning v. State*, 1 Chand. (Wis.) 178; 2 Pinn. (Wis.) 215; 50 Am. Dec. 153; *Douglass v. State*, 4 Wis. 387; *Stoughton v. State*, 5 Wis. 291; *Rooker v. Perkins*, 14 Wis. 79; *Ogletree v. McQuaggs*, 67 Ala. 580; 42 Am. Rep. 112; *State v. Purse*, 4 McCord (S. Car.) 472; *State v. Close*, 35 Iowa 570; *Watson v. Van Meter*, 43 Iowa 6; *State v. Bush*, 29 Ind. 110; *Com. v. Clarke*, 1 A. K. Marsh. (Ky.) 323; *Neale v. Cogar*, 1 A. K. Marsh. (Ky.) 589; *Story v. Hammond*, 4 Ohio 376; *Morris v. McCamey*, 9 Ga. 160; *Nelms v. Morgan*, 44 Ga. 617; *Central R., etc., Co. v. Wood*, 51 Ga. 515; *Ellington v. Bennett*, 56 Ga. 158; *Carlisle v. Cooper*, 21 N. J. Eq. 576; 19 N. J. Eq. 257; *Ramsay v. Chandler*, 3 Cal. 90; *Neal v. Henry*, Meigs (Tenn.) 17; 33 Am. Dec. 125; *State v. Gainer*, 3 Humph. (Tenn.) 39.

If a mill pond is dangerous to health, it should be abated; otherwise, not. *Montezuma v. Minor*, 73 Ga. 484.

Where the jury finds that, though the proposed rebuilding of a mill and dam will overflow the plaintiff's land and injure the health of the family, the mill will be a public convenience, an injunction will be denied, and the plaintiff must be limited to his damages. *Daughtry v. Warren*, 85 N. Car. 136.

The continuance of a mill dam will not be enjoined, on the ground that the plaintiff's house is rendered unhealthful thereby, where the evidence leaves the matter in doubt. *Thomas v. Calhoun*, 58 Miss. 80.

Where a mill dam, by making the waters stagnant, caused them to emit malarial gases that injured the health of those living near by, a plaintiff was held entitled to recover for the expenses

If the injury to the adjoining owner is caused by a dam which, though not affecting the ordinary level of the water on another's land, yet on the occasion of an ordinary and expected freshet, or even unusual rise in the water, causes an overflow, the dam owner is liable;¹ but if the injury is in consequence of an extraordinary

of sickness and loss of time thereby. *Mills v. Hall*, 9 Wend. (N. Y.) 315; 24 Am. Dec. 160.

In *Virginia*, a finding of a jury in a case under the mill act, that probably the health of neighboring families will be injured by the stagnation of the water in the pond, is conclusive against the dam. *Mayo v. Turner*, 1 Munf. (Va.) 405.

1. *Dorman v. Ames*, 12 Minn. 451; *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245; *State v. Ousatonie Water Co.*, 51 Conn. 137; *Richardson v. Kier*, 37 Cal. 263; *Bell v. McClintock*, 9 Watts (Pa.) 119; 34 Am. Dec. 507; *Casebeer v. Mowry*, 55 Pa. St. 419; 93 Am. Dec. 766; *Allen v. Chippewa Falls*, 52 Wis. 430; 28 Am. Rep. 748; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236. See also DAM, vol. 4, p. 978; FLOODS, vol. 8, p. 68.

In *McCoy v. Danley*, 20 Pa. St. 85; 57 Am. Dec. 680, the opinion of an apparently conflicting decision in *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, was considered, and the conflict said to be mere *dicta*. Lowrie, J., said: "A distinction is taken between the ordinary stage of the water and at its ordinary stage at particular periods. The former is without meaning unless it means the average stage; for there is no ordinary stage of any stream in this country for the year round. A man may make his dam according to the ordinary, but not according to the average, stage of the stream. But what is the ordinary stage? That depends upon seasons and weather. The ordinary stage, in ordinary rainy seasons, is one thing, and in ordinary dry seasons, is another. The ordinary stage in March is high; in August, low. The ordinary rises of streams are matters which everyone is expected to provide against, because, with ordinary care, he can calculate upon them. The owner of a dam is not answerable for damages caused by his dam, combined with an act of Providence. But an act of Providence, in legal phraseology, means an accident against which ordinary skill and foresight is not expected to provide. It does not include those

floods which happen so frequently that men of ordinary prudence are expected to calculate upon them; and against such swellings the defendant was bound to provide when he erected his dam."

The ordinary stage of water must be held to include its stage or level in such rises from the water as are usual, ordinary, and reasonably to be expected, but not to include its stage or level in such extraordinary freshets as cannot reasonably be anticipated at particular periods of the year. *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245.

It is not merely such freshets as are annual in their recurrence which must be provided against, but unusual freshets occurring once in several years, but at no regular intervals. *Gray v. Harris*, 107 Mass. 492; 9 Am. Rep. 61.

In an action for damages from back water, caused by a certain dam, it appearing that the overflow took place during freshets, it was competent for the defendant to show that below the dam the banks were high and close together, so that when the water rose, during floods, in the dam, the water was as high below as above the dam. *Rucker v. Athens Mfg. Co.*, 54 Ga. 84.

Damage by Boom Company.—Where, on account of the high state of water, which might reasonably have been expected to occur at intervals of a few years, the lands and crops of a riparian owner were damaged by an overflow of water caused by a river boom, it was held that there was a taking of the land which could not be justified by the owner of the boom, without compensation paid or secured. *McKenzie v. Mississippi, etc., Boom Co.*, 29 Minn. 288.

Opinion of Witness as to Cause of Overflow.—In an action to recover damages from a boom company, for the loss of property resulting from an ice dam, where the flood was alleged to be due to the construction of the dam by the company, the opinion of a witness as to the cause of the ice dam was inadmissible, though he lived by the side of the boom for years, and knew the condition of the river before the boom was built. *Shaw v. Susquehanna Boom Co.*, 125 Pa. St. 324.

Construction of Dam.—In order to

flood, or one which could not reasonably have been expected, or results from other unforeseen causes,¹ although not necessarily unprecedented,² no liability attaches to the owner of the dam.

Whether in a particular case the flood or freshet was of such an unusual or extraordinary character as to excuse the dam owner, is a question for the jury under proper instructions.³

avoid liability for damages, the owner must construct his dam so as to be free from defects, or as free as reasonable care, forethought, and judgment can devise. If constructed with that reasonable care which prudent men would use, and no negligence is shown in its care and management, the owner is not liable for damages caused by the breaking of the dam. *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413; *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 541; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393. Otherwise, where there has been negligence. *Rich v. Keshena Imp. Co.*, 56 Wis. 287.

So in *New York v. Bailey*, 2 Den. (N. Y.) 433, it was held that a dam should be sufficient to resist not merely ordinary freshets, but such extraordinary freshets as might be reasonably expected. See also *Lapham v. Curtis*, 5 Vt. 379; 26 Am. Dec. 310.

In *Mundy v. New York, etc., R. Co.*, 75 Hun (N. Y.) 479, it was held that the fact that a flood, by reason of which the lands of the plaintiff were overflowed, was higher than any to which the river had ever been subjected before, did not relieve the defendant from liability, where the river had been subject to sudden rises which steadily increased in volume.

Where the proprietor of land with mill privilege erected a dam across the stream upon his own land, and thereby caused the stream to become obstructed with ice, and the water of the stream to be thrown back upon the lands and mills of a proprietor above, it was held that the proprietor below was liable for damage occasioned by the obstruction. *Cowles v. Kidder*, 24 N. H. 364; 57 Am. Dec. 287; *Weaver v. Mississippi, etc., Boom Co.*, 28 Minn. 534.

1. *China v. Southwick*, 12 Me. 238; *Proctor v. Jennings*, 6 Nev. 83; 3 Am. Rep. 240; *Cobb v. Smith*, 38 Wis. 21; *Sabine v. Johnson*, 35 Wis. 185; *Pixley v. Clark*, 35 N. Y. 520; 91 Am. Dec. 72; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.

In *Alexander v. Milwaukee*, 16 Wis. 247, it was said that the duty of providing against an extraordinary rain fall or unusual freshet, such as does not occur but once in a series of years, which persons of ordinary prudence would not think of guarding against, is a burden which ought not to be imposed upon the city.

In *Knoll v. Light*, 76 Pa. St. 268, it was held that a dam owner was not liable for the overflow of another's land caused by the spontaneous growth of a particular kind of grass in the dam. The injured party might have removed the grass.

Unlawful Obstruction.—But where the obstruction or dam causing the injury is unlawful in the first instance, this rule does not apply. So, where the plaintiff and defendant were owners of land on opposite sides of a creek, which in times of freshets overflowed the land on one side, belonging to the plaintiff, against which he had guarded by piling, and the defendant drove piles in the creek extending thirty feet in the channel and beyond those of his neighbor, it was held that the injury caused therefrom, on the occasion of an unusual freshet, rendered the defendant liable in damages to the plaintiff. *Hartshorn v. Chaddock* (Super. Ct.), 40 N. Y. St. Rep. 953.

2. *People v. Utica Cement Co.*, 22 Ill. App. 159. In *Pittsburg, etc., R. Co. v. Gilleland*, 56 Pa. St. 445; 94 Am. Dec. 98, the injury complained of was caused by three floods at intervals of several months. An instruction that left the jury to find the cause from extraordinary floods, for the second and third floods, which came in rapid succession, was held to be erroneous. *Agnew, J.*, said: "If all were extraordinary as the instruction conceded, the surprise of the second or third could not be less than at the first, and it was still more surprising that they should come in such rapid succession; being extraordinary, neither the second nor third could have been expected more than the first."

3. *Borchardt v. Wausaw Boom Co.*,

(e) **By Embankments.**—A riparian owner may erect embankments or barriers upon his own land for the protection of his premises from an overflow, to prevent a change in the natural state of the stream or the old course of the channel from being altered.¹ But he will be liable for damages if, by erecting such embankments, water is thrown upon another's land,² even in the case of freshets or ordinary floods.³

54 Wis. 107; 41 Am. Rep. 12; Gray v. Harris, 107 Mass. 492; 9 Am. Rep. 61.

1. Rex v. Commissioners, 8 B. & C. 355; 15 E. C. L. 237; Boston Mfg. Co. v. Burgin, 114 Mass. 340; Shelbyville, etc., Turnpike Co. v. Green, 99 Ind. 205; Schlichter v. Phillipy, 67 Ind. 201; Cairo, etc., Co. v. Stevens, 73 Ind. 278; 38 Am. Rep. 139; Collins v. Macon, 69 Ga. 542; Deidrich v. Northwestern Union R. Co., 42 Wis. 248; Miller v. Milwaukee, 14 Wis. 642.

In Barnes v. Marshall, 68 Cal. 569, it was held that the defendant had a right to protect his land from a threatened change of the channel of a river, by building a bulkhead as high as the original bank before it was washed away.

2. Angell on Watercourses (7th ed.), § 333; Fletcher v. Smith, L. R., 2 App. Cas. 781; Farquharson v. Farquharson, 3 Bligh. N. S. 421; Gerrish v. Clough, 48 N. H. 9; 97 Am. Dec. 561; 2 Am. Rep. 165; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53; Tillotson v. Smith, 32 N. H. 90; 64 Am. Dec. 355; Longstreet v. Harkrader, 17 Ohio St. 23; Pierce v. Kinney, 59 Barb. (N. Y.) 56; Varnum v. Wheeler, 35 Hun (N. Y.) 53; Ten Eyck v. Delaware, etc., Canal Co., 18 N. J. L. 200; Montgomery v. Locke (Cal. 1886), 11 Pac. Rep. 874.

In Crawford v. Rambo, 44 Ohio St. 279, Minshall, J., explaining the extent of this right, said: "The maxim, *sic utere tuo ut alienum non ledas*, would seem to apply with peculiar propriety to a case like this. Each proprietor on a river has a right to the enjoyment of its waters as it flows by his premises, and the right, also, to modify and limit its current upon his own property as will best subserve his own convenience and notions of propriety; and he may, therefore, construct and maintain embankments thereon, for the purpose of protecting any part of his land from being injured from the overflow of the river in times of high waters; but it is equally clear that this right to deal with the river and to control its current

must be exercised with a just regard to the rights of others. He cannot, by the construction of embankments or otherwise, divert the waters of the river from his own lands, and cause them to flow over and upon those of his neighbor to the substantial injury of the latter, however beneficial it may be to his own lands, without violating this elementary maxim of justice."

One who rightfully erects or maintains a barrier on his own land must exercise reasonable care and skill to avoid defects in its condition, and for the want of such care and skill that results in injuries to another, he is liable. Savannah, etc., R. Co. v. Lawton, 75 Ga. 192; Grant v. McDonogh, 7 La. Ann. 447.

Damages.—In Tinsman v. Belvedere, etc., R. Co., 26 N. J. L. 148; 69 Am. Dec. 565, where the complaint was that the defendant, a railroad company, had constructed an embankment in a creek's mouth, in which the plaintiff had a right of storing, landing, etc., lumber for the use of his mill, so that the water was prevented from flowing in its accustomed channel, and the plaintiff was thereby deprived of the full enjoyment of his privilege, it was held that the injury was the direct and immediate consequence of the act of the defendant, and the damages sustained could not be denominated remote or consequential.

3. Menzies v. Breadalbane, 3 Bligh N. S. 414; Crawford v. Rambo, 44 Ohio St. 279; Railroad Co. v. Carr, 38 Ohio St. 448; 43 Am. Rep. 428.

In Burwell v. Hobson, 12 Gratt. (Va.) 322; 65 Am. Dec. 247, Moncure, J., said: "The maxim, *sic utere tuo ut alienum non ledas*, emphatically applies to the case of a riparian proprietor, and is the true legal as well as moral measure of his rights. He has no right to divert the stream, or any part of it, from its accustomed course, to the injury of other persons. This is a plain proposition laid down by all the writers on the subject of water rights, and was

One may, by embankments upon his own land, return the stream to its old channel, when, by reason of floods, it has turned from its natural course, and encroaches upon his land,¹ provided he does not cause it to flow on the lands of others, except in its old channel,² and provided, further, that the right to return it has not been lost by acquiescence in the flow in the new channel.³

But one is not answerable for damages caused by his protecting himself in cases of extraordinary or unusual floods.⁴ And where

not denied by the counsel for the appellee. But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods, by erecting a dike or other obstruction on his land, though its necessary effect may be to turn superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream, is not laid down or recognized by any elementary writer, nor in any adjudged case, as far as I have seen. The utmost extent to which authorities seem to go, in that direction, is that a riparian proprietor may erect any work, in order to prevent his land being overflowed by any change in the natural state of the stream, and to prevent its old course from being altered. Angell on Watercourses, § 333. But he has no right, for his greater convenience and benefit, to build anything which, in times of ordinary flood, will throw the water on the grounds of another proprietor, so as to overflow and injure them."

In *Rex v. Trafford*, 20 E. C. L. 498; 1 B. & Ad. 874, Tenterden, C. J., did not admit any such distinction. He said: "Now, it has long been established that the ordinary course of water cannot be lawfully changed or obstructed, for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction."

Injunction.—In *Blaine v. Brady*, 64 Md. 373, it was held that a bill which prayed for an injunction to restrain the defendant from maintaining an em-

bankment, erected on his own land as a protection against the overflow of a stream, dividing his land from that of the complainant, but which failed to state how often the stream had overflowed its banks, by reason of heavy freshets, or how much of the complainant's land had been, or was, liable to be overflowed at such times in consequence of the embankment, did not present a case entitling the complainant to equitable relief.

1. *Slater v. Fox*, 5 Hun (N. Y.) 544; *Farquharson v. Farquharson*, 3 Bligh N. S. 421.

Where a stream running across the defendant's land, and thence upon the plaintiff's land below, during a flood broke through its bank, making an opening sufficient to carry the water ordinarily running, and through this new channel the water would have continued to run, if not prevented, it was held that the defendant had a right, for his own protection, to erect an embankment across the crevasse for the purpose of confining the waters within their original channel; provided he did not build such barrier too high, nor project it into the stream so as to interfere with the accustomed flow. *Pierce v. Kinney*, 59 Barb. (N. Y.) 56.

2. See Angell on Watercourses (7th ed.), § 333; *Tuthill v. Scott*, 43 Vt. 525; 5 Am. Rep. 301; *Rood v. Johnson*, 26 Vt. 64; *Barnes v. Marshall*, 68 Cal. 569.

3. *Woodbury v. Short*, 17 Vt. 387; 44 Am. Dec. 344.

4. *Mailhot v. Pugh*, 30 La. Ann. 1359. In *Nield v. London, etc.*, R. Co., L. R., 10 Exch. 4, the owner of a canal which was near the river, but not communicating with it, fearing in time of flood an overflow of the river into the canal, and consequent injury to his warehouses thereon, inserted planks in grooves made in the banks of the canal to keep the overflowing water out. The water found its way to the canal, and confined by the planks rose to a higher level than it otherwise would

one, by his embankment, causes more than the natural flow upon the land of another, he cannot complain if the party so injured protects himself by embankments or dams upon his own land, although the latter throws back water upon him.¹

Water resulting from an overflow, in districts where flood waters cover great tracts of land, may be treated as surface water, and the landowner entails no liability where, in protecting his land from such waters, he throws them back upon an upper proprietor.²

have done, and ultimately overflowed, causing damages to a mill on the canal, which it would not have done but for the use made of the planks. It was held that the canal owner was not liable, since, without doing anything affecting the natural channel of the river, he had only sought to protect himself against the common enemy.

1. *Merritt v. Parker*, 1 N. J. L. 460. In *Wilhelm v. Burleyson*, 106 N. Car. 381, where there was an issue of damages for erecting a dam upon the bank of a creek so that the water overflowed the plaintiff's land, and it appeared that the plaintiff had previously erected a dam which caused the defendant to have to erect one for his protection, it was said: "It is true, as a general rule, that a riparian proprietor of land is restricted in the management of his property by the maxim, '*sic utere tuo ut alienum non lēdas*,' and cannot, therefore, take the initiative and construct a dam on a stream that will cause the water to overflow and injure the land of his neighbor that may lie opposite or above his own premises, either when the water is at its usual height or in an ordinary freshet, or that so obstructs its flow as to prevent the land of the other riparian owner from being properly drained. If the defendant's evidence was sufficient to satisfy the jury that the plaintiff first built a wall on his side of the creek, and thereby caused the water to overflow the defendant's land on the other side and lower down, the defendant had a right to build a dam on the north bank to stop the overflow brought about in that way, and if, in effecting that object, it became necessary to obstruct the flow of water in the creek, and cause it to 'eddy,' so as in freshets to flood more of the plaintiff's land than had previously been covered in freshets, the defendant was not answerable in damages for such additional overflow."

In *Avery v. Empire Woolen Co.*, 82 N. Y. 582, the facts were as follows: A

stream of water ran across the plaintiff's land, northerly, upon and across the defendant's lands below. Near the line was the stump of a tree, on the east side of which was the natural channel, but in times of high water the water flowed on the west side. The plaintiff's predecessors constructed, and the plaintiff maintained, an embankment upon his land, which caused the water of the creek, in its ordinary stages as well as in time of floods, to flow on the west side, and the defendant thereupon constructed an embankment on his land which prevented any water from flowing on the west side, and turned it to the east. It was held that the plaintiff had no right of action on that account, but that the defendant had the right to dam against the water so turned upon his land, and if, in order to protect himself from the consequences of the plaintiff's acts, he obstructed the flow, the plaintiff could not complain.

Where the plaintiff charged that the defendant had obstructed a stream of water and caused it to flow over the lands of the plaintiff, adjoining, and the defendant answered by a general denial, and, in a second paragraph, that the plaintiff had previously diverted the watercourse to the defendant's injury, and for his own protection he had provided against its flow over his land, a demurrer to the second paragraph was properly overruled. *Harding v. Whitney*, 40 Ind. 379.

2. *Schlichter v. Phillipy*, 67 Ind. 201; *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. Co. v. Houry*, 77 Ind. 364; *Shelbyville, etc., Turnpike Co. v. Green*, 99 Ind. 205; *Abbott v. Kansas City, etc., R. Co.*, 83 Mo. 271; 53 Am. Rep. 581, *overruling McCormack v. Kansas City, etc., R. Co.*, 70 Mo. 359; 35 Am. Rep. 431; *Shane v. Kansas City, etc., R. Co.*, 71 Mo. 237; 36 Am. Rep. 480.

In *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; 38 Am. Rep. 139, *Woods, J.*,

(d) **By Bridges and Culverts.**—The owner of land or right of way which is traversed by an unnavigable watercourse, has the right to bridge it, but he must so construct and maintain the bridge as not to modify the natural flow of the stream, and if he does interfere to the injury of riparian owners, he is liable in damages;¹ the

thus states the rule: "With reasonably near approximation to accuracy, it may be laid down as a general rule, that upon the boundaries of his own land, not interfering with any natural or prescriptive watercourse, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse. This is in accordance with the general principle that such waters are a common enemy which each proprietor may fight off as he will."

In *Hoard v. Des Moines*, 62 Iowa 326, it was held that every owner of land has a right to protect himself from overflow of water from a river in times of flood, even though, by excluding the water from his own premises, he deepens it between his land and the river; and, on the same principle, a city may protect its territory from overflow by the construction of a levee, and, in the absence of negligence, will not be liable to one who owns a lot between the levee and the river.

In *Gray v. McWilliams*, 98 Cal. 157, it was held that a landowner might construct an embankment to protect his land from such overflows, though the effect might be to prevent the free discharge of the water, or tend to increase the flow on the land of his neighbor. See also *Lamb v. Reclamation Dist.* No. 108, 73 Cal. 125; 2 Am. St. Rep. 775.

A riparian owner who plants trees on his own land, and thereby prevents large quantities of driftwood and other matter from being carried away, is not liable to the upper riparian owner adjoining him, whose lands are overflowed

in times of freshets, and, upon the subsidence of the waters, are covered with the driftwood and deposits so detained. *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114.

1. See *BRIDGES*, vol. 2, p. 540; *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) 344; *Lawrence v. Fairhaven*, 5 Gray (Mass.) 110; *Talbot v. Whipple*, 7 Gray (Mass.) 123; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491; *Smith v. Philadelphia, etc., R. Co.*, 57 Fed. Rep. 903; *Fick v. Pennsylvania R. Co.*, 157 Pa. St. 622.

Where the piers of a bridge set back water on the lands of a riparian owner, it is no defense, in an action therefor, that the abutments of an old bridge, which had stood immediately above for twenty years, extended equally as far into the stream. *Gillespie v. Forest*, 18 Hun (N. Y.) 110.

General Liability.—In *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) 344, Shaw, C. J., said: "An individual or company making a road, pursuant to an authority granted by law, in the absence of positive enactment on the subject, in the execution of such authority are bound, in constructing their road over watercourses, on private land, to make suitable bridges, culverts, or other provision for carrying off the water effectually; that if in doing so they are under the necessity of diverting the watercourse, in some measure, from its natural channel, they are at liberty to do so; making such bridges, culverts, and drains as may be necessary to carry off the water, in the direction which they may give it; but they are bound, as part of their public duty, to keep such bridge, culvert, or new watercourse, in suitable and sufficient repair to effect the purpose for which it was made, and for carrying off the water effectually. . . . The company are not to be required to go to any unreasonable expense; as, where a stream is a broad, shallow watercourse, which may be reduced in width, and deepened so as to carry off the water as effectually as before, we think the company might well be allowed, instead of building a bridge over the whole wide space which it

same principle applies in the case of a railroad company constructing their road across running streams;¹ and likewise in the

originally covered, to narrow it, and pass it by a suitable bridge. So, if the natural bed of such a watercourse is muddy and deep, where it would be difficult and expensive to erect a bridge, they may change the watercourse from its natural channel to another, taking care that it shall be equally beneficial for the purposes intended."

1. *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491; *Sullen v. Chicago, etc.*, R. Co., 74 Iowa 659; 7 Am. St. Rep. 501; *Norris v. Vermont Cent. R. Co.*, 28 Vt. 102; *Ohio, etc., R. Co. v. Neutzel*, 143 Ill. 46; *Ohio, etc., R. Co. v. Thillman*, 143 Ill. 127; *Chicago, etc., R. Co. v. Schaffer*, 124 Ill. 112; *March v. Portsmouth, etc., R. Co.*, 19 N. H. 373; *Brink v. Kansas City, etc., R. Co.*, 17 Mo. App. 177; *Talbot v. Hore*, 17 Mo. App. 175; *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39; *McCleneghan v. Omaha, etc., R. Co.*, 25 Neb. 523; 13 Am. St. Rep. 508; *New Albany, etc., R. Co. v. Higman*, 18 Ind. 77; *Omaha, etc., R. Co. v. Brown*, 29 Neb. 492; *Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 95.

It is the duty of a railroad company to construct its culverts so that they will carry off water in the streams over which they are built, under all ordinary circumstances likely to occur in the usual course of nature, including such heavy rains as are ordinarily expected, although only of occasional occurrence. But it is not liable for damages resulting from its culverts being insufficient to carry off the overflow caused by extraordinary and unusual rainfalls. *Knight v. Albemarle, etc., R. Co.*, 111 N. Car. 80; *Emery v. Raleigh, etc., R. Co.*, 102 N. Car. 209; 11 Am. St. Rep. 727. And it is the duty of the railroad company to keep the culvert unobstructed. *West v. Louisville, etc., R. Co.*, 8 Bush (Ky.) 404.

A railroad company is liable for damages to lands from the construction of a bridge which causes the water and ice to gorge and overflow adjacent land. In the selection of the character of the bridge to be built, due regard must be had for the rights of the adjacent landowners. *McCleneghan v. Omaha, etc., R. Co.*, 25 Neb. 523; 13 Am. St. Rep. 508.

"The right of changing watercourses and taking water" will not relieve a

company, where it appears that the flooding complained of could have been avoided. *St. Louis, etc., R. Co. v. Harris*, 47 Ark. 340.

An injury caused by the concentration of flow, through a railroad company's building too small a culvert for the proper discharge of the waters of a creek in times of overflow, though the waters would naturally go in the same direction, is an actionable nuisance. *McCormick v. Kansas City, etc., R. Co.*, 70 Mo. 359; 35 Am. Rep. 431.

In *Spencer v. Hartford, etc., R. Co.*, 10 R. I. 14, it was held that a railroad company was liable in damages for building a bridge across a river, with a pier turned obliquely to the course of the river, in such a manner as to turn the water of the stream, in times of freshets, upon the plaintiff's grass land, thereby throwing sand and earth upon it, and gullying and washing away the same, it appearing that the bridge at an additional expense, could have been erected with safety to the railroad company so as not to injure the said land. The plaintiff was not estopped from maintaining his action for the damage so caused to his land, by reason of having previously, by deed, conveyed to the railroad company a portion of his land for the purposes of a railroad, and, in consideration of the purchase-money, released all claims for damages which might be awarded by commissioners, as the commissioners could have appraised and awarded only such damages as would have resulted from the construction and use of the road in a legal and proper manner.

Maintenance of County Structure.—

If the structure maintained by the railroad company constitutes a nuisance, it is liable therefor, although it was originally erected by the county under legislative authority. *Payne v. Kansas City, etc., R. Co.*, 112 Mo. 6.

Change of Channel.—Where a railroad crossing a stream obstructed the flow of the water, and the landowner diverted it to a new channel, his right to have it flow in the old channel was not extinguished, unless he intended permanently to abandon it, and this was a question for the jury. *Mississippi Cent. R. Co. v. Mason*, 51 Miss. 234.

Surface Water.—A bridge duly authorized by law is not a nuisance, if its

case of the construction and maintenance of bridges by municipal corporations.¹

The bridge must be so constructed and maintained as not to interfere with the natural flow, not only when at its ordinary height, but also when it is swollen with the floods to which it is subject.² But no liability attaches on account of damage on the occasion of an extraordinary flood.³

(2) *Pollution*—(a) *In General*.—The right of every owner of land, through which a stream of water flows, to have the same

abutments are properly placed and sufficient to discharge the water coming down the creek in times of flood, and the owner of the bridge is not liable for the obstruction of surface water flowing on his land. *Conhocton Stone Road Co. v. Buffalo, etc., R. Co.*, 3 Hun (N. Y.) 523.

Temporary Obstruction.—A railroad company, with power to construct a bridge over a stream, is not responsible for damages arising from the temporary obstruction of the stream by scaffolding, or by the construction of a temporary, stationary bridge, or any unavoidable delay in the completion of the bridge. *Hamilton v. Vicksburg, etc., R. Co.*, 34 La. Ann. 970.

1. In *Haynes v. Burlington*, 38 Vt. 350, Pollard, C. J., said: "Substantially the same obligations to the owners of lands adjacent to the highway, we consider, are devolved upon towns, in the building and maintaining their roads."

But in *Sprague v. Worcester*, 13 Gray (Mass.) 193, it was held that an action would not lie against a city for obstructing a stream, to the injury of a mill, by the erection of a bridge, if the bridge was suitably constructed so as to let water pass off with reasonable freedom at all times, except in cases of extraordinary freshets, not occurring annually.

2. *Sullens v. Chicago, etc., R. Co.*, 74 Iowa 659; 7 Am. St. Rep. 501; *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263; *Byrne v. Minneapolis, etc., R. Co.*, 38 Minn. 212; 8 Am. St. Rep. 668; *McClure v. Red Wing*, 28 Minn. 786; *Gulf, etc., R. Co. v. Pomeroy*, 67 Tex. 498; *Emery v. Raleigh, etc., R. Co.*, 102 N. Car. 209; 11 Am. St. Rep. 727; *Houston, etc., R. Co. v. Parker*, 50 Tex. 330; *Higgins v. New York, etc., R. Co.*, 78 Hun (N. Y.) 567; *St. Louis, etc., R. Co. v. Winkelmann*, 47 Ill. App. 276; *Sinai v. Louisville, etc., R. Co.* (Miss. 1893), 14 So. Rep. 87.

In constructing its road over a nat-

ural watercourse, a railroad company should leave an opening sufficient to afford an outlet for all water, in times of flood, as well as at other times, and is liable for failure to do so to one whose land is flooded. *New York Union Trust Co. v. Cuppy*, 26 Kan. 754. So one whose land is overflowed by reason of the failure of a railroad company to construct a culvert long enough to carry away the waters of an occasional extraordinary flood, has a right of action therefor. *Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 388.

It is no defense that a railroad company, whose failure to construct a culvert for the passage of water has injured a party, constructed its road in the usual manner. *Van Orsdol v. Burlington, etc., R. Co.*, 56 Iowa 470.

Altering a bridge so as to reduce the distance between the abutments to ninety-two feet, when the natural channel of the stream is one hundred and fifty feet wide, so that the surface of the water is raised at the plaintiff's mill dam five feet, and the plaintiff's premises are injured in a freshet, although before the alteration there was no damage from freshets, is an actionable nuisance. *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39.

3. *Mills v. Greenville, etc., R. Co.*, 13 S. Car. 97; *Emery v. Raleigh, etc., R. Co.*, 102 N. Car. 209; 11 Am. St. Rep. 727; *Central Trust Co. v. Wabash, etc., R. Co.*, 57 Fed. Rep. 441; *Fick v. Pennsylvania R. Co.*, 157 Pa. St. 622.

In *Morrissey v. Chicago, etc., R. Co.*, 38 Neb. 406, it was held that a railroad company was not liable for damages from an overflow of water, flowing in no definite channel, and overflowing only on occasions of extraordinary freshets, caused by the erection of an embankment properly constructed, although the injury might have been avoided or lessened by the erection of trestle work at a great expense.

flow in its natural state, extends to the quality as well as the quantity of the water, and, therefore, one who pollutes or contaminates water may be liable to those injured thereby;¹ and a court of

1. *Wood v. Waud*, 3 Exch. 748; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Aldred's Case*, 9 Coke 59; *Clowes v. Staffordshire, etc., Co.*, L. R., 8 Ch. 127; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. Div. 769; *Goldsmid v. Tunbridge Wells Imp. Com'rs*, L. R., 1 Ch. 349; *Baxendale v. M'Murray*, L. R., 2 Ch. App. 790; *Swindon Water Co. v. Wilts Canal Co.*, L. R., 7 H. L. 697; *Lewis v. Stein*, 16 Ala. 214; 50 Am. Dec. 177; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40; 93 Am. Dec. 656; *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; 7 Am. Dec. 526; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Richmond Mfg. Co. v. Atlantic DeLaine Co.*, 10 R. I. 106; 14 Am. Rep. 658; *Howell v. M'Coy*, 3 Rawle (Pa.) 256; *Dwight Printing Co. v. Boston*, 122 Mass. 583; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Woodward v. Worcester*, 221 Mass. 245.

In *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, the defendants, by discharging from their premises large quantities of chemical matter and other impurities, discolored, polluted, and rendered unfit for all domestic purposes, the stream flowing through the plaintiff's lands. Chancellor, C. J., said: "Every owner of land through which a stream flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or corruption. The right extends to the quality as well as the quantity of the water. . . . The court of chancery has a concurrent jurisdiction with courts of law, by injunction, equally clear and well established in cases of private nuisance. And it is a familiar exercise of the power of the court to prevent by injunction injury to watercourses by obstruction or diversion."

A proprietor has a right to enjoy water which flows upon his land, without having its purity destroyed by the discharge of slops and other deleterious substances from a distillery, cattle stable, or piggery, maintained by an upper proprietor on the same stream,

and the violation of his riparian right may be such ground of special damages as will entitle him to maintain a private action. *Greene v. Nunnemacher*, 36 Wis. 50.

But in an action for damages caused by the return of the waters of a stream, special damages cannot be proved, unless they are alleged in the complaint. *Potter v. Froment*, 47 Cal. 165.

The pollution is actionable if it is such as to produce disgust in those using the water for domestic purposes, as by erecting privies over the stream. *Norton v. Scholefield*, 9 M. & W. 665.

The building of a reservoir to supply water to a town, whereby the water is made muddy to the injury of the owner of dye works, is a nuisance. *Clowes v. Staffordshire Potteries, etc., Co.*, L. R., 8 Ch. 126.

Measure of Damages.—The measure of damages in such an action is the depreciation in the rental value of the premises of the lower owner, and bodily sickness, and any discomfort caused thereby. *Eufaula v. Simmons*, 86 Ala. 515; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576; 14 Am. St. Rep. 319; *Randolph v. Bloomfield*, 77 Iowa 50; 14 Am. St. Rep. 268; *Shiveley v. Cedar Rapids, etc., R. Co.*, 74 Iowa 170; 7 Am. St. Rep. 471; *Gladfelter v. Walker*, 40 Md. 1.

In *Loughran v. Des Moines*, 72 Iowa 384, it was held that recovery might be had for time and expense incurred by reason of sickness, in addition to the depreciation in rental value of the premises.

In *Seely v. Alden*, 61 Pa. 302; 100 Am. Dec. 642, which was an action by the owners of a water power against the owner of a tannery higher up the stream, for permitting tan to be conveyed in the plaintiff's pool, it was held that evidence, both as to the value of the land with and without the deposit, and the cost of removing the deposit, was admissible.

Pollution by Complainant.—The lower owner on a stream cannot recover of the upper owner for polluting it, when he himself pollutes it also, and thus contributes to the very injuries of which he complains. *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576; 14

equity will interfere by injunction to restrain such use as will cause an irreparable injury, or endanger the complainant's rights by adverse possession, if continued.¹ The fact that there are other

Am. St. Rep. 319. See also *Turner v. Hitchcock*, 20 Iowa 318. But if the injury to the plaintiff, by the defendant, can be ascertained specifically, it is no defense that the plaintiff also polluted the stream. *Moulton v. Newburyport Water Co.*, 137 Mass. 163.

Stagnant Water.—An action will lie for a nuisance caused by the erection of a dam whereby water is collected, as when a running stream becomes stagnant or unhealthy. *Story v. Hammond*, 4 Ohio 376.

An indictment for such nuisance, alleging that, by reason of the dam, animal and vegetable substances brought down the stream were collected and accumulated in large quantities, becoming offensive and corrupting the water, etc., although it did not show that the injury had resulted from the alternate rise and fall of the water in the pond, or from the action of the sun upon the vegetable matter, was sufficient to maintain an issue. *People v. Townsend*, 3 Hill (N. Y.) 479.

Killing Fish.—In *Seaman v. Lee*, 10 Hun (N. Y.) 607, it was held that the discharge of waste water and drainage, whereby the plaintiff's fish were killed, was a nuisance which would be restrained.

1. Injunction.—See also INJUNCTIONS, vol. 10, p. 844; *Goldsmid v. Tunbridge Wells Imp. Co.*, L. R., 1 Ch. 349; *Woodyear v. Schaefer*, 57 Md. 1; 40 Am. Rep. 419; *Lockwood Co. v. Lawrence*, 77 Me. 297; 52 Am. Dec. 763; *Merrifield v. Lombard*, 13 Allen (Mass.) 16; 90 Am. Dec. 172; *Woodward v. Worcester*, 121 Mass. 245; *Chapman v. Rochester*, 110 N. Y. 273.

A continuing nuisance, by polluting the waters of a stream, may be proceeded against either at law or in equity at the election of an injured party. *Barton v. Union Cattle Co.* (Neb. 1889), 7 L. R. A. 457; *Webb v. Portland Mfg. Co.* 3 Sumn. (U. S.) 189; *Atty. Gen'l v. Steward*, 20 N. J. Eq. 415.

In *Barton v. Union Cattle Co.* (Neb. 1889), 7 L. R. A. 457, the injury complained of by the lower riparian owner was the pollution of a stream on his land, which was used for general farming purposes and for stock, caused by the filth which was washed from the

defendant's stable, in which he kept and fed a maximum of three thousand seven hundred and fifty head of cattle; the defendant was restrained by injunction from continuing the nuisance. See also *Losee v. Buchanan*, 51 N. Y. 477; 10 Am. Rep. 623.

The lessee of bleaching works on a stream, is entitled to an injunction against a town drainage commission, who, having paid him damage for past pollution, agree to foul the stream no longer, but in draining by the irrigation system, the irrigation proves inadequate and the sewage flows down a tributary and overflows into the plaintiff's stream. *Wood v. High, etc.*, Com'rs, 22 W. R. 763.

Prescription.—In *Goldsmid v. Tunbridge Wells Imp. Co.*, L. R., 1 Ch. 349, the pollution complained of had been going on for over twenty years and was continuous, and was sought to be maintained on the ground of the prescriptive rights, but an injunction was granted, on the ground that the right to pollute the stream could be acquired only by a continuous discharge of the sewer prejudicially affecting the estate for a period of twenty years, and that the discharge had not affected the estate for so long a period.

The defendant, the owner of an ancient paper mill where paper had been made from rags, introduced new vegetable fiber, and carried on works upon the same scale for making paper from this new material. For more than twenty years before this change, the refuse arising from the paper manufacture had been discharged into a stream flowing through the plaintiff's premises. In a suit to restrain the use, it was held that the easement to which the defendant was entitled was to be presumed to be, not a right to foul the stream by discharging into it the washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper, in the reasonable and proper course of such manufacture, using any proper materials for the purpose not increasing the pollution, and that the burden of proof lay on the plaintiff to prove any increase. *Baxendale v. M'Murray*, L. R., 2 Ch. 790.

sources of pollution, or that there are many other persons committing the same sort of nuisance, is no reason why a particular cause or source shall not be restrained.¹ One who is not affected by the pollution may not complain of the injury.²

It is not every pollution of a stream which will render a riparian owner liable for injuries arising therefrom, or which a court of equity will restrain; the standard of reasonable use is to be applied to the use resulting in the corruption of the stream, as the right of one proprietor to have the stream flow in its natural state must yield in a reasonable degree to the right of the upper proprietor, whose use for legitimate purposes may tend to make the water more or less impure.³ No action will lie for the pollution of a

The prescriptive right can be acquired only by the continuous and perceptible amount of injury for twenty years. *Goldsmid v. Tunbridge Wells Imp. Co.*, L. R., 1 Ch. 349.

Under a statute providing that a city could take the waste of a stream for certain purposes, and providing for compensation for damages, the actual withdrawal of the water is not necessary to constitute a taking, but an order of a city council, laying out the section of a stream as a sewer, followed by the construction of a sewer, through which the water is afterward discharged, is a taking within the meaning of the statute. *Worcester Gas Light Co. v. County Com'rs*, 138 Mass. 289.

1. *Crossley v. Lightowler*, L. R., 2 Ch. 478; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Blair v. Deakin*, 57 L. T. N. S. 522; *McKeon v. See*, 51 N. Y. 300; 10 Am. Rep. 659.

Where a large number of persons were mining on a small stream, and each deteriorated the water a little, so that the combined acts of all rendered the water unfit for use, it was held that each could not successfully defend an action, on the ground that his act alone did not affect the water. *Hill v. Smith*, 32 Cal. 166.

Joint Liability for Pollution by Several.—In *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. St. 142; 98 Am. Dec. 211, it was held that where a dam was filled up by deposits of coal dirt from different mines on the stream above the dam, some worked by the defendants and others by persons entirely unconnected with them, it was error for the court to charge that if, at the time the defendants were engaged in throwing their coal dirt into the river, the same thing was being done at other

collieries, and the defendants knew of this, they were liable for the combined results of all the deposits, for if others above on a stream contribute to such pollution, the defendant cannot be held liable for the injury done by them; his part of the pollution or wrong must be separated by means of the best proof the nature of the case affords. *Seely v. Alden*, 61 Pa. St. 306; 100 Am. Dec. 642.

2. *Cone v. Hartford*, 28 Conn. 363.

3. *Atty. Gen'l v. Gee*, L. R., 10 Eq. 131; *Robertson v. Stewart*, 9 G. & M. 189; *Baxendale v. M'Murray*, L. R., 2 Ch. 790; *Lingwood v. Stowmarket Paper Making Co.*, 11 Jur. (N. S.) 993.

Whether the use causing the contamination of the stream is reasonable or not, is a question of fact for the jury. Evidence of usage in the deposit of similar waste is not admissible in such a case. *Hayes v. Waldron*, 44 N. H. 580; 84 Am. Dec. 105.

The reasonableness in such cases depends upon the circumstance of each particular case. In regard to manufacturing purposes there must certainly be more or less refuse matter which, by ordinary care, could be prevented from falling into the stream, in which case the reasonableness of the use of the water must determine the right, and this must be governed by the extent of detriment received by the riparian proprietors below. *Lockwood Co. v. Lawrence*, 77 Me. 297; 52 Am. Dec. 763.

In *Baltimore v. Warren Mfg. Co.*, 59 Md. 96, the manufacturing company was restrained from such use of the waters in a stream as the discharging of refuse from the factory, whereby the stream, a source of supply of water for the city of Baltimore, was polluted. In discussing the extent of the pollution

stream caused by the natural and ordinary use of a watercourse, as for instance, the pollution of a stream by the usual impurities flowing from streets,¹ or by the maintenance and operation of mills and factories adapted to the stream; for running streams cannot be used for commercial and manufacturing purposes, and retain their pristine clearness and purity.²

(b) **By Factories and Mills.**—A frequent ground of action arises from the operation of mills and factories, the refuse from which poisons,

of a stream which would call for active interference of the court, Alvey, J., said: "It is not every impurity imparted to the water, however small in degree, that will be the subject of an injunction. All running streams are, to a certain extent, polluted; and especially are they so when they flow through populous regions of country, and the waters are utilized for mechanical and manufacturing purposes. The washings of the manured and cultivated fields, and the natural drainage of the country, of necessity bring many impurities to the stream, but these and the like sources of pollution cannot, ordinarily, be restrained by the court. *Wood v. Sutcliffe*, 2 Sim. N. S. 163. Therefore, when we speak of the right of each riparian proprietor to have the water of a natural stream flow through his land in its natural purity, those descriptive terms must be understood in a comparative sense; as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity. But any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance, that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose."

In *Robinson v. Stewart*, 11 MacPh. (Sc.) 189, Lord Armitage said that it is not every slight pollution of the waters of a stream, nor every disagreeable odor, that is to be dealt with as a nuisance to be put down by the authority of the law. The abatement of a

nuisance does not necessarily mean the entire and absolute removal of all pollution of a stream and all disagreeable odor, but such diminution of pollution or smell as to render it such as ought fairly and reasonably to be submitted to.

In *Barnard v. Shirley* (Ind. 1893), 34 N. E. Rep. 600, the erection and maintenance of a sanitarium was held to be lawful, although the waters of a stream were thereby polluted to the injury of lower riparian owners. In this case, the matter polluting the stream was carried from the defendants' premises by means of the flow from a ditch which they had dug.

In *Red River Roller Mills v. Wright*, 30 Minn. 249; 44 Am. Dec. 194, the defendants were held to make a reasonable use of the stream, although in exercising their right and running their sawmill much sawdust and refuse was cast into the stream.

In *Hazeltine v. Case*, 46 Wis. 391; 32 Am. Rep. 715, which was an action by a lower against an upper riparian owner on a stream, for polluting the stream by means of a hog yard, and depriving him of its use for domestic purposes, an instruction that, if the stream in its natural state was more useful to all the owners for stock purposes than for ordinary domestic uses, the upper owner had a right reasonably so to use it, in spite of the injury complained of, was held correct.

1. *Wheeler v. Worcester*, 10 Allen (Mass.) 591; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592.

In *Bainard v. Newton*, 154 Mass. 255, it was held that an injunction would not lie to restrain a city from discharging sewage into a stream running through the plaintiff's land lower down, as only surface drainage was allowed to run therein.

2. *Townsend v. Bell*, 70 Hun (N. Y.) 557; *Bullard v. Saratoga Victory Mfg. Co.*, 77 N. Y. 525.

corrupts, and renders unwholesome, the waters of a stream, or in some other way impairs its usefulness.¹ The deposit of dye stuffs, whereby a stream is polluted or discolored;² the discharge of poisonous and corrosive substances into a stream, whereby the machinery of lower riparian owners has been injured;³ emptying offensive matter from tan yards;⁴ and a deposit of sawdust, waste,

1. Laing v. Whaley, 3 H. & N. 675; Stockport Water Works Co. v. Potter, 7 H. & N. 160; Hodgkinson v. Ennor, 4 B. & S. 229; 8 L. T. N. S. 451; St. Helens Chemical Co. v. St. Helens, 1 Exch. Div. 196; Russell v. Haig, 3 Pat. App. (Sc.) 403; Merrifield v. Lombard, 13 Allen (Mass.) 16; 90 Am. Dec. 172; Smiths v. McConathy, 11 Mo. 517; Lewis v. Stein, 16 Ala. 214; 50 Am. Dec. 177.

In Aldred's Case, 9 Co. Rep. 58, 59a, it was laid down as an established rule, that if a man has a watercourse running in a ditch from the river to his house, for his necessary use, and a glover sets up a lime pit for calf skins and sheep skins so near the said watercourse that the lime pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged in H. 7, 26, and this stands with the rule of law and reason, etc. *Prohibetur ne quis faciat in suo quod nocere possit alieno; et sic utere tuo ut alienum non ledas.*

It is a principle of the common law, that the erection of anything in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable. And this principle not only stands with reason, but it is supported by unquestionable authority, ancient and modern. It has long since been adjudged, that he who has a fishery may maintain an action against a person for erecting a dyehouse. 9 Rep. 59; Co. Litt. 200b. See Howell v. McCoy, 3 Rawle (Pa.) 268.

Discharging water, polluted in the manufacture of lead, through channels whereby it reaches the watercourse of a paper manufacturer to his injury, is a nuisance. Hodgkinson v. Ennon, 4 B. & S. 229.

Gas-Works Refuse.—In Carhart v. Auburn Gas Light Co., 22 Barb. (N. Y.) 297, where the plaintiffs, carpet manufacturers, occupied premises on a river and supplied their works with the water therefrom, and the defendants, engaged in manufacturing gas upon and near the same stream above the plain-

tiffs' works, suffered to flow from their gas works into the river certain noxious and offensive substances, and certain tarry and oily substances, which mingled with and adulterated the water as it flowed to the plaintiffs' works, and injured the wool, etc., it was held that this was an injury for which an action would lie by the plaintiffs, notwithstanding the fact that the defendants claimed exemption from damages and liability, on the ground that the soil on which their works were situated was pervious, and was percolated by the water of the river without their agency or fault.

2. Crossley v. Lightowler, L. R., 2 Ch. 478; Holsman v. Boiling Springs Bleaching Co., 14 N. J. Eq. 335.

In Richmond Mfg. Co. v. Atlantic De Laine Co., 10 R. I. 106, the complainants, a corporation situated upon a running stream, engaged in the business of dyeing and printing calico, brought a bill in equity to restrain the defendants, a company engaged in manufacturing, dyeing, and producing worsted goods, and an injunction was granted.

A riparian owner is not estopped from complaining of the pollution of water by a cheese factory above, by the fact that he knew of the custom of such factories so to dispose of their surplus whey, and that he has patronized the establishment for two years. Snow v. Williams, 16 Hun (N. Y.) 468.

3. Pennington v. Brinsop Hall Coal Co., 5 Ch. Div. 769; Lingwood v. Stowmarket Co., L. R., 1 Eq. 77.

4. Moore v. Webb, 1 C. B. N. S. 673; 87 E. C. L. 672; Howell v. McCoy, 3 Rawle (Pa.) 256; Honsee v. Hammond, 39 Barb. (N. Y.) 89; Thomas v. Brackney, 17 Barb. (N. Y.) 654.

A grant to carry away the spent bark from a tannery does not authorize the grantee to discharge his waste so that it will lodge on the plaintiff's premises, or obstruct and set back the water upon his wheel. Winchester v. Osborne, 61 N. Y. 555, reversing 62 Barb. (N. Y.) 337.

or refuse from mills, to the injury of lower proprietors,¹ have been held to be actionable, and proper grounds for an injunction.

(c) **By Discharge of Sewage.**—A riparian proprietor who pollutes a stream by an unreasonable discharge of sewage, to the injury and inconvenience of lower riparian owners, is liable in damages therefor.² If a municipal corporation, in the absence of legal right so to do, causes sewage to pollute a watercourse, to the use of which a lower landowner through whose premises it passes is entitled, it is guilty of a nuisance, for which damages may be recovered.³

In *Crosby v. Bessey*, 49 Me. 539; 77 Am. Dec. 271, an action was brought for injury to the plaintiff's land by reason of the deposit therein of bark from the defendant's tannery, by the natural flow of water. The instruction to the jury that, unless the defendant had acquired by grant or prescription the right so to deposit, by the natural action of the water, it would be carried upon the plaintiff's land below to his damage, and that, if he did thus deposit without having acquired such right, and it was carried onto the plaintiff's land to his damage, the plaintiff was entitled to recover, was held to be correct. See also *Washburn v. Gilman*, 64 Me. 163; 18 Am. Rep. 246.

Sawdust.—In *Jacobs v. Allard*, 42 Vt. 303; 1 Am. Rep. 331, it was held that the defendant might, in the use of his mill in a reasonable manner, discharge sawdust and waste matter into the stream in the ordinary course of using his mill, and that he was not bound to prevent them from going into the stream. But it was said that he had not a right wantonly and needlessly, and out of the ordinary course in such cases, and not in the service of his substantial interests in the use of his mill in a reasonable manner, to throw off, or permit to go into the stream, the waste of his mill, to the injury of other proprietors. See also *Snow v. Parsons*, 28 Vt. 459; 67 Am. Dec. 723; *Green v. Gilbert*, 60 N. H. 144; *Hayes v. Waldron*, 44 N. H. 580; 84 Am. Dec. 105.

1. *Lockwood Co. v. Lawrence*, 77 Me. 297; 52 Am. Rep. 763; *Waterman v. Buck*, 58 Vt. 519; *People v. Rogers*, 12 Colo. 278.

In *O'Riley v. McChesney*, 3 Lans. (N. Y.) 278, it was held that it was not a reasonable or an ordinary use of the defendant's water privileges to allow flax sheaves from his mill to pass down the stream and impair the use of the plaintiff's mill, and that the expense in-

curred by the plaintiff in removing the deposit of sheaves was directly the result of the injury, for which he might recover damages.

In *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970, the defendant company was enjoined from discharging refuse matter from its factory, into the stream used by the water company as a source of supply for furnishing the city with water for domestic purposes.

In *Potter v. Froment*, 47 Cal. 165, the defendant was held chargeable for a nuisance in discharging sawdust from red cedar wood from his mill into a stream, thereby rendering it impure and unfit for domestic purposes.

Joint Wrongdoers.—Where the pollution complained of is caused by the acts of several, though acting independently, the nuisance constitutes, in equity, one cause of action, and all may be restrained in one suit. *Lockwood Co. v. Lawrence*, 77 Me. 297; 52 Am. Rep. 763.

2. *Woodyear v. Schaefer*, 57 Md. 1; 40 Am. Rep. 419; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Watson v. Toronto, etc., Water Co.*, 4 U. C. Q. B. 158.

3. *Atty. Gen'l v. Leeds*, L. R., 5 Ch. 583; *Goldsmid v. Tunbridge Wells Imp. Co.*, L. R., 1 Eq. 161; *Blackburne v. Somers*, L. R., 5 Ir. 1; *Atty. Gen'l v. Birmingham*, 4 K. & J. 528; *Hayes v. Dwight*, 49 Ill. App. 330; *Jacksonville v. Lambert*, 62 Ill. 519; *Chapman v. Rochester*, 110 N. Y. 273; *Gillett v. Kinderhook*, 77 Hun (N. Y.) 604; *New York Cent., etc., R. Co. v. Rochester*, 127 N. Y. 591; *Smith v. Atlanta*, 75 Ga. 110; *Simmons v. St. Paul*, 18 Minn. 176; *O'Brien v. St. Paul*, 25 Minn. 331; *State v. Luce* (Del. 1885), 6 Cent. Rep. 862; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Inman v. Tripp*, 11 R. I. 520; 23 Am. Rep. 520; *Clark v. Peckham*, 9 R. I. 455.

The fact that the public health and

A city may not use a private mill race, located outside of the corporate limits, as an outlet to its sewerage, to the injury of the proprietor, without making proper compensation.¹ And although a city may, without incurring liability, use the water of a stream for the purpose of emptying sewers into it, when authorized to take such steps as may be necessary, in its discretion, for the proper drainage of the city, it may be held responsible if the pollution complained of arises from the faulty construction, or

convenience will be best subserved by discharging sewage into the stream makes no difference. *Atty. Gen'l v. Hackney Board of Works*, L. R., 20 Eq. 626.

In *Locks & Canals v. Lowell*, 7 Gray (Mass.) 223, it was held that a canal corporation might maintain an action of tort against a city, for laying down sewers and drains over lands purchased by the corporation for the use of their canal, and emptying into the canal, though the city was authorized by its charter to cause drains and common sewers to be laid down through streets and private lands, and though the canal was constructed in the channel of an ancient, natural watercourse.

In *Sleight v. Kingston*, 11 Hun (N. Y.) 594, the plaintiff, who for more than forty years ran a ferry across a creek, complained that a village had caused a new sewer to be constructed, by which they diverted an old watercourse from its channel, and discharged the same, together with surface water and sewage, just above the plaintiff's slip, whereby they filled the same with sand and dirt, preventing the plaintiff from entering the same. It was held that he was entitled to recover damages therefor.

In *Lillywhite v. Trimmer*, 16 L. T. N. S. 318, the plaintiff was the owner of a mill upon the stream, and the defendant, who was a clerk of the board of health of the town, had caused a sewer to be built which was discharged into the stream. The plaintiff claimed that the water had previously been pure and fit for primary use, but sewage matter, discharged into it, killed the trout and occasioned an offensive and unwholesome smell. The water of the stream, although fit for primary use previous to the erection of the sewer, had never been used for that purpose, and as the other allegations of the case were not proved, the court would not interfere by injunction.

By Consent.—There is no liability,

however, if a sewer is built with the plaintiff's consent. *Searing v. Saratoga Springs*, 39 Hun (N. Y.) 307.

Drainage.—A riparian owner has a right to drain surface waters from his land into a stream running through the same, in any reasonable manner; he is not limited to the drainage and discharge of such water into the stream in the precise manner in which it was discharged when the land was in a state of nature, but he cannot surcharge the stream beyond its natural capacity. *McCormick v. Horan*, 81 N. Y. 86; 37 Am. Rep. 479. He may drain it by artificial means, without being liable to the lower owner for the increased volume of water at a particular season of the year. *Waffle v. New York Cent. R. Co.*, 53 N. Y. 11; 13 Am. Rep. 467. See also DRAINS AND SEWERS, vol. 6, p. 2.

Prescription.—A city may acquire the right to the use of a stream as a sewer, by prescription. *Kranz v. Baltimore*, 64 Md. 491. But there can be no prescriptive right to pollute a stream by the discharge of sewage in such a manner and to such an extent as to be injurious to the public health. Even assuming that a prescriptive right to foul the stream with sewage can be acquired, such right must be limited when the period of prescription commences, and if the pollution be substantially increased gradually or suddenly, equity will interfere by injunction to prevent the wrongful excess. *Blackburne v. Somers*, L. R., 5 Ir. 1.

1. In *Columbus v. Hydraulic Woolen Mills Co.*, 33 Ind. 435, an injunction was granted to restrain a city from making a ditch for the purpose of draining the streets of the city into the plaintiff's mill race, which would be so contaminated with filth as to make it unfit for the purposes for which it was then used, although the cutting of the ditch resulted in changing the grade of the street, which the city was authorized to make.

unreasonable use, of the sewers.¹ The rule, as stated by an eminent authority, is that, "If a sewer in any place is so constructed by the municipal authorities as to cause a positive and direct

1. *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Perry v. Worcester*, 6 Gray (Mass.) 544; *Sprague v. Worcester*, 13 Gray (Mass.) 193; *Emery v. Lowell*, 104 Mass. 13; *Child v. Boston*, 4 Allen (Mass.) 41; 81 Am. Dec. 680; *Kansas City v. Slangstrom* (Kan. 1894), 36 Pac. Rep. 706.

It is the duty of a municipal corporation to construct its sewers so that they shall not become nuisances. *West v. Brockport*, cited in *Conrad v. Ithaca*, 16 N. Y. 161.

In *Rome v. Portsmouth*, 56 N. H. 291, a city was held liable for the construction of a sewer so unskillfully that it became obstructed and caused water to set back on the plaintiff's premises.

In *Atty. Gen'l v. Birmingham*, 4 K. & J. 528, it was held that, although the town was authorized by act of Parliament to effectually drain the town, it was not justified in so carrying on the operations for this purpose as to drive away fish, and prevent cattle from drinking the water, at a point seven miles below the town, the point belonging to the plaintiff, and that, assuming the inhabitants of the borough to have had, before the act, a right to drain their lands into the river, that circumstance could not authorize the councils to discharge the sewage in such manner as to subject the plaintiff to the inconvenience of which he complained.

In *Jacksonville v. Lambert*, 62 Ill. 519, a city constructed a sewer so that garbage, suds, slops, offal, and filth, from dwelling houses and woolen mills, near which it was conducted, were discharged upon and flowed through the real estate of the plaintiff, corrupting and polluting the atmosphere so as to render the land unsalable and unsuitable for residences. It was held that the city was liable to the plaintiff for damages sustained.

Under a statute giving the city of Worcester authority to fix the boundary of a certain creek, and use it as they should judge necessary for the purpose of sewerage, and providing for recovery of damages by persons injured by the excess of such authority, it was held that the owner of a mill, on the river into which the brook flowed

at a point above the mill, might recover for the diminution in worth of the water for use in connection with his mine, by reason of the increased pollution thereof, by the appropriation of the brook for common sewage. *Washburn, etc., Mfg. Co. v. Worcester*, 153 Mass. 494. As to the construction of this and other similar statutes, see *Worcester Gas Light Co. v. County Com'rs*, 138 Mass. 289; *Butler v. Worcester*, 112 Mass. 547; *Woodward v. Worcester*, 121 Mass. 245; *Bailey v. Woburn*, 126 Mass. 416; *Aetna Mills v. Waltham*, 126 Mass. 422.

In *England*, under the Local Government Act, 24 & 25 Vict., ch. 61, § 4, enabling local boards to erect sewers, etc., subject to the following proviso, "that nothing herein contained shall give, or be construed to give, power to any local board to construct or use any outfall, drain, or sewer, for the purpose of conveying sewage or filthy water into any natural watercourse or stream, until such sewage, or filth, or refuse water, be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse," it was held that a local board could not discharge sewage into a river so as to pollute the water at the point of discharge, and although the pollution was imperceptible at the point where it was complained of, an injunction to restrain such pollution should be granted. *Atty. Gen'l v. Cockermouth*, L. R., 18 Eq. Cas. 172.

Practice.—Under a charter providing that before using a stream for sewer purposes the damages suffered by any individual must be ascertained and paid, and describing the method of ascertaining such damage, in an action for damages, an allegation, by the city, that in using the stream it has proceeded under the act, is insufficient, and an allegation, that the use of a stream for a sewer was reasonable, natural, and proper, without stating the use and manner thereof, constitutes a conclusion of law, or law and fact, so blended that they cannot be separated, is demurrable. *Kellogg v. New Britain*, 62 Conn. 232.

invasion of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water and sewage which would not otherwise have flowed and found its way there, the corporation is liable."¹

(d) **By Mining Operations.**—A mine owner cannot, in the operation of his works, or in the development and enjoyment of his property, infringe upon the rights of others by discharging refuse from his mines into running streams, destroying their usefulness to other riparian owners.² But in *Pennsylvania*, in view of the great industrial interests which would be hampered by any other doctrine, it is held that the primary or domestic uses are subservient to the right of a mine owner to use the stream in the development of his property.³

1. 2 Dillon on Municipal Corporations (4th ed.), § 1047; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552. Another authority says: "As to the necessity for a sewer or its location, or the system or plan of sewerage, the decision of the proper municipal authorities is conclusive, because it is an exercise of a discretion reposed in them by the law, and consequently is not reviewable by the courts." Wood on Nuisances (2d ed.), § 752, cited with approval in *Seifert v. Brooklyn*, 101 N. Y. 145.

2. *Columbus, etc., Coal, etc., Co. v. Tucker*, 48 Ohio St. 41; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412; 40 Am. Rep. 118; *Drake v. Lady Ensley Coal, etc., Co.* (Ala. 1894), 14 So. Rep. 749.

In *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412; 40 Am. Rep. 118, the defendant was held liable for injury to a lower owner, caused by the pollution of the stream from debris deposited therein, which in rainy seasons was carried and left on the plaintiff's land by the natural flow of the stream.

In *Satterfield v. Rowan*, 83 Ga. 187, where the defendant alleged that the stream was more useful to him, and all other riparian owners, for washing ore, than it was to the plaintiff for agricultural purposes, it was held that it was proper to charge the jury that the defendant, in using the stream to wash ore on his land, was bound to do so in such a manner as not to injure its reasonable use by the plaintiff; that if no one lived on the stream below the point in use, or had a farm or pasture on it, or if the stream was mainly useful to the riparian owner for washing ore, then the pollution of the stream would not interfere with its enjoyment.

In *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. Div. 769, an injunction was granted to restrain the defendants from diverting water from their collieries into a stream, by which the water in use for a cotton mill of the plaintiff was corrupted; in answer to the suggestion that, in lieu of the remedy sought, damages should be awarded, it was said: "The rights of the plaintiffs as riparian owners are not limited to their present modes of enjoyment. . . . It is impossible to foresee what modes of enjoyment the plaintiffs, or their successors in title, may resort to, or the extent of damages which would be a compensation for the injury which the continued pollution might cause to such new modes of enjoyment."

In *Tennessee Coal, etc., R. Co. v. Hamilton* (Ala. 1893), 14 So. Rep. 167, a corporation using the waters of a stream for washing ore, in such a manner as to foul the water so that stock would not drink it, and destroying it for domestic purposes, was held liable for the damage sustained, although the ore was valueless without the washing, and the stream furnished the only available water supply for the purpose, and the company used the customary and best means for purifying the water after being used.

3. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445; *overruling Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401; 27 Am. Rep. 711. See also *Hauck v. Pipe Line Co. (Limited)*, 153 Pa. St. 366.

In *Elder v. Lykens Valley Coal Co.*, 157 Pa. St. 490, the doctrine that a mine owner was not liable for the pollution of a stream by drainage from his mines was recognized; but it was held that he had no right to throw culm

(e) *Other Causes*.—The pollution of running waters is occasioned frequently by the maintenance of slaughter houses thereon¹ and the keeping of large cattle stables or hog pens;² and when, in such cases, it is injurious to the public health or to the rights of individuals, the same will be restrained and damages can be recovered as for a nuisance.

(3) *Diversion*—(a) *In General*.—A riparian owner may divert the water flowing through his land, provided he returns it to the original channel when it leaves his land, and does not diminish materially the flow.³ But it is a nuisance to divert the waters of a stream onto another's land without license, grant, or prescriptive right.⁴ Where the diversion complained of is such as to lessen the

and refuse into the stream, or leave it on his own land in such manner as to let it down upon the lands of others. In this case the court said: "It may be convenient or economical for the coal owner to throw the refuse from his mines into the streams, but that is not enough. He is bound to consider the rights of others. If he takes the risk of injuring others to save trouble and expense for himself, he makes himself liable for the loss his conduct may inflict on his neighbors." See also *Lentz v. Carnegie*, 145 Pa. St. 612.

1. *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576; 14 Am. St. Rep. 319.

If the intended use of a slaughter house about to be erected will, by the discharge of blood of slaughtered animals into a creek, corrupt and pollute the stream for most of the purposes for which it may be used by the owners of lands which border on it below, and so affect it as to make its waters offensive to houses in the neighborhood, an injunction will be granted to prohibit the blood from being discharged into the stream. *Atty. Gen'l v. Steward*, 20 N. J. Eq. 415.

In *Woodyear v. Schaefer*, 57 Md. 1; 40 Am. Rep. 419, the plaintiff, a mill owner, was injured by offensive matter in his mill race, caused by the defendant, who maintained a slaughter house on the stream above him, letting blood and offal flow into the stream, rendering it impure and offensive. It was held that the plaintiff was entitled to an injunction.

2. *Greene v. Nunnemacher*, 36 Wis. 50; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480.

Keepers of pig styes, the offal from which renders a creek unwholesome, are liable for a nuisance. *Smiths v. McConathy*, 11 Mo. 518.

In *Baltimore v. Warren Mfg. Co.*, 59 Md. 96, the cause of pollution complained of was that the defendant had erected privies and hog pens at, or near, the said factory, the excrement and filth whereof the defendants caused, or willfully suffered, or permitted, to be discharged into the waters of the said stream.

3. *Earl of Sandwich v. Great Northern R. Co.*, L. R., 10 Ch. Div. 707; *Garwood v. New York Cent., etc., R. Co.*, 83 N. Y. 400; 38 Am. Rep. 452; *Creighton v. Kaweah Canal, etc., Co.*, 67 Cal. 221; *Moore v. Clear Lake Water Works* (Cal. 1885), 5 Pac. Rep. 494; *Pettibone v. Smith*, 37 Mich. 579.

In *Embry v. Owen*, 6 Exch. 353, an action for the diversion of the waters of a stream, it was declared that the question was properly left to the jury. The diversion had been by the riparian proprietor, for the purpose of irrigation, and no sensible diminution of the stream being shown, it was held that there could not be said to be an unreasonable use of the water.

In *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191; 57 Am. Dec. 85, a railroad company which, by an arrangement with a riparian proprietor, diverted a small quantity of water from a stream, for the purpose of furnishing their steam engines with water, it was held that an instruction to the jury to the effect that, "unless the plaintiff suffered an actual perceptible damage in consequence of the diversion, the defendants were not liable," was correct.

4. *Learned v. Castle*, 78 Cal. 454, *Vernum v. Wheeler*, 35 Hun (N. Y.) 53; *Porter v. Durham*, 74 N. Car. 767.

The diversion of an outlet of a pond through a new drain was not excused by the fact that the owner of the outlet

supply to which every riparian owner is entitled, the proprietor causing the same is liable in damages for any injuries resulting,¹

had suffered it to become obstructed so as to raise water on the land of him who cut the drain; the latter should have removed the obstruction. *Mohr v. Gault*, 10 Wis. 513; 78 Am. Dec. 687.

1. *Wright v. Howard*, 1 Sim. & Stu. 190; *Ewing v. Colquhoun*, L. R., 2 App. Cas. 839; *Colburn v. Richards*, 13 Mass. 420; 7 Am. Dec. 160; *Cook v. Hull*, 3 Pick. (Mass.) 269; 15 Am. Dec. 208; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Hilliker v. Coleman*, 73 Mich. 170; *Pettibone v. Smith*, 37 Mich. 579; *Welton v. Martin*, 7 Mo. 307; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; 7 Am. Dec. 526; *Platt v. Johnson*, 15 Johns. (N. Y.) 213; 8 Am. Dec. 233; *Van Hoesen v. Coventry*, 10 Barb. (N. Y.) 518; *Colrick v. Swinburne*, 105 N. Y. 503; *Covert v. Valentine* (Supreme Ct.), 50 N. Y. St. Rep. 516; *Koch v. Delaware, etc.*, R. Co., 54 N. J. L. 401; *Halsey v. Lehigh Valley R. Co.*, 45 N. J. L. 26; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Vanwinkle v. Curtis*, 3 N. J. Eq. 427; *Tillotson v. Smith*, 32 N. H. 90; 64 Am. Dec. 355; *Shamleffer v. Peerless Mill Co.*, 18 Kan. 24; *Emporia v. Soden*, 25 Kan. 588; 37 Am. Rep. 265; *Weiss v. Oregon Iron, etc.*, Co., 13 Oregon 496; *Thayer v. Brooks*, 17 Ohio 489; 49 Am. Dec. 474; *Cannfield v. Andrew*, 54 Vt. 1; 41 Am. Rep. 828; *Clement v. Gould*, 61 Vt. 573; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Kimberly v. Hewitt*, 79 Wis. 334; *Clark v. Pennsylvania R. Co.*, 145 Pa. St. 438.

Chancellor Kent thus states the rule: "Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below." 3 Kent's Com. (13th ed.) 439.

In *Garwood v. New York Cent., etc.*, R. Co., 83 N. Y. 400; 38 Am. Rep. 452, the defendant, a riparian owner, diverted the waters of a creek, conveying them by pipes to reservoirs from whence locomotives were supplied with water. Upon the finding of the jury

that the water so diverted from the creek was sufficient "to perceptibly reduce the volume of water flowing," and to "materially reduce or diminish the grinding power of plaintiff's mill," it was held that the plaintiff was entitled to maintain an action to recover the damages sustained, and to restrain such diversion.

In *Carron v. Wood*, 10 Mont. 500, an action for damages for the unlawful diversion of water, an instruction "that the extent of the plaintiff's appropriation is determined by the capacity of his head-gate and ditches, and the quantity required by him for the uses for which it may be appropriated, measured as required by statute," was held to be correct, in that it tested the extent of the appropriation by the capacity of the head-gate and not that of the ditch. In this case the defendants were liable for a diversion, although the diversion was not continuous, but at certain periods.

A diversion of a watercourse by the authority of a riparian proprietor, to enable a company to supply, in part, a village with water, is unlawful; for as between co-proprietors such a diversion is not a reasonable use of the common property. *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538.

In *Clement v. Gould*, 61 Vt. 573, the defendant was held liable in damages for the diversion of a running stream while he operated a mill thereon jointly with another, while, he being the owner, it was operated by another under a lease from him, and while, having conveyed it, he operated it by lease from the owner.

The diversion of water from a natural stream, on the part of one who has conducted some to it, will be restrained at the suit of a riparian proprietor, unless the former shows that he has not diverted from it more water than he led to it. *Wilcox v. Hausch*, 64 Cal. 461.

Where there are mills on both sides of a watercourse, and the mill owner on one side has the exclusive right to the whole of the water, when there is not enough for the mills on both sides, he has not a right to erect a permanent dam to turn the water to his mill, but must rely on his legal remedy, if his

and may be restrained from further diversion by injunction.¹ The diversion cannot be justified by the fact that others are engaged in similar wrongful acts on the same stream;² nor by the fact that such diversion was in accordance with the practice of a former owner.³ Although the diversion may cause no actual injury to the complainant, it is an infringement of his right, and nominal damages may be recovered, inasmuch as the act of the defendant, if repeated often enough without interruption, might furnish evi-

right be infringed by the mill owners on the other side. *Curtis v. Jackson*, 13 Mass. 507.

The fact that a stream is navigable to the extent that it is used for floating purposes, does not extinguish the riparian owner's title to the soil and deprive him of the right, on that ground, to complain of the unlawful diversion of the water. *Shaw v. Oswego Iron Co.*, 10 Oregon 371; 45 Am. Rep. 146.

Diversion of Water Cast on Land.—

Where the plaintiff erected a dam to flow his cranberry bog, and the defendant subsequently dug a ditch on his own land diverting the water, but which would not have diverted any water if the plaintiff's dam had not been built, there was no unlawful diversion by the defendant. *Bearse v. Perry*, 117 Mass. 211.

Railroad Ditch.—A railroad company which diverts a natural watercourse by a ditch across its track, cannot escape liability to a riparian owner thereby injured, on the ground that the ditch was necessary to protect its track and was wholly on land it owned in fee. *Union Pac. R. Co. v. Dyche*, 31 Kan. 120.

1. Injunction.—Equity will interfere by injunction to prevent an encroachment upon the rights of a proprietor in a running stream, and will exercise jurisdiction to compel the restoration of running water to its natural channel. *West Point Iron Co. v. Reymert*, 45 N. Y. 705. See also *Smith v. Rochester*, 38 Hun (N. Y.) 612; *affirmed* in 104 N. Y. 674; *Hilliker v. Coleman*, 73 Mich. 170; *Chesapeake, etc., R. Co. v. Bobbett*, 5 W. Va. 138; *Fairhaven Marble, etc., Co. v. Adams*, 46 Vt. 496.

Where the plaintiff owns valuable and extensive machinery worked by the water power of a stream, a court of equity will restrain, by injunction, a repeated diversion of the water, and a threatened continuance of such diversion by the upper proprietors, by means of a ditch on their own lands, on

the principle of preventing irreparable mischief and a multiplicity of suits. *Wright v. Moore*, 38 Ala. 593; 82 Am. Dec. 731.

In *Franklin v. Pollard Mill Co.*, 88 Ala. 318, it was held that to maintain a bill in equity for an injunction against the diversion of water in a running stream, the complainant must show that he is a riparian owner, and that he has title to the land extending to the bank of the stream, and if he shows title, but fails to show actual damage resulting to him from the diversion, an injunction will be granted only in vindication of his title, so as to prevent the acquisition of an adverse right by prescription.

In *Conkling v. Pacific Imp. Co.*, 87 Cal. 296, it was held that if the power for the diversion of water from a riparian owner was wrongful, it was not necessary for the plaintiff to prove damages to entitle him to an injunction. The fact that the unlawful diversion of water had actually taken place before the commencement of a suit to enjoin the diversion, and that a water pipe of improper size, by which the water was diverted, was completed before the filing of an amended complaint seeking to enjoin the diversion of water thereby, constitutes no objection to an injunction to prevent the continued diversion of the water. See also *Moore v. Clear Lake Water Works*, 68 Cal. 146.

2. Crossley v. Lightowler, L. R., 3 Eq. Cas. 279; *affirmed* L. R., 2 Ch. 478.

3. Practice of Former Owner.—In *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349, it was held that the fact that the plaintiff and the defendant, heirs of a brick maker, divided land they inherited from him by a mutual quitclaim deed, knowing his custom of varying the course of the brook to suit his business, did not justify the owner of the upper portion in diverting the brook from flowing through the lower portion.

dence in derogation of the plaintiff's right.¹ The diversion will be restrained, although sufficient water is left for the use to which the complainant puts the stream at the time of the wrongful act.²

A diversion, when wrongful, is a continuing injury, and is not referable exclusively to the day when first committed,³ but successive actions may be brought as long as the diversion is continued.⁴

One whose rights are not affected may not complain of the wrongful act.⁵

1. *Mason v. Hill*, 5 B. & Ad. 1; *Bower v. Hill*, 1 Bing. N. Cas. 549; *Harrop v. Hirst*, L. R., 4 Exch. 43; *Finoux v. Hobenan*, Cro. Eliz. 664; *Turner v. Lewis*, 1 Chitty 265; 18 E. C. L. 74; *Mellor v. Spateman*, 1 Wm. Saund. 343; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Marzetti v. Williams*, 1 B. & Ad. 415; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. Rep. 72; *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394; *Chapman v. Thames Mfg. Co.*, 13 Conn. 269; 33 Am. Dec. 401; *Creighton v. Evans*, 53 Cal. 55; *Ferreira v. Knipe*, 28 Cal. 340; 87 Am. Dec. 128; *Plumleigh v. Dawson*, 6 Ill. 544; 41 Am. Dec. 109; *Butman v. Hussey*, 12 Me. 407; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 190; *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 504; *Munroe v. Stickney*, 48 Me. 462; *Crooker v. Bragg*, 10 Wend. (N. Y.) 260; 25 Am. Dec. 555; *Allaire v. Whitney*, 1 Hill (N. Y.) 487; *Ware v. Allen*, 140 Mass. 513; *Lund v. New Bedford*, 121 Mass. 286; *White v. Chapin*, 12 Allen (Mass.) 516; *Bloodgett v. Stone*, 60 N. H. 167; *Tillotson v. Smith*, 32 N. H. 90; *Philadelphia v. Collins*, 68 Pa. St. 116; *Miller v. Miller*, 9 Pa. St. 74; 49 Am. Dec. 545; *Delaware, etc., Canal Co. v. Torrey*, 33 Pa. St. 143.

It is a settled rule, that where an act is done which violates the rights of any one, and which is of such a nature that, if it be continued for a sufficient period of time, the wrongdoer may acquire a title by adverse possession or presumption of a grant, the person whose rights are violated may maintain an action therefor, without proof of any other actual damages. *Lund v. New Bedford*, 121 Mass. 286.

In *Chapman v. Copeland*, 55 Miss. 476, it was held that, in an action to recover damages for the flowage of the plaintiff's land, caused by the diversion of the water of a creek from its natural

course, through a ditch cut by the defendant, it was error to instruct the jury to find for the defendant, unless the plaintiff had sustained damage "in amount appreciable and ascertainable by evidence to the satisfaction of the jury."

In *Smith v. Rochester*, 38 Hun (N. Y.) 612, affirmed in 104 N. Y. 674, the defendant diverted the waters of a lake which had flowed into a creek on which the plaintiff's mill was situated, and the plaintiff admitted that the defendant had taken steps by which the plaintiff would be supplied with sufficient water to furnish a more uniform supply for his mill than he had had from the lake, the waters of which the defendant had diverted, yet it was held that as the defendant had no legal right to divert the waters of the lake, and thus diminish the plaintiff's supply, the plaintiff was entitled to an injunction restraining such diversion, even though it occasioned no actual damage to him. See also *Gilzinger v. Saugerties Water Co.* (Supreme Ct.), 49 N. Y. St. Rep. 308.

2. *Gilzinger v. Saugerties Water Co.* (Supreme Ct.), 49 N. Y. St. Rep. 308.

3. *Colrick v. Swinburne*, 105 N. Y. 503; *Arnold v. Hudson River R. Co.*, 55 N. Y. 661; *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306; 45 Am. Dec. 474; *Covert v. Valentine* (Supreme Ct.), 50 N. Y. St. Rep. 516.

4. *Bare v. Hoffman*, 79 Pa. St. 71; 21 Am. Rep. 42.

5. *Miner v. Gilmour*, 12 Moore P. C. 131. The diversion of water from a watercourse will not be restrained at the instance of a riparian owner on another watercourse into which the former occasionally empties, unless it lessens the quantity that would have emptied into the latter watercourse by the natural channel, and shortens the duration of such flow, and it will be

(b) **Mode of Diversion.**—The mode of diversion is immaterial. It is equally wrongful whether done by diverting the waters of a spring, the source of a running stream;¹ or by erecting a bulwark on the banks of a stream which may, in the time of flood, have the effect of diverting the stream from its accustomed course, causing an overflow of the lands of other proprietors,² or by drawing off water from the stream by percolations.³

(c) **By Change of Channel.**—A proprietor may change the whole course of a stream within the limits of his own land, provided he restores the water undiminished to the original channel before leaving his premises,⁴ and if he has exercised reasonable care and foresight he cannot be held liable for injuries resulting from unforeseen causes.⁵ He may improve the bed of the watercourse,

restrained only as to such amount and time. *Creighton v. Kaweah Canal, etc., Co.*, 67 Cal. 221.

1. *Lord v. Meadville Water Co.*, 135 Pa. St. 122; 20 Am. St. Rep. 864; *Colrick v. Swinburne*, 105 N. Y. 503.

It is an actionable diversion to take the sources of a watercourse and turn the water away therefrom except for the natural wants of the riparian owners. *Boynton v. Gilman*, 53 Vt. 17.

It is an actionable diversion to take springs that are the sources of a creek, though the waters find their way from the spring to the creek through unknown subterranean channels. *Strait v. Brown*, 16 Nev. 317; 40 Am. Rep. 497.

Draining Waters of a Lake.—The owner of water power on a stream may have an injunction to restrain the digging of a ditch to a lake, the source of a running stream, where at times of high water the ditch would draw off the waters of the lake. *Bennett v. Murtaugh*, 20 Minn. 151.

2. *Menzies v. Lord Beedlebane*, 2 Wils. 235; *Bickett v. Morris*, 1 H. L. Cas. 47; *Ewing v. Colquhoun*, L. R., 2 App. Cas. 839.

3. See UNDERGROUND WATERS, vol. 27, p. 423.

4. *Elmhirst v. Spencer*, 2 McN. & G. 45; *Norton v. Volentine*, 14 Vt. 239; *Caufield v. Andrew*, 54 Vt. 1; 41 Am. Rep. 828; *Brisbane v. O'Neill*, 3 Strobb. (S. Car.) 348; *Dilling v. Murray*, 6 Ind. 324; 63 Am. Dec. 385; *Pettibone v. Smith*, 37 Mich. 579; *Society for Establishing Useful Manufactures v. Morris Canal Co.*, 1 N. J. Eq. 157; *Webster v. Fleming*, 2 Humph. (Tenn.) 518.

A failure to restore the water con-

stitutes an unlawful diversion, and it is no excuse that the unauthorized injuries of a stranger rendered the means provided for restoring the water, otherwise adequate, unavailable for that purpose. *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394.

New Channel Must Equal Old.—One who diverts water must do it so that the new channel is as adequate to carry off the flow as the former, and is also adequate to carry off the waters of floods that may be reasonably anticipated, and he is liable for the injuries caused by defects in regard to these points. *Fletcher v. Smith*, L. R., 7 Exch. 305; *affirming*, L. R., 2 App. Cas. 781.

Public Rights of New Channel.—If one, by such diversion, obstructs rafting and boating on the stream, he impliedly authorizes the public to use the new channel as they had previously used the original channel, but if the obstruction of the old channel arises, not from the making of a new one, but from a subsequent stoppage of the flow of the stream at a distant point, the public acquires no right to use the new channel. *Dwinel v. Barnard*, 28 Me. 554; 48 Am. Dec. 507.

5. *Brown v. Best*, 1 Wils. 174; *Hargreaves v. Kimberly*, 26 W. Va. 787; 57 Am. Rep. 121.

In *Railroad Co. v. Carr*, 38 Ohio St. 448; 43 Am. Rep. 428, it was held that one owning land abutting on a river, through which a creek flows and empties into the river, might, as against the proprietors on the opposite side of the river, change the channel and mouth of the creek upon his own land for his own protection and convenience, if in doing so he exercises reasonable care

although thereby an increase in the quantity results.¹ Where the water has continued to flow in the new channel for a period of twenty-one years, it cannot be diverted and returned to the old channel to the injury of those having gained a prescriptive right to the flow in the new channel.²

(d) **Measure of Damages.**—As we have seen, a riparian owner, in an action for the wrongful diversion of a watercourse, may recover nominal damages for the invasion of his rights, although he has sustained no actual injury.³ Where the diversion complained of results in actual injury to the complainant, the measure of damages is to be estimated by the actual loss which he has sustained, and the expense to which he has been put by reason of such diversion, or the value of the use of the water during the time of diversion.⁴ Where the diversion results in a permanent injury to the premises, the proper measure of damages is the difference between the market value of the property at the time of the injury complained of, and that subsequent thereto.⁵

and caution not to injure others; but that he could not do so if, in the exercise of such privilege, increased danger of inundation and overflow on the opposite side of the river might be anticipated.

1. *Waffle v. Porter*, 61 Barb. (N. Y.) 130. In this case the plaintiff increased the flow by clearing out and tubing a spring, which was the source of a creek.

But the owner of upland through which a stream flows will be restrained from changing the natural course of a stream, to protect his meadow, where such change would increase the current of the stream so as to damage the mill dam of the owner below, by washing the banks and filling the dam with sediment. *Kay v. Kirk*, 76 Md. 41.

2. *Mathewson v. Hoffman*, 77 Mich. 420.

It is a nuisance to restore a stream to an old channel after the period of prescription has run, when the change of the channel was caused by sudden floods. *Woodbury v. Short*, 17 Vt. 387; 44 Am. Dec. 344. So the restoration of the stream to its original channel is a nuisance, as to a mill owner who has acquired by prescription the right to have the water from his mill flow into the artificial channel. *Delaney v. Boston*, 3 Harr. (Del.) 489.

But where one diverted the water from a watercourse for his mill race, having been in the habit of occasionally turning the water back into its natural channel when cleaning and repairing the race, during a period of

twenty-one years, and then turning it back into its original channel, to the damage of a recent purchaser of land thereon, he was held not liable. *Peter v. Caswell*, 38 Ohio St. 518.

3. See *supra*, this title, *Diversion—In General*.

4. *Hart v. Evans*, 8 Pa. St. 13; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306; 8 Am. Dec. 404; *Platt v. Johnson*, 15 Johns. (N. Y.) 213; 8 Am. Dec. 233.

So in *Colrick v. Swinburne*, 105 N. Y. 503, in an action for an injury caused by the diversion of a stream from the plaintiff's tannery, it was held that the diminished rental value during the period of diversion was the proper measure of damages. See also *Honsee v. Hammond*, 39 Barb. (N. Y.) 89.

In *Pollitt v. Long*, 58 Barb. (N. Y.) 20, where the diversion of the water by the defendant resulted in depriving the plaintiffs of the use of the water for their factory, it was held that the true measure of damages was the value of the use of the water to the plaintiffs during the time they were wrongfully deprived of it.

5. *Shenango, etc., R. Co. v. Braham*, 79 Pa. St. 447.

In *Finley v. Hershey*, 41 Iowa 389, it was held that the measure of damages sustained by a riparian owner, for the unlawful filling of a pond, was the depreciation thereby occasioned to the value of his property, and that both the effect upon its present use and upon its permanent value should be considered.

In *Hanover Water Co. v. Ashland*

d. RIGHTS IN BED OF STREAM.—Each proprietor, in the absence of an express reservation limiting him to the margin, owns to the center of the stream.¹

III. EFFECT OF PRIOR APPROPRIATION—1. **Common-Law Rule.**—In several early English cases the opinion is expressed by eminent judges, that a riparian owner may acquire exclusive rights to running water by prior occupancy,² but later cases have not adhered to these *dicta*, but maintain the contrary, and it may be safely said that it is well settled, both in *England*, and the *United States*, that prior appropriation or occupancy, unless continued for a period of time, and under such circumstances as would be requi-

Iron Co., 84 Pa. St. 279, it was held that the measure of damages, for the diversion of a stream whereby a farm with an ore bank thereon was injured, was the difference in the market value of the farm and ore bank immediately before and immediately after the diversion of the stream, as affected thereby.

But in *Bare v. Hoffman*, 79 Pa. St. 71; 21 Am. Rep. 42, where the plaintiff had a dam from which he conducted water to his tannery, and the defendant made a dam below, into which the surplus water over the plaintiff's dam flowed, by which the plaintiff lost the use of the water required to carry the offal from his tannery, it was held that evidence of permanent injury to the market value of the tannery was inadmissible.

1. **BOUNDARIES**, vol. 2, p. 504. See also 3 Kent's Com. (6th ed.) 428; *Bardwell v. Ames*, 22 Pick. (Mass.) 333; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268; *Pratt v. Lamson*, 2 Allen (Mass.) 284; *Illinois, etc., Canal v. Harris*, 11 Ill. 554; *Rockwell v. Baldwin*, 53 Ill. 19; *Houck v. Yates*, 82 Ill. 179.

Where the calls in a conveyance of land are for two corners on the bank of a stream, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, and all riparian rights pass. *Whitehurst v. McDonald*, 52 Fed. Rep. 633.

Change of Channel.—Where the channel of a stream, which is the boundary line of a tract of land, suddenly abandons the old channel and makes a new one, the middle of the old channel still continues to be the boundary line of the tract. *Bouvier v. Stricklett* (Neb. 1894), 59 N. W. Rep. 550; *McKay v. Huggan*, 24 Nova Scotia 514.

2. See *Bealey v. Shaw*, 6 East 208,

where LeBlanc, J., expressed this opinion, which, however, was not sanctioned by other members of the court, and was unnecessary to a decision of the case.

In *Liggins v. Inge*, 7 Bing. 682; 20 E. C. L. 287, *Tindall, C. J.*, said: "Water flowing in a stream, it is well settled by the law of *England*, is *publici juris*. . . . And by the law of *England*, the person who first appropriates any part of the water flowing through his land to his own use, has a right to the use of so much as he thus appropriates against any other."

And in *Williams v. Morland*, 2 B. & C. 910; 9 E. C. L. 269, it was said that flowing water is *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*. A party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public.

None of these opinions were necessary to an adjudication of the cases in which they were delivered, and as is said by an eminent author, referring to the opinion of *Tindall, C. J.*, and a like expression in 2 Black Com. 402, the proper construction of this opinion is, that the water is considered *publici juris*, not as a *bonum vacans* to which the first occupant might acquire an exclusive right, but as public and common in this sense, that all, who have a right of access, may drink it, or apply it to the necessary purposes of supporting life, and that no one has any property in the water itself, except in that particular portion which he might have abstracted from the stream and of which he has possession. See *Angell on Watercourses* (7th ed.), § 132.

site to establish rights by prescription, confers no exclusive rights,¹ except in those states where the common law has been modified by statute or local usage.

1. *Embrey v. Owen*, 6 Exch. 353; *Chasemore v. Richards*, 2 H. & N. 68; *Wright v. Howard*, 1 Sim. & Stu. 190; *King v. Tiffany*, 9 Conn. 163; *Buddington v. Bradley*, 10 Conn. 213; 26 Am. Dec. 386; *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391; *Gillett v. Johnson*, 30 Conn. 180; *Ingraham v. Hutchinson*, 2 Conn. 592; *Heath v. Williams*, 25 Me. 209; 43 Am. Dec. 265; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102; *Bliss v. Kennedy*, 43 Ill. 67; *Stout v. M'Adams*, 3 Ill. 67; 33 Am. Dec. 441; *Burnett v. Nicholson*, 72 N. Car. 334; *Gilman v. Tilton*, 5 N. H. 231; *Bullen v. Runnels*, 2 N. H. 255; 9 Am. Dec. 55; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71; *Norway Plains v. Bradley*, 52 N. H. 86; *M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84; 23 Am. Dec. 102; *Hoy v. Sterrett*, 2 Watts (Pa.) 327; 27 Am. Dec. 313; *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Bearse v. Perry*, 117 Mass. 211; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 538; *Martin v. Bigelow*, 2 Aik. (Vt.) 184; 16 Am. Dec. 696; *Johns v. Stevens*, 3 Vt. 308; *Palmer v. Mulligan*, 3 Cal. (N. Y.) 307; 2 Am. Dec. 270; *People v. Platt*, 17 Johns. (N. Y.) 195; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 319; 8 Am. Dec. 404; *Crooker v. Bragg*, 10 Wend. (N. Y.) 264; 25 Am. Dec. 555; *People v. Canal Appraisers*, 13 Wend. (N. Y.) 355.

In *Mason v. Hill*, 5 B. & Ad. 1; 27 E. C. L. 1, a leading case on this subject in *England*, Denman, C. J., in an opinion in which he reviewed the earlier cases, said: "The position, that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back water, nor the owner of the land above divert it, to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrongdoer; and the owner of land who applies a stream that runs through it to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for such consequential injury to the mill." And, further commenting upon the early English de-

cisions, he said: "None of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities that the first occupier, or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of the land below, and may deprive him of the benefit of the natural flow of water."

In *Bealey v. Shaw*, 6 East 208, where the contrary was expressed by LeBlanc, Lord Ellenborough distinctly states the right of every man to have the advantage of a flow of water in his land without diminution or alteration, unless the occupancy of another has been for so long a time as to raise the presumption of a grant.

And in *Pugh v. Wheeler*, 2 Dev. & B. (N. Car.) 55, a leading case in the *United States*, Ruffin, C. J., said: "The defendants say that such one of the owners as may first apply the water to any particular purpose, gains thereby, and immediately, the exclusive right to that use of the water. That is true in this sense, that any other proprietor above or below cannot do any act whereby that particular enjoyment would be impaired, without answering for the damages which are occasioned by the loss of the particular enjoyment. Whereas, before the particular application of the water to that purpose, the damages would not have included that possible application of the water, but been confined to the uses then subsisting. But to render the proposition thus far true, the use supposed must be a legitimate one; that is, it must not interfere with any previously existing right in another proprietor; for usurpation does not justify itself. If one build a mill on a stream, and a person above divert the water, the owner of the mill may recover for the injury to the mill, although before he built he could only recover for the natural uses of the water, as needed for his family, his cattle, and irrigation. But if, instead of building a mill, he had diverted the stream itself, he cannot justify it, against a proprietor below, on the

The view, in apparent conflict with the general rule, that one who first erects his mill is entitled to operate it in derogation of a similar privilege in others, only maintains the doctrine of protection in reasonable use, that subsequent mill owners must not build their dams so as to interfere with the operation of the mill built prior, provided this is a reasonable exercise of the rights of the proprietor.¹

ground that he had thus made an artificial use of the water, before the other had made any such application of it. The truth is that every owner of land on a stream, necessarily, and at all times, is using water running through it—if in no other manner, in the fertility it imparts to his land and the increase in the value of it. There is, therefore, no prior or posterior in the use, for the land of each enjoyed it alike from the origin of the stream, and the priority of a new application or artificial use of the water does not therefore create the right to that use; but the existence or non-existence of that application, at a particular time, measures the damages incurred by the wrongful act of another, in derogation of the general right to the use of the water as it passes to, through, or from, the land of the party complaining. The right is not founded in the user, but is inherent in the ownership of the soil; and when a title by use is set up against another proprietor, there must be an enjoyment for such a length of time as will be evidence of a grant, and thus constitute a title under the proprietor of the land."

And in *Platt v. Johnson*, 15 Johns. (N. Y.) 213; 8 Am. Dec. 233, Thompson, C. J., said: "To give such an extension to the doctrine of occupancy would be dangerous and pernicious in its consequences. The elements being for general and public use, and the benefit of them appropriated to individuals by occupancy only, this occupancy must be regulated and guarded with a view to the individual rights of all who may have an interest in their enjoyment."

1. *Tye v. Catching*, 78 Ky. 463; *Hatch v. Dwight*, 17 Mass. 296; 9 Am. Dec. 145; *Thurber v. Martin*, 2 Gray (Mass.) 394; 61 Am. Dec. 468; *Pratt v. Samson*, 2 Allen (Mass.) 288; *Smith v. Agawam Canal Co.*, 2 Allen (Mass.) 357.

The opinion of Chief Justice Shaw, in *Cary v. Daniels*, 8 Met. (Mass.) 466; 41 Am. Dec. 532, is frequently

cited in favor of the doctrine of exclusive rights acquired by prior occupancy, but he seems to hold this doctrine to a very qualified extent, and, as stated in the text, merely to the protection of the prior mill owners who have erected their mills and operate them in a reasonable manner. He says: "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream, above and below. This last limitation of the right must be taken with one qualification, growing out of the nature of the case. The usefulness of water for mill purposes depends as well on its fall as its volume. But the fall depends upon the grade of the land over which it runs. The descent may be rapid, in which case there may be fall enough for mill sites at short distances, or the descent may be so gradual as only to admit of mills at considerable distances. In the latter case, the erection of a mill on one proprietor's land may raise and set the water back to such a distance as to prevent the proprietor above from having sufficient fall to erect a mill on his land. It seems to follow, as a necessary consequence to these principles, that, in such case, the proprietor who first erects his dam for such a purpose has a right to maintain it, as against the proprietors above and below; and to this extent, prior occupancy gives a prior title to such use. It is a profitable, beneficial, and reasonable use, and therefore one which he has a right to make. If it necessarily occupy so much of the fall as to prevent the proprietor above from placing a dam and mill on his land, it is *damnum absque injuria*. For the same reason, the proprietor below cannot erect a dam in such a manner as to raise the water and obstruct the wheels of the first

2. Doctrine in Pacific States—*a.* IN GENERAL.—In the Pacific states and territories, owing to the peculiar conditions of the settlers upon public lands, and their necessity for water for the successful operation of mines, and the pursuit of agricultural interests, a doctrine contrary to that of the common law has arisen from usage and custom, to the effect that one who first appropriates the waters of a stream passing through the public lands, acquires a special property therein, and the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of his appropriation; and for the protection of these rights he may invoke all legal remedies.¹ This law

occupant. He had an equal right with the proprietor below to a reasonable use of the stream; he had made only a reasonable use of it; his appropriation to that extent being justifiable and prior in time, necessarily prevents the proprietor below from raising the water, without interfering with a rightful use already made; and it is therefore not an injury to him. Such appears to be the nature and extent of the prior and exclusive right which one proprietor acquires, by a reasonable appropriation of the use of the water in its fall; and it results, not from any originally superior legal right, but from a legitimate exercise of his own common right, the effect of which is, *de facto*, to supersede and prevent a like use by other proprietors originally having the same common right." See also opinion of Wells, J., in *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39.

Certainly, later decisions in *Massachusetts* do not recognize the doctrine that exclusive rights in running streams are acquired by prior occupancy, except so far as the common law is modified by statute. *Bearse v. Perry*, 117 Mass. 211; *Drake v. Hamilton Woolen Co.*, 99 Mass. 574. See also *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39; *Smith v. Agawam Canal Co.*, 2 Allen (Mass.) 357; *Hapgood v. Brown*, 102 Mass. 451; *Keeney, etc., Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 582.

In *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442, it is asserted that the proprietor below is so far restricted in his right of appropriation that he cannot erect a mill on his own land and throw back water to the destruction of the mill erected above, and the exclusive right is said to be no more than necessarily arises from a reason-

able exercise of rights in the water-course.

Prior Appropriation as Evidence of Reasonable Use.—In *Keeney, etc., Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576, although holding that priority of appropriation could not infer exclusive right, Seymour, J., said: "We are not prepared to say that such prior appropriation, especially if of long continuance, may not be taken into consideration, as one of the many elements which enter into a question of fact, whether, in a given case, a detention of the water above, which interferes with an existing use and appropriation of it below, be, or be not, reasonable."

1. *Atchison v. Peterson*, 20 Wall. (U. S.) 507; *Broder v. Natoma Water, etc., Co.*, 101 U. S. 276; *Sturr v. Beck*, 133 U. S. 541; *Jennison v. Kirk*, 98 U. S. 453; *Tartar v. Spring Creek Water, etc., Co.*, 5 Cal. 398; *Stoakes v. Barrett*, 5 Cal. 39; *Irwin v. Phillips*, 5 Cal. 143; 63 Am. Dec. 113; *Conger v. Weaver*, 6 Cal. 556; 65 Am. Dec. 528; *Hoffman v. Stone*, 7 Cal. 46; *Sharp v. Hoffman*, 79 Cal. 404; *Lux v. Haggin*, 69 Cal. 447; *Rupley v. Welch*, 23 Cal. 455; *Osgood v. El Dorado Water, etc., Min. Co.*, 56 Cal. 571; *Butte Canal Co. v. Vaughan*, 11 Cal. 143; *Hill v. Lenormaud* (Ariz. 1888), 16 Pac. Rep. 267; *Yunker v. Nichols*, 1 Colo. 551; *Strickler v. Colorado Springs*, 16 Colo. 61; *Drake v. Earhart*, 2 Idaho 716; *Lobdell v. Simpson*, 2 Nev. 274; 90 Am. Dec. 537; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534; 97 Am. Dec. 550; *Reno Smelting, etc., Works v. Stevenson*, 20 Nev. 269; 19 Am. St. Rep. 364; *Curtis v. La Grande Water Co.*, 20 Oregon 34; *Crane v. Winsor*, 2 Utah 248; *Munroe v. Ivie*, 2 Utah 535; *Elliott v. Whitmore* (Utah, 1890), 24 Pac. Rep. 673.

In *Atchison v. Peterson*, 20 Wall. (U. S.) 507, Field, J., after clearly setting out the common law with reference to prior appropriation, said: "This equality of right, among all the proprietors on the same stream, would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship, with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific states and territories, by their customs, usages and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation, and enforced by the courts in those states and territories."

In *Irwin v. Phillips*, 5 Cal. 146; 63 Am. Dec. 113, referring the origin of prior appropriation in *California* to the peculiar requirements and conditions existing on the public lands of the *United States*, Heydenfeldt, J., said: "Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this state, the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of the disposition of these lands has been shown, either by the *United States* or the state governments, and with the exception of certain state regulations, very limited in their character, a system has been permitted to grow up, by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily

encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata*. Among these, the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles, over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that, without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law makers; as, for instance, in the revenue act 'canals and water races' are declared to be property subject to taxation, and this when there was none other in the state than such as were devoted to the use of mining."

In *Schilling v. Rominger*, 4 Colo. 100, the reason of the rule as applied to the purposes of irrigation was thus stated by Stone, J.. "In a country with a climate like ours, this right arises *ex necessitate rei*, and hence a statute may be regarded as declaratory merely of the law of necessity in this respect as regulating the right thus acquired."

Where a ditch has been excavated from the bed of a stream, and its water has been diverted through the same for mining purposes, the miner has no right to work a claim located above its head, after the ditch is dug, in such a manner as to mingle mud and sediment with the water, and injure its value to the ditch owner for mining purposes, or to fill the ditch and reservoir with the same, so as to lessen the capacity and increase the expense of cleaning them out. *Hill v. Smith*, 27 Cal. 476.

An appropriator is protected from damage occasioned by subsequent ap-

exists by virtue of custom and usage, independent of statutory enactment, but is recognized at present by the courts and legislation of the several states,¹ and was at an early period confirmed by federal legislation.²

propriators above him as well as below.
Hill v. King, 8 Cal. 337.

Estoppel—Acquiescence in Use by Others.—In *Lehi Irrigation Co. v. Moyle*, 4 Utah 327, it was held that the owner of an irrigating ditch upon the public land, who, without objection, sees others enlarge and repair his ditch, increase its capacity, take up lands in its vicinity which could be irrigated only through his ditch, and make improvements thereon on the faith of obtaining water through his ditch to the extent of its increased capacity, is estopped to deny the right of such parties to so use such ditch.

Underground Waters.—No distinction exists between the water running under the surface in defined channels and those upon the surface, but the doctrine of prior appropriation is applicable as well to underground currents. *Strait v. Brown*, 16 Nev. 317; 40 Am. Rep. 497. But where the water is the result of mere undefined percolations, no right of use therein can be acquired, either by statutory appropriation or adverse use. *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615. See *UNDERGROUND WATERS*, vol. 27, p. 423.

Rights Acquired by Aliens.—In *Qrigley v. Birdseye*, 11 Mont. 439, it was held that an alien might acquire title to the ditch and water right, and hold the same until office found against collateral attacks by third persons other than the sovereign, and in the absence of forfeiture by office found, may convey title to his grantee.

1. The rights of prior appropriators, though recognized by the courts in the Pacific states as arising from a well-established custom in the several states, are now confirmed and regulated by statute, and are in some states declared by state constitutions.

California, see Constitution, art. 14, § 1; Civil Code, § 1, 1411, etc.

Colorado, see *Colorado Const.*, art. 16, § 5.

Idaho, see *Idaho Rev. Stat. of 1887*, art. 15, § 3155, etc.

Montana, *Rev. Stat. 1887*, § 983.

New Mexico, *Compiled Laws 1884*, § 49.

Utah, *Compiled Laws 1888*, p. 216 *et seq.*

Washington, 1 *Hill's Ann. St.*, §§ 1709-1717.

Colorado, Const., art. 16, § 6, providing that "the right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied," and that "priority of appropriation shall give the better right as between those using the water for the same purpose; but, when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose," does not authorize an interference with the rights of prior appropriators for irrigating purposes, in order to supply water for domestic purposes to later comers. *Armstrong v. Larimer County Ditch Co.*, 1 *Colo. App.* 49.

Nevada.—The rights of prior appropriators are recognized and protected in this state. See *Nevada Stat.* (1889), p. 65, ch. 65, § 9. The common law is wholly inapplicable to the condition of things existing in this state, and it is held that the legislative enactment adopting the common law did not include the common law applying to water and watercourses, but that the act should be construed as such statutes generally are, as applying only to those cases where the common law is applicable to the habits and conditions of society then existing. See *Reno Smelting, etc., Works v. Stevenson*, 20 Nev. 269; 19 *Am. St. Rep.* 364; *Jerrett v. Mahan*, 20 Nev. 89.

In *Arizona*, the courts will take judicial notice of the customs and laws relating to water rights. *Clough v. Wing* (*Ariz.* 1888), 17 *Pac. Rep.* 453.

But in *Oregon*, where one alleges the right to appropriate water upon a local custom, and the allegation is denied, the plaintiff must prove such custom and the compliance therewith, for the court does not take judicial knowledge of such custom. *Lewis v. McClure*, 8 *Oregon* 274.

2. *United States Rev. Stats.*, § 2339. The act of July 16, 1866 (14 U. S.

b. TO WHAT LANDS AND TO WHOM APPLICABLE.—The doctrine of prior appropriation, as first established, related exclusively to the public lands of the *United States*,¹ but the reason of the law is equally applicable to all lands in that region, and in *California* it is said to be applicable to state lands.² And in many of the Pacific states, recent legislation has entirely abolished the common law doctrine of riparian rights.³ Although denied by some earlier cases, it is maintained by the weight of authority that the prior appropriator acquired rights, even prior to the act of 1866, against the government and its grantee, and that that act was merely declaratory of his rights.⁴

Stat. at L. 253), provides that whenever by priority of possession the rights to the use of the waters for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed. This act was amended by an act July 9, 1870 (16 U. S. Stat. at L. 218), which provides that all patents granted, or pre-emption, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under, or recognized by, the 9th section of the act of which this act is amendatory.

1. *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Vansickle v. Haines*, 7 Nev. 249; *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323.

A riparian proprietor of private lands cannot acquire any right in the waters of the stream, by mere appropriation. And where it does not appear whether the lands through which a stream ran, at the time when a riparian proprietor claims to have acquired a right by appropriation, were private or public property, it will not be presumed that they were public lands, but the burden of proving that they were such lands devolves upon the claimant. *Santa Cruz v. Enright*, 95 Cal. 105.

2. *Lux v. Haggin*, 69 Cal. 255.

3. See the statutes of *Arizona*, *Colorado*, *The Dakotas*, *Idaho*, *New Mexico*, *Utah*, and *Wyoming*.

4. *Atchison v. Peterson*, 20 Wall.

(U. S.) 511; *Broder v. Natoma Water, etc., Co.*, 101 U. S. 276; *Basey v. Gallagher*, 20 Wall. (U. S.) 670; *Osgood v. El Dorado Water, etc., Min. Co.*, 56 Cal. 571; *Lux v. Haggin*, 69 Cal. 449; *Sturr v. Beck*, 133 U. S. 541.

In *Vansickle v. Haines*, 7 Nev. 249, it was held that prior to the act of 1866, a prior appropriator acquired no rights against the *United States* or its grantee, notwithstanding the customs established in mining localities arising from the necessities of the miners, and well recognized by the courts, on the ground that the *United States*, as the original owner of lands, had the rights of an ordinary riparian owner of streams flowing on the public land, and that its patent vested the grantee, in the absence of legislation to the contrary, with the rights incident to riparian ownership. And in *Union Mill, etc., Min. Co. v. Dangberg*, 2 Sawy. (U. S.) 450, it was held that a person who entered and paid for his land before the passage of the act of 1866, held it unaffected by that act, since his patent when issued would relate to the date of entry, the inception of his title. But in *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788, *Vansickle v. Haines*, 7 Nev. 249, was expressly overruled, and in *Reno Smelting, etc., Works v. Stevenson*, 20 Nev. 269; 19 Am. St. Rep. 364, this case was again expressly overruled, and the common-law theory of riparian rights declared to be altogether inapplicable to *Nevada*. And, further, in conformity with the decisions of the supreme court, declared that the statute was a voluntary recognition of a preëxisting right of possession, and not simply prospective in its nature. Referring to the *Nevada* Gen. Stat., § 3021, adopting the doctrines of the common law of *England* so far as they are not repugnant or conflicting with

There is no doubt that by the act of Congress of 1866, the rights of priority acquired subsequently thereto, as well as those formerly acquired, are protected against the claims of those gaining title from the government afterward.¹ No prior appropriator subsequent to congressional legislation can acquire any right, as against a grantee of land under a grant made or issued prior thereto, except where such right is reserved by the terms of the grant.² And it seems that as against any subsequent appropriator, the rights of a prior purchaser, grantee, or patentee, from the government, when completed by a full compliance with the statutory requirements, relate back to their inception.³

the constitution and laws of the *United States*, the court said: "The statute is silent upon the subject of the applicability of the common law, but we think 'the common law of *England*' was employed in the sense which is generally understood in this country, and that the intention of the legislature was to adopt only so much of it as was applicable to our condition."

In the several cases before the Supreme Court of the *United States*, in construing the act of 1866, the court has expressly declared that the act was merely a declaratory and voluntary recognition of pre-existing rights.

So in *Basey v. Gallagher*, 20 Wall. (U. S.) 670, Field, J., said: "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of public lands under the peculiar necessities of their condition, and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or decisions of the courts."

And in *Jennison v. Kirk*, 98 U. S. 453, it was said that the object of the ninth section of the act was to give the sanction of the *United States*, the proprietor of the lands, to possessory rights which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.

And in *Broder v. Natoma Water, etc., Co.*, 101 U. S. 274, Miller, J., speaking of the act of 1866, said that it "was rather a voluntary recognition of a pre-existing right of possession constituting a valid claim to its continued use, than the establishment of a new one."

1. *Atchison v. Peterson*, 20 Wall.

(U. S.) 507; *Hill v. Lenormand* (Ariz. 1888), 16 Pac. Rep. 267; *Farley v. Spring Valley Min., etc., Co.*, 58 Cal. 142; *De Necochea v. Curtis*, 80 Cal. 397; *Himes v. Johnson*, 61 Cal. 259; *Ware v. Walker*, 70 Cal. 591; *Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 378; *Kaler v. Campbell*, 13 Oregon 596; *Cole v. Logan*, 24 Oregon 304; *Ellis v. Pomeroy Imp. Co.*, 1 Wash. 572. Any question on this point was set at rest by the act of Congress of July 9, 1870.

The riparian rights of a homestead claimant are subject and subordinate to the prior appropriation of the waters. If it appears that the land upon which the plaintiff's ditch is situated, and over which the water runs, is public land, unless the claimant of the homestead acquired his rights prior to the appropriation of the water by the plaintiff, the homestead claimant may be enjoined from diverting the waters of the stream. *South Yuba Water, etc., Co. v. Rosa*, 80 Cal. 333; *Cave v. Crafts*, 53 Cal. 135; *Farley v. Spring Valley Min., etc., Co.*, 58 Cal. 142; *Himes v. Johnson*, 61 Cal. 259; *Ware v. Walker*, 70 Cal. 591; *De Necochea v. Curtis*, 80 Cal. 397.

2. *Lux v. Haggin*, 69 Cal. 257. But the prior appropriator cannot be defeated by one who, having consented to the appropriation, subsequently files a homestead entry and obtains a patent for the same. *Tenem Ditch Co. v. Thorpe* (Wash. 1889), 20 Pac. Rep. 588.

3. In *Sturr v. Beck*, 6 Dak. 71; *affirmed* in 133 U. S. 541, this rule is laid down in respect to a homestead settler, his rights being held to relate back to his occupancy. *Faull v. Cooke*, 19 Oregon 455; 20 Am. St. Rep. 836.

In *Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 451, it was held

It is not necessary that all the conditions referred to in the act of Congress should exist, but it is sufficient that the right of prior appropriation should be recognized by custom or by legislation.¹

c. HOW EFFECTUATED.—In order to render effectual the act of the appropriator, independent of the statutory provisions, several elements must be shown to exist. Appropriation, in this connection, is the intent to take, accompanied by some physical demonstration of the intent, and for some valuable purpose. The water must be appropriated to a beneficial or useful purpose immediately, or must be contemplated in the near future,² and

that one who had entered and paid for his land before the passage of the act of July 26, 1866, held the land unaffected by it, since his patent when issued would relate to the date of his entry, the inception of his title.

The riparian rights of a grantee of the state, under the act of Congress Sept. 4, 1841, are not affected by the claims of an appropriator of water made after the selection, though made before the actual grant. *Ison v. Nelson Min. Co.*, 47 Fed. Rep. 199.

In *California*, it was held that the right of a grantee or purchaser from the government was complete from the time that all the statutory requirements had been complied with, including payment, and that his right as against an appropriator related from that time, and not from the date of his patent. *Farley v. Spring Valley Min., etc., Co.*, 58 Cal. 142. In conflict with this is the case of *Osgood v. El Dorado Water, etc., Min. Co.*, 56 Cal. 571, where it was held that the rights of the pre-emption claimant as against the appropriator, dated only from his patent or certificate of purchase, and this was proved in *Lux v. Haggin*, 69 Cal. 255.

1. *Drake v. Earhart*, 2 Idaho 716; *Speake v. Hamilton*, 21 Oregon 3; *Basey v. Gallaher*, 20 Wall. (U. S.) 670.

2. *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 220; *Peregoy v. McKissick*, 79 Cal. 572; *Eddy v. Simpson*, 3 Cal. 249; 58 Am. Dec. 408; *Low v. Rizer* (Oregon, 1894), 37 Pac. Rep. 82; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; *Dick v. Bird*, 14 Nev. 161; *Dick v. Caldwell*, 14 Nev. 167; *Fort Morgan Land, etc., Co. v. South Platte Ditch Co.*, 18 Colo. 1.

In *Low v. Rizer* (Oregon, 1894), 37 Pac. Rep. 82, it was said that, to constitute a valid appropriation of water, three elements must exist: first, an intent to apply it to a beneficial use,

existing at the time or contemplated in the future; second, a diversion from the natural channel, by means of a ditch, canal, or other structure; and third, an application of it to some industry within a reasonable time.

If the amount of water appropriated is within the given beneficial use for which it was taken, no more than is necessary to irrigate the lands contemplated to be reduced to cultivation as soon as can be reasonably done, although more than can be beneficially used for the present, it is, nevertheless, a valid appropriation. *Simmons v. Winters*, 21 Oregon 35; *Barnes v. Sabron*, 10 Nev. 243.

Under the *Colorado* constitution, to make any diversion of water from a natural stream an appropriation, it must be applied to some beneficial use; and in cases of irrigation, it must be actually applied to the land before the appropriation is complete. *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111; *Schilling v. Rominger*, 4 Colo. 100; *Sieber v. Frink*, 7 Colo. 149; *Thomas v. Guiraud*, 6 Colo. 530.

The water must be applied within a reasonable time, the diversion being a valid appropriation only when the water is utilized by the consumer, although the priority of such appropriation may date, a proper diligence having been used, from the commencement of the ditch. *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582; 3 Am. St. Rep. 603.

The true test of the appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial. *Thomas v. Guiraud*, 6 Colo. 533.

Appropriation by Ditch Companies.—The diversion of the waters of a stream

not for a speculative purpose.¹ It may be for any useful purpose, and is not confined to mining or irrigation, but the appropriation may be for mill purposes.²

Possession or actual appropriation is the test of priority, and no rights can be acquired by constructive appropriation.³ The

by a company organized for the purpose of building ditches and conveying water to arid regions, does not, of itself, amount to such appropriation as will establish prior rights to the use of the water, but there must be further application of the water to a beneficial use. Such a company "must be regarded merely as an intermediate agency, existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners." *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582; 3 Am. St. Rep. 603; *Strickler v. Colorado Springs*, 16 Colo. 61; *Wyatt v. Larimer, etc., Irrigation Co.*, 18 Colo. 298, *overruling* 1 Colo. App. 480.

So, a stockholder of an irrigation company, as such, acquires no prior rights in the water, but upon the application of the water by him to a beneficial use, within a reasonable time, his rights are established. *Combs v. Agricultural Ditch Co.*, 17 Colo. 146. In this case Elliott, J., said: "Individuals may organize a company, either by, or without, incorporation, by the construction of an irrigating ditch, and may, by such means, divert the unappropriated waters of a natural stream; they may provide that their several interests in such enterprise shall be represented by shares of stock, but neither the company, nor any stockholder of the company, can thus withhold the water from a beneficial use, nor reserve it for the future use of junior appropriators, to the prejudice of prior appropriators, nor to the exclusion of those who, in the meantime, may undertake in good faith to make a valid appropriation thereof. Undoubtedly, those who, by labor or by the payment of money, actually construct an irrigating ditch, may thereby acquire a prior right to the water which may be diverted therein, provided they apply the same to a beneficial use within a reasonable time after such diversion. . . . Those who construct ditches and divert water for general purposes of irrigation must, within a

reasonable time, apply the water to a beneficial use, or else, upon proper application and for proper consideration, they must dispose of the same to those who are ready to make a beneficial use of it. If ditch companies are unwilling to be charged with such duties and responsibilities, they must leave the water in the natural stream."

A ditch company, operated for general purposes of irrigation, cannot refuse arbitrarily to supply a *bona fide* consumer, but may be compelled to deliver water for such purposes by writ of *mandamus*. *Combs v. Agricultural Ditch Co.*, 17 Colo. 146.

Any unreasonable regulations and demands that operate to withhold or prevent the exercise of the right of appropriation by the consumer, must be held illegal, even though there is no express legislative declaration on the subject. *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582; 3 Am. St. Rep. 603.

The diversion by the company and the application of the use by a consumer, constitute but one act of appropriation. And although, when the water is applied to a beneficial use, the right of the consumer may date back to the beginning of the work on the ditch, yet there may be priorities between the consumers who receive water through the same ditch. *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111.

1. *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Dick v. Caldwell*, 14 Nev. 167; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146.

2. *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 220. In *Basey v. Gallagher*, 20 Wall. (U. S.) 681, Field, J., said: "No distinction is made, in those states and territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator, from the use made of the water, if the use be a beneficial one."

3. *Eddy v. Simpson*, 3 Cal. 249; 58 Am. Dec. 408. In *Kelly v. Natoma Water Co.*, 6 Cal. 105, it was held that the erection of a dam across a natural watercourse was an actual appropriation of the water at that point, but not below

appropriation must be by an actual diversion of the water from its ordinary course,¹ as water flowing in its natural channel cannot be the subject of private ownership, except as an incident to property in the land. Merely cutting a ditch for a drain, without using the water, gives no priority.²

The notice of intention to appropriate is, of itself, insufficient, although it may be evidence of possession.³ Planting stakes along the line, giving the public notice of actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit.⁴

The rights of the appropriator relate back to the time of the commencement of the work of appropriation, provided he pursues his work with due diligence.⁵ If he fails to exercise this diligence in the completion of his work, the appropriation dates from the time the work is completed.⁶

it, even though the water flowing over the dam was brought into the water-course by canals constructed by the owners of the dam.

1. Farmers' High Line Canal, etc., Co. v. Southworth, 13 Colo. 111; Dalton v. Bowker, 8 Nev. 190.

It is not necessary that the appropriator shall construct an actual ditch in order to take possession, but he may avail himself of the economy nature affords, and use a dry ravine. Hoffman v. Stone, 7 Cal. 46. The lower part of the bed or channel from which the water is diverted may also be used. Simmons v. Winters, 21 Oregon 35.

2. Maeris v. Bicknell, 7 Cal. 261; 68 Am. Dec. 257; McKinney v. Smith, 21 Cal. 374.

3. Thompson v. Lee, 8 Cal. 275; Columbia Min. Co. v. Holter, 1 Mont. 296.

4. Conger v. Weaver, 6 Cal. 548; 65 Am. Dec. 528. Notice with other acts of appropriation must be such as would put a prudent man on inquiry. Kimball v. Gearhart, 12 Cal. 27.

Construction of Notice.—A notice of appropriation of water should be liberally construed; and though a notice is ambiguous in describing two branches of a stream in which the water is taken, without designating the amount taken from each, its admission in evidence cannot be held error, where the means of the appropriation, and the quantity, purpose, and date of the diversion are otherwise sufficiently shown. Floyd v. Boulder Flume, etc., Co., 11 Mont. 435.

5. Stark v. Barnes, 4 Cal. 412; Osgood v. El Dorado Water, etc., Min. Co., 56 Cal. 571; Kelly v. Natoma

Water Co., 6 Cal. 109; Sieber v. Frink, 7 Colo. 148.

In Elliott v. Whitmore (Utah, 1890), 24 Pac. Rep. 673, it was held that where a person settles on the public domain, with the intention of acquiring title as soon as he can under the law, and does acquire title, and afterward appropriates water for its cultivation, such appropriation is effective from its date.

In Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534; 97 Am. Dec. 550, Lewis, C. J., said: "The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs; such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. . . . It would be a most dangerous doctrine to hold that ill health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation within a reasonable time, or the diligence which is usually required in the prosecution of the work necessary for the purpose. We find no recognition of such doctrine in the law, nor are we disposed to adopt it as the rule to govern cases of this kind."

6. Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534; 97 Am. Dec. 550; Woolman v. Garringer, 1 Mont. 535; Parke v. Kilham, 8 Cal. 77; 68 Am. Dec. 310;

In *California*, it is well settled that where there has been an actual appropriation of water, the right to it is acquired, notwithstanding the appropriator has not complied with the course laid down in the code.¹

d. EXTENT OF RIGHT.—The extent of the rights of the prior appropriator is limited, in every case, to the quantity and quality of water necessary to the use for which the appropriation is made.² The appropriator, however, is not limited to the quantity

White v. Todd's Valley Water Co., 8 Cal. 444; 68 Am. Dec. 338; *Weaver v. Eureka Lake Co.*, 15 Cal. 272; *James v. Williams*, 31 Cal. 211.

The want of pecuniary means requisite to complete the work in a reasonable time, such pecuniary inability being known to the parties at the time of making the claim, will not excuse the latter for want of diligence in prosecuting and completing the work within a reasonable time; but the jury may take into consideration the circumstances surrounding the parties at the date of the appropriation, such as the nature and climate of the country, and the difficulty of procuring labor and materials. *Kimball v. Gearhart*, 12 Cal. 27.

1. *Watterson v. Saldunbehere*, 101 Cal. 107. In *De Necochea v. Curtis*, 80 Cal. 397, it was held that an actual appropriation was good as against a subsequent pre-emptioner of the land upon which a spring was situated from which the appropriated water flowed. The court said: "We decide nothing except that a diversion of water, without compliance with the statute, gives a right to continue the diversion against a pre-emptioner whose right of purchase vests after the diversion is fully completed, and then only to the extent, and in the manner, of such actual and completed diversion." We do not hold that an incomplete diversion, without compliance with the statute, gives any right to complete or continue the diversion as against an intervening right of pre-emption. And referring to the *California* Code, § 1418, which provides that, "by a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted," the court also said: "In this provision we begin to see the purpose and object of the legislature, which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the ad-

vantage of the familiar doctrine of relation upon which it had always been held, before the statute, that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was, upon its completion, to be deemed an appropriator, from the date of his notice, and was, therefore, prior in time and stronger in right than an intervening appropriator, notwithstanding his diversion of the water might be first completed." See also *Burrows v. Burrows*, 82 Cal. 564.

The later cases expressly declare that the rights of prior appropriators exist without the compliance of the statutory provisions, both against subsequent appropriators who have not complied with the statute, as well as pre-emptioners. In *Wells v. Mantes*, 99 Cal. 583, it was held that the scope and purpose of the provisions of the *California* Civil Code upon water rights was merely to establish a procedure for the claimants of the right to the use of the water, whereby a certain definite time might be established as the date at which their title should accrue by relation, and that section 1419 of the civil code, providing that a failure to comply with the rules thereof "deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith," refers to a party posting and recording the notices required by the provisions of section 1415 of the code, and not to an appropriator by actual diversion.

In *Montana*, it is expressly provided by statute, requiring a record for the appropriation, that "a failure to comply with the requirements of this section may in no wise work the forfeiture of such heretofore acquired rights, nor prevent any such claimant from establishing such rights in the courts." *Montana* Comp. Stat. of 1885, § 1258. See *Salazar v. Smart*, 12 Mont. 395.

2. *Atchison v. Peterson*, 20 Wall. (U. S.) 514; *Ortman v. Dixon*, 13 Cal.

used by him at once, or even in the first year, but it is held that he may add from time to time to his cultivated land, and increase his application of water thereto for irrigation, until he has put to a beneficial use the entire quantity first diverted by him.¹

34; *McKinney v. Smith*, 21 Cal. 374; *Nevada County, etc., Canal Co. v. Kidd*, 37 Cal. 282; *O'Keiffe v. Cunningham*, 9 Cal. 590; *Simmons v. Winter*, 21 Oregon 35.

He is not entitled to have a priority adjudged for more water than he has actually appropriated, nor for more than he actually needs. *Nichols v. McIntosh* (Colo. 1893), 34 Pac. Rep. 278. The extent of an appropriation is limited, not by the quantity of water diverted, but by the quantity which is, or which may be, applied by the appropriator for a beneficial use, and as to any surplus, a riparian owner below the point of diversion has a right to demand that it should flow in the stream as it had been accustomed to flow. *Peregory v. McKissick*, 79 Cal. 572; *Barrows v. Fox*, 98 Cal. 63.

The appropriator cannot acquire a right to more water than his ditch will convey from the point of diversion, without running over its banks. *Caruthers v. Pemberton*, 1 Mont. 111.

The fact that one who has appropriated a certain quantity of water is a riparian owner on the stream from which the water is taken, cannot be urged against his right to take a greater quantity, where no other rights have intervened. *Healy v. Woodruff*, 97 Cal. 464.

In *Barnes v. Sabron*, 10 Nev. 243, it was held that the plaintiff's right to the water was not dependent upon the amount beneficially used by him in the first year of his appropriation. *Hawley, C. J.*, said that the plaintiff was only entitled to as much water within his original appropriation as was necessary to irrigate his land, and was bound under the law to make a reasonable use of it. And further said: "No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law, and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation. . . . What is a reasonable use depends upon the peculiar circumstance

of each particular case. In this case the plaintiff should not be confined to the amount of water used by him in 1869 or 1870, nor his rights regulated by the number of acres he then cultivated. He did not cultivate more land, because 'his team was poor' and he 'had no money to hire help.' The object had in view at the time of his diversion of the water must be considered in connection with the actual extent of his appropriation."

The Right to Increase in the Stream.—If two persons appropriate waters from the same stream, one prior in point of time to the other, and a third person builds a flume in the stream, so as to increase the flow of water, the first appropriator may use the increase to the extent of his appropriation. *Davis v. Gale*, 32 Cal. 26; 91 Am. Dec. 554.

Appropriator May Remove Obstructions from the Stream.—An appropriator of the waters of a natural stream flowing through public lands has a right, as against a subsequent purchaser from the *United States*, to go upon the land of such purchaser higher up the stream than the point of diversion, and remove obstructions from the bed of the stream, so as to cause the water to flow in its natural channel to the point of diversion. *Ware v. Walker*, 70 Cal. 591.

1. An appropriator of water for irrigation purposes, after diverting the water, has a reasonable time in which to apply it to the use intended. He may add, from year to year, acreage to his cultivated land, and increase his application of water flowage for irrigation as his necessities may demand, until he has put to a beneficial use the entire amount of water at first diverted by him, and conducted it to the point of intended use, provided that amount is needed for the reasonable irrigation of his land. *Conant v. Jones* (Idaho, 1893), 32 Pac. Rep. 250.

Abandonment of Right to Increase.—The appropriator of water for irrigation abandons his right to increase the appropriation, by failing for thirteen years to increase the area cultivated. *Low v. Rizer* (Oregon, 1894), 37 Pac. Rep. 82.

He acquires no actual property rights in the stream above his ditch, yet any interference therewith, preventing the full enjoyment of his appropriation, is a nuisance for which damages may be recovered, and which may be abated.¹ And to this extent, his right exists with regard to tributaries.²

Subsequent Appropriators.—The prior appropriator does not acquire an absolute right to the body of the water so that he may allow it to run to waste; others, by subsequent appropriation, may acquire rights in the residue, provided they do not interfere with the enjoyment of the rights of the prior appropriator.³ As

1. *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Parke v. Kilham*, 8 Cal. 77; 68 Am. Dec. 310; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *White v. Todds' Valley Water Co.*, 8 Cal. 443; 68 Am. Dec. 338; *McDonald v. Askew*, 29 Cal. 200; *Lower Kings River Water Ditch Co. v. Kings River, etc., Canal Co.*, 60 Cal. 408; *Harris v. Shontz*, 1 Mont. 212; *Fabian v. Collins*, 3 Mont. 215.

An appropriator may go upon the land of a subsequent purchaser and remove obstructions from the bed of the stream, so as to cause its waters to flow in their natural channel to the point of diversion. *Ware v. Walker*, 70 Cal. 591.

2. *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 378; *Strickler v. Colorado Springs*, 16 Colo. 61.

3. *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Butte Canal, etc., Co. v. Vaughn*, 11 Cal. 143; 70 Am. Dec. 769; *Ortman v. Dixon*, 13 Cal. 33; *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 220; *Higgins v. Barker*, 42 Cal. 233; *Brown v. Smith*, 10 Cal. 510; *Saint v. Guerrerio*, 17 Colo. 448; *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 587; 3 Am. St. Rep. 603; *Proctor v. Jennings*, 6 Nev. 83; 3 Am. Rep. 240.

The question is, has the use and enjoyment of the water, for the purposes for which the first appropriator claims it, been impaired by the acts of the subsequent claimant. *Hill v. Smith*, 27 Cal. 476.

In Nevada County, etc., *Canal Co. v. Kidd*, 37 Cal. 313, *Sawyer, C. J.*, said: "That the mere diversion or use of water by another is no injury to a party claiming, till he is in a position to use it himself, and even after he has acquired a right, during any cessation of his ability, to use it, is settled by many cases. Nor is such diversion or use, or the diversion or use of any surplus beyond the amount which the claimant has ability to use, actionable."

In *Ortman v. Dixon*, 13 Cal. 36, the water was first appropriated by the defendant for mill power; subsequently, the plaintiffs, by a ditch above the mill, used the water for mining purposes when the mill was not running, and still later, the defendant dug a ditch above the plaintiffs, and conducted the water off for mining purposes; it was held that "the measure of the right, as to extent, follows the nature of the appropriation or the uses for which it is taken. . . . If A erects a mill on a running stream, this shows an appropriation of the water for the mill; but, if he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use."

Where it appeared that the plaintiff's grantors had not appropriated all of the water of the creek, prior to the appropriation, by the defendant's grantors, of nearly all the waters of the tributaries, and the water appropriated by the defendant ran off his land into the creek, so that its flow was not materially lessened during part of the irrigation season, it was held that the plaintiff was entitled only to the amount of water appropriated by its grantors, and a judgment for the plaintiff, reserving undefined rights in the waters of the tributaries to the defendant, was erroneous. *Salina Creek Irrigating Co. v. Salina Stock Co.*, 7 Utah 456.

In *Raymond v. Wimsette*, 12 Mont. 551, it was held that if it is shown, by the experience of many years, that the water used by a junior appropriator for a beneficial use would, if not so used, sink before reaching the point of diversion of the prior appropriator, the latter is not, by reason of his prior claim, entitled to injunction to compel the

to any surplus, the riparian proprietor below has a right to demand that it flow in the stream as it has been accustomed.¹

Where the first appropriator makes use of the water only on certain days in the week, others may use it during the remainder of the week.² And where a prior appropriator uses the water as it ordinarily flows in the stream, others may appropriate and divert the surplus during times of extraordinary high water.³

e. CHANGE OF PLACE OR USE OF THE APPROPRIATION.—

The right of the appropriator is not dependent upon the place of the application, or the use, but when once acquired, the appropriator may change the place of diversion and application, or apply it to a different purpose,⁴ pro-

junior appropriator to allow the water to remain in the stream.

Injury to Prior Appropriator.—Where a tract of land in the mineral and mining region, bordering on a natural stream, is inclosed and appropriated for garden purposes, and one subsequently appropriates the waters of the stream running through the land for mining purposes, he must use the water thus appropriated so as not to interfere with the enjoyment of the garden. *Wixon v. Bear River, etc., Water, etc., Co.*, 24 Cal. 367; 85 Am. Dec. 69.

Temporary Irregularity in Flow.—A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appropriator below, will not be actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie not only to recover damages, but to enjoin the future commission of the wrong. *Phoenix Water Co. v. Fletcher*, 23 Cal. 481.

1. *Barrows v. Fox*, 98 Cal. 63; *Low v. Schaffer*, 24 Oregon 239.

2. *Smith v. O'Hara*, 43 Cal. 371; *Barnes v. Sabron*, 10 Nev. 217; *Thorp v. Freed*, 1 Mont. 651.

3. *Edgar v. Stevenson*, 70 Cal. 286. See also *Heilbron v. The 76 Land & Water Co.*, 80 Cal. 189; *Modoc Land, etc., Co. v. Booth* (Cal. 1894), 36 Pac. Rep. 431.

4. *Knowles v. Clear Creek, etc., Mill, etc., Co.*, 18 Colo. 209; *Sieber v. Frink*, 7 Colo. 154; *Hammond v. Rose*, 11 Colo. 524; 7 Am. St. Rep. 258; *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12; *Strickler v. Colorado Springs*, 16 Colo. 61; *Ramelli v. Irish*, 96 Cal. 214; *Nevada Water Power Co. v. Powell*, 34 Cal. 109; 91 Am. Dec. 685; *Davis v. Gale*, 32 Cal. 27; 91 Am. Dec. 554;

Maeris v. Bicknell, 7 Cal. 262; 68 Am. Dec. 257; *Butte Table Mountain Co. v. Morgan*, 19 Cal. 609; *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 221; *Junkans v. Bergin*, 67 Cal. 267; *Kirman v. Hunnewell*, 93 Cal. 519; *Woolman v. Garringer*, 1 Mont. 535.

In all cases, the effect of the change upon the rights of others is the controlling consideration, and, in the absence of injurious consequences to others, any change which the parties choose to make is reasonable and proper. *Kidd v. Laird*, 15 Cal. 162; 76 Am. Dec. 472. The adoption of any other, it is said, would destroy the utility of the appropriation. *Maeris v. Bicknell*, 7 Cal. 262; 68 Am. Dec. 257.

In *Davis v. Gale*, 32 Cal. 30; 91 Am. Dec. 554, *Sanderson, J.*, said: "A party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use, and nonuse are the tests of his right; and place of use and character of use are not. When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges."

In *Green v. Heiser* (Cal. 1891), 26 Pac. Rep. 770, the fact that the party has changed the head of a ditch to a point higher up the stream, or that he has built a new ditch, will not affect his right.

Notice of Change of Use Not Necessary.

—The prior appropriator of water, who posts notices of his appropriation near the stream and immediately constructs

vided¹ such change does not injuriously affect the rights of others. And, as we have seen, he may sell his right to be used as the purchaser may design.²

The right will not be lost if the stream be changed to a different drainage.³

f. TRANSFER OF RIGHT.—The rights acquired by prior appropriation may be severed, transferred, and conveyed, like other property, or rights analogous to property.⁴ The sale or transfer must be by deed.⁵ So, one who enters into the possession of a ditch used for appropriating water, under a verbal sale, does not succeed to the rights of the seller so as to claim the benefit of the vendor's prior appropriation, but he must date his appropriation from the time he enters into possession.⁶ A good title may be acquired to water rights,

his dams and ditches, is not required to give any actual notice to subsequent appropriators, of his intention to extend his ditches, and reclaim the waste water from his mining operations, and use the water at another place. *Woolman v. Garringer*, 1 Mont. 535.

1. *Cole v. Logan*, 24 Oregon 304; *Last Chance Min. Co. v. Bunkerhill, etc., Min., etc., Co.*, 49 Fed. Rep. 430.

Where A appropriated the waters of a creek at a certain point in 1865, and B appropriated the same water above A in 1867, for the use of a mill, and returned the water into the creek so that A had the benefit thereof, it was held that A had no right to change his point of diversion of the water in 1869, and appropriate it above B's mill, thereby depriving B of the use of the water. *Columbia Min. Co. v. Holter*, 1 Mont. 296.

2. See *infra*, this title, *Transfer of Right*.

3. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 449; *Thomas v. Guiraud*, 6 Colo. 532; *Schulz v. Sweeney*, 19 Nev. 359; 3 Am. St. Rep. 888; *Tucker v. Jones*, 8 Mont. 225.

4. *Strickler v. Colorado Springs*, 16 Colo. 61; *Fort Morgan Land, etc., Co. v. South Platte Ditch Co.*, 18 Colo. 1; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 220; *Painter v. Pasadena Land, etc., Water Co.*, 91 Cal. 74.

These rights may be made the subject of mortgage. *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *Bradley v. Harkness*, 26 Cal. 69; *Hungarian Hill Gravel Min. Co. v. Moses*, 58 Cal. 168.

Rights acquired by the owner of land, and represented by stock in a

ditch company, do not become inseparably annexed to the land in connection with which they are acquired and used. And if the owner disposes of the stock in the company, he has no further claim to such rights. *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142.

The sale by an appropriator of all his interest in the water of a stream to the owner of a ditch above, does not defeat his prior right to the water which flows down after the sale, as against one who appropriated the water of the stream below him after his appropriation, but before the sale. *McDonald v. Askew*, 29 Cal. 200.

Conveyance by Partner.—A partner in a water right, acquired by appropriators, cannot convey the interest therein of his copartner. *Henderson v. Nicholas*, 67 Cal. 152.

5. *Reed v. Spicer*, 27 Cal. 57; *Union Water Co. v. Crary*, 25 Cal. 509; 85 Am. Dec. 145.

The attempt to convey water rights by an imperfect deed, operates as an abandonment of the title obtained by the appropriation thereof. *Barkley v. Tieleke*, 2 Mont. 59.

Where an appropriator abandoned his claim, and also his wife, who succeeded to his rights, it was held that, the ditch and water interest therein being real property, they could only be acquired by deed, prescription, or condemnation, and the wife had no interest therein. *Burnham v. Freeman*, 11 Colo. 601.

6. *Smith v. O'Hara*, 43 Cal. 371; *Low v. Schaffer*, 24 Oregon 239; *Salina Creek Irrigating Co. v. Salina Stock Co.*, 7 Utah 456; *Chiatovich v. Davis*, 17 Nev. 133.

when they pass as appurtenant to land which has been acquired through the purchase of possessory rights, and not by deed.¹ And where the owner of land receives water acquired by appropriation, and such water is necessary to the proper use of his land, the water right is an appurtenance to the land upon which it is used, and will pass by a deed conveying the land.²

g. HOW LOST—ABANDONMENT.—The right acquired by prior appropriation may be lost by abandonment,³ or adverse possession.⁴ But nonuser, which does not amount to abandonment,

1. *Geddis v. Parrish*, 1 Wash. 587. If by the erection of a mill, and the acquisition of a possessory right of land on a stream, the water right be acquired, the transfer of the possession of the property to a vendee, as owner, passes the water right. *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 220.

Right of Action.—A deed of conveyance does not pass the right of action which the grantee has for an injury to his right, prior to the transfer. *Kimball v. Gearhart*, 12 Cal. 27.

2. In *Crooker v. Benton*, 93 Cal. 365, this was held even though the ditch terminated at a long distance from the land conveyed, and the right to take the water therefrom across the adjacent land was partly without right and partly conferred by a revocable license.

Where a ditch and water right clearly passed by a deed of the land as an appurtenance thereto, the admission of evidence that the actual intention and understanding of the parties were to include them in the sale, cannot be prejudicial error. *Coonrad v. Hill*, 79 Cal. 587.

The party who buys a mining claim and its appurtenances, and who asserts that a ditch and its water rights passed to him by the conveyance, as appurtenances to the claim, must, in order to hold them as such, prove that they were appurtenances. *Quirk v. Falk*, 47 Cal. 453.

Water appropriated by a trespasser does not become appurtenant to the land under a contract of purchase. *Smith v. Logan*, 18 Nev. 149.

Right of Way as Appurtenant.—In *Coventon v. Senfert*, 23 Oregon 548, it was held that, where a grantor possesses the right to conduct water to the land granted, over the land of another, such right passes to the grantor under the *habendum* clause as an "ap-

purtenance thereunto belonging," without specifically mentioning such right.

3. *Dorr v. Hammond*, 7 Colo. 83; *Dougherty v. Creary*, 30 Cal. 290; 89 Am. Dec. 116.

In *Kirman v. Hunnewill*, 93 Cal. 519, it was held that after a ditch, by which the waters of a creek were appropriated for mining purposes, has fallen into disuse and has been abandoned, the water right is destroyed by abandonment, and where, after such abandonment, the water of the creek has continuously flowed over lands belonging to a riparian owner, and been used by him for irrigation, and for domestic and general purposes for many years, no person claiming under the appropriators can revive the old ditch and water right, so as to divert the water to the injury of the riparian owner. But where the appropriator continues the use of the water, the abandonment of an irrigating ditch will not be presumed against him as an abandonment of the water right. *Nichols v. McIntosh* (Colo. 1893), 34 Pac. Rep. 278.

Utah.—It is provided by statute, in this state, that a neglect to keep in repair the means of appropriation for seven years shall be a forfeiture of the right. *Utah Comp. Laws*, § 2783.

4. *Union Water Co. v. Cray*, 25 Cal. 509; 85 Am. Dec. 145; *American Co. v. Bradford*, 27 Cal. 360; *Woolman v. Garringer*, 1 Mont. 544; *Huston v. Bybee*, 17 Oregon 140.

In *Ledu v. Jim Yet Wa*, 67 Cal. 346, where the plaintiff pleaded adverse possession in himself, it was error to instruct the jury "that if they believed that the plaintiff was the first to appropriate and use the waters in dispute, and that his appropriation and use thereof was prior to that of the defendant and those under whom he claims adversely to the plaintiff, and that his possession was continuous, exclusive, and notorious, and that he has

will not affect the right.¹ Failure to use for a time, however, is competent evidence of an abandonment, and may create fairly a presumption of the intention to abandon. But this presumption is not conclusive, and may be overcome by satisfactory proofs.²

Turning the water from an artificial ditch into a natural watercourse for the purpose of conducting it to another point, whereby its identity is destroyed by the mingling of such waters with the natural water of the stream, is not an abandonment.³ But if the water is turned into a natural stream for the purpose of getting rid of it, without any intention to reclaim it, it is subject to the same rights as the water naturally flowing therein.⁴

After the prior appropriator abandons his right, it seems he may return, and recover all his original rights, provided no one has appropriated them in his absence.⁵

h. PRIOR APPROPRIATOR AS RIPARIAN OWNER.—In the states where the common-law theory of riparian rights has not been abolished, an appropriator of water, acquiring title to the lands through which the watercourse flows, becomes the riparian owner, with rights as such, but his rights as appropriator are not thereby limited. So, an appropriator on the public land does not, by becoming the riparian owner, lose his right to acquire more of the water by a subsequent appropriation; and those who subsequently become riparian owners acquire no rights as against the

not parted with his right thereto or forfeited the same, they will find for the plaintiff," for the reason that the instruction would authorize the jury to find for the plaintiff without considering the defense of adverse possession.

California.—The provision of *California Code of Civ. Proc.*, § 325, providing that one claiming adverse possession of land must show that he has paid all taxes assessed upon the said land, does not apply to mere easements or appurtenant rights. *Frederick v. Dickey*, 91 Cal. 358.

1. *Dodge v. Marden*, 7 Oregon 456; *Rominger v. Squires*, 9 Colo. 329; *Partridge v. McKinney*, 10 Cal. 181. In *McCauley v. McKeig*, 8 Mont. 389, where the evidence showed that the defendant had appropriated water for placer mining purposes in 1869, and that in 1872 the plaintiff had appropriated the same for irrigating his land; that during the years 1878, 1879, 1880, 1882 and 1883, the defendant had not used the said water, but that in certain of the said years the supply was not sufficient for his purposes, it was held that there had been no abandonment by the defendant of his prior right to the use of the water.

2. *Sieber v. Frink*, 7 Colo. 154. The

facts that water was appropriated for a particular purpose, and that the purpose has been fully accomplished, and that when accomplished the appropriators dispersed it and allowed a long time to elapse without using the ditch, and then sold it for a nominal sum, may be received in evidence as tending to show abandonment. *Davis v. Gale*, 32 Cal. 36; 91 Am. Dec. 554.

Several Owners Constructing New Ditch.—Where several owners of two irrigating ditches entered into an agreement to construct a new ditch to supersede the old ones, it was held that, as nothing was said in the agreement, the priorities existing between the parties to the contract were not waived. *Rominger v. Squires*, 9 Colo. 327.

3. In *Butte Canal, etc., Co. v. Vaughn*, 11 Cal. 143; 70 Am. Dec. 769, it was held that the burden of proof devolved on the party mingling the water belonging to him with that appropriated by others.

4. *Eddy v. Simpson*, 3 Cal. 249; *Adams v. Slater*, 8 Ill. App. 73.

5. But one showing no privity between himself and the original owners of the ditch cannot re-enter and claim such rights. *Jatunn v. O'Brien*, 89 Cal. 57.

prior appropriator.¹ On the other hand, however, after the necessities of the prior appropriator are satisfied, as riparian proprietor he is not entitled to have the excess flow in the channel of the stream.²

IV. RIGHTS ACQUIRED BY PRESCRIPTION—1. General Principles.—Rights in watercourses, which are not justified by natural rights, may be acquired by prescription. If a proprietor has made a special use of the water, by penning it up and flowing it back upon a proprietor above, or holding it back from a proprietor below, or by diverting it, and has so used the water without resistance or opposition from other proprietors, or has made a use which is continuous, uninterrupted, and adverse, for the period of time prescribed by the Statute of Limitations for entry upon lands, a grant will be presumed for such a use.³ An uninterrupted enjoyment,

1. *Healy v. Woodruff*, 97 Cal. 464; *Kaler v. Campbell*, 13 Oregon 596. See also *Edgar v. Stevenson*, 70 Cal. 286.

In *Healy v. Woodruff*, 97 Cal. 464, it was contended that the plaintiff's grantor, having acquired title to land on the stream, and become a riparian proprietor, could not acquire further rights by appropriation. *McFarland, J.*, said: "The fact that plaintiff or his grantor was a riparian owner, does not warrant the conclusion that he could not be an appropriator,—there is, as is said in a play, 'No consonancy in the sequel.' The notion seems to be, that becoming a riparian owner estops one, in some sort of a way, from being an appropriator of water, although there be no one in existence in whose favor the estoppel can be invoked. When the ditch was enlarged, there was no person having any rights on the stream except plaintiff's grantor himself, and, therefore, the enlargement of the ditch encroached upon nobody's vested or prior rights. Respondent argues that if appellant's position be correct, the first riparian owner could monopolize all the waters of the stream. But he admits that an appropriator, who is not a riparian owner, can take all the water of a stream on the public lands, if he be the prior, or first, appropriator. And it would certainly be strange if the first comer to a stream, who acquired title to some land upon it, has less rights in the water of the stream than one who owns no land there at all. At the time of the enlargement of the ditch, there was no riparian owner on the stream except plaintiff's grantor. If some other person had been the riparian owner, instead of plaintiff's grantor, the latter,

with the consent of such riparian owner, or by adverse user, could have diverted the waters of the stream, and held them against all subsequent comers; and, certainly, his own consent to the appropriation was equal, at least, to the consent of another person who might have occupied his position. Counsel for respondents seems to think that because plaintiff's grantor, as a riparian owner, could have prevented subsequent appropriators from diverting the water above his land and away from it, therefore, he could not divert the water himself; but that is a confusion of the distinction between *meum* and *tuum*. Counsel complain that this view gives great advantage to the first possessor and appropriator of the water of a stream. This is no doubt true, but it is the advantage which the law gives, and which necessarily follows prior occupancy and appropriation."

2. *Low v. Schaffer*, 24 Oregon 239.

3. *Balston v. Bensted*, 1 Campb. 463; *Bealey v. Shaw*, 6 East 208; *Cowell v. Thayer*, 5 Met. (Mass.) 253; 38 Am. Dec. 400.

In *Bealey v. Shaw*, 6 East 208, which is a leading English case, persons under whom the defendants claimed had an ancient weir across the stream, by means of which they had an easement to divert a certain quantity of water. The plaintiff erected a mill lower down, to supply which he used a part of the water which remained undisturbed by the weir. After he had continued to do so for four years, the defendants enlarged their weir in such a manner as to divert an additional quantity of water, to the injury of the plaintiff's mill, and for this diversion the action was

brought. Lord Ellenborough said: "The general rule of law, as applied to this subject, is that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration. But an adverse right may exist, founded on the occupation of another. And though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet, if the occupation of the party so taking or using it having existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. . . . Here it appears that from 1724 downwards, there has been a partial enjoyment of the water of this river by those occupying the defendants' premises, by means of a weir of a given height, and a sluice of given dimensions. In this state of things, the plaintiff, in 1787, comes to a spot lower down the stream and erects a weir, mill, and other works, on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert; and this he does for four years without objection from any person. Supposing the question had arisen then on that enjoyment by the plaintiff of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objection could have been made to it? How could it have been shown that the occupiers of the defendants' premises were then in possession of all the water, when it is apparent that their use of it was not increased so as to deprive the plaintiff of the benefit of it until 1791, when they enlarged their works, and, for the very purpose of appropriating to themselves more of the water, they enlarged their sluice?"

In *England*, the period of twenty years is settled, according with the time mentioned in the statute of 21 Jac. 1. *Campbell v. Smith*, 8 N. J. L. 145; 40 Am. Dec. 400; *Balston v. Bensted*, 1 Campb. 463.

The period of prescription differs in the several states, according to the varying provisions of their respective statutes limiting the period for entry upon lands.

Alabama.—In this state perscriptive rights in water may be acquired by a

continuous, uninterrupted, and adverse use for a period of ten years. *Nininger v. Norwood*, 72 Ala. 277; 47 Am. Rep. 412; *Crabtree v. Baker*, 75 Ala. 91; 51 Am. Rep. 424.

Texas.—Here the rule is the same. *Baker v. Brown*, 55 Tex. 377; *Rhodes v. Whitehead*, 27 Tex. 304; 84 Am. Dec. 631.

Connecticut.—Here the period is fifteen years. *Buddington v. Bradley*, 10 Conn. 213; 26 Am. Dec. 386; *Ingraham v. Hutchinson*, 2 Conn. 591.

Vermont.—The rule is as in *Connecticut*. *Norton v. Volentine*, 14 Vt. 239; 39 Am. Dec. 220; *Ford v. Whitlock*, 27 Vt. 265.

Georgia.—The period here is twenty years. *Phinizy v. Augusta*, 47 Ga. 260.

New York.—In this state the rule is like that of *Georgia*. *Terry v. Smith*, 47 Hun (N. Y.) 333; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Smith v. Adams*, 6 Paige (N. Y.) 435.

New Hampshire.—Here the rule is the same. *Bucklin v. Truell*, 54 N. H. 122; *Burnham v. Kempton*, 44 N. H. 78.

Maine.—The rule in this state is like that of *Georgia*. *Dority v. Dunning*, 78 Me. 381; *Murchie v. Gates*, 78 Me. 300.

Massachusetts.—The same rule applies to this state also. *Campbell v. Talbot*, 132 Mass. 174.

Missouri.—In this state the right may be acquired by prescription after a period of ten years. *Smith v. Musgrove*, 32 Mo. App. 241; *House v. Montgomery*, 19 Mo. App. 170.

Pennsylvania.—Here the period is twenty-one years. *Strickler v. Todd*, 10 S. & R. (Pa.) 63; 13 Am. Dec. 649; *Hoy v. Sterrett*, 2 Watts (Pa.) 327; 27 Am. Dec. 313; *Darlington v. Painter*, 7 Pa. St. 473; *Horn v. Miller*, 142 Pa. St. 557; *Messinger's Appeal*, 109 Pa. St. 285.

Ohio.—The period is the same as in *Pennsylvania*. *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732.

California.—The prescriptive period in this state is five years. *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217; *Crandall v. Woods*, 8 Cal. 136; *Union Water Co. v. Crary*, 25 Cal. 509; 85 Am. Dec. 145; *Jatunn v. Smith*, 95 Cal. 154; *Spargue v. Heard*, 90 Cal. 221.

Nevada.—Here the period is the same as in *California*. *Boynton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781.

Effect of Imperfect Grant.—The presumption of a grant of an easement,

or adverse continuous use for a less time, will not confer any rights.¹ This presumption arises from the adverse use by the claimant, and cannot be acquired by the mere omission of the owner of the water to use his right; such nonuser does not impair his title, nor confer any right upon another.² Prescriptive rights may be acquired upon conditions in respect of the mode in which they are to be enjoyed, or may have annexed to them a duty to be performed for the benefit of the person against whom they exist.³

The general principles relating to the doctrine of prescription are treated elsewhere in this work, to which reference is made in the notes.⁴

The right acquired by prescription is the same in validity and force as one acquired by grant, and no words or acknowledgments of the owner thereof will affect the rights which have become so vested.⁵

No right can be acquired by prescription against persons incapable of making a grant, as infants, married women, and lunatics.⁶ But, as in the case of the operation of the Statute of Limitations, no intervening disability will defeat the right after the adverse

arising from an adverse enjoyment for twenty years, is not rebutted by the production of an imperfect or unexecuted agreement making a formal grant of the same easement to the party who claims under the adverse enjoyment. *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241.

Public Lands.—One can acquire no right by prescription to overflow the lands of the *United States* or of a state. *Wattier v. Miller*, 11 Oregon 329; *Vansickle v. Haines*, 7 Nev. 256.

1. *Mason v. Hill*, 5 B. & Ad. 1; 27 E. C. L. 1; *Prescott v. Phillips*, cited in *Bealey v. Shaw*, 6 East 208; *Campbell v. Smith*, 8 N. J. L. 146; 14 Am. Dec. 400; *Sherwood v. Burr*, 4 Day (Conn.) 244; 4 Am. Dec. 211; *Tyler v. Wilkinson*, 4 Mason (U. S.) 397; *Rudd v. Williams*, 43 Ill. 385; *Buddington v. Bradley*, 10 Conn. 213; 26 Am. Dec. 386; *Gilman v. Tilton*, 5 N. H. 231; *Pugh v. Wheeler*, 2 Dev. & B. (N. Car.) 50; *Boynton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781; *Hoy v. Sterrett*, 2 Watts (Pa.) 327; 27 Am. Dec. 313; *Davis v. Fuller*, 12 Vt. 178; 36 Am. Dec. 334.

2. *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Townsend v. McDonald*, 12 N. Y. 382; 64 Am. Dec. 508; *Butz v. Ihrie*, 1 Rawle (Pa.) 218.

3. *Kenchon v. Knight*, 1 Wils. 253; *Paddock v. Forrester*, 3 M. & G. 903; 42 E. C. L. 470; *Carlisle v. Cooper*, 21

N. J. Eq. 576; *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156.

If the right claimed is independent of an incidental duty, there is no doubt but that such right, accompanied by such duty, may be presumed. *Mitchell v. Walker*, 2 Aik. (Vt.) 264; 16 Am. Dec. 710.

Where a dam had been kept up more than twenty years, but the water had been drawn down six weeks in each year, between June and October, to enable the landowners to get clay, it was considered good evidence of right to keep up the dam subject to such limitations. *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241.

Where a mill has been kept up in the winter time only, and the mill owner has been uniformly accustomed to draw off the water sufficiently early in the spring to allow the growth of a crop of grass, it must be regarded as establishing a right to a winter privilege only, and not a constant privilege. *Marcy v. Shults*, 29 N. Y. 346.

4. See *PRESCRIPTION*, vol. 19, p. 6.

5. *Weed v. Keenan*, 60 Vt. 74; 6 Am. St. Rep. 93; *Arbuckle v. Ward*, 29 Vt. 45.

6. *Reimer v. Stuber*, 20 Pa. St. 458; 59 Am. Dec. 744; *Edson v. Munsell*, 10 Allen (Mass.) 557; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287.

In *Tyler v. Wilkinson*, 4 Mason (U. S.) 402, Story, J., in speaking of the

enjoyment has commenced.¹ And, in the case of a reversioner, the time of prescription does not begin to run until his interest becomes vested.²

2. Essentials to Acquisition by—*a. ADVERSE USE.*—The use of water, in order to ripen into a prescriptive right, must be adverse, that is, inconsistent with the rights of him against whom the claim is made, open and notorious as of right, and not clandestine and uninterrupted through the prescriptive period.

There must be a clear invasion of the rights of the party against whom the claim is made; that is, an invasion of his rights which would have entitled him to an action, or which he could have prevented.³ The mere use, by a riparian owner, of the water, unaccompanied by any act of exclusion against the other, or by the assertion of any exclusive or superior claim, not in its nature

presumption of a grant for the lapse of twenty years, said that its operation had never yet been denied in cases where personal disabilities of particular proprietors might have intervened, such as infancy, coverture, and insanity, and where, by the ordinary course of proceeding, grants would not be presumed. But in *Watkins v. Peck*, 13 N. H. 377; 40 Am. Dec. 156, *Parker, C. J.*, commenting upon this dictum, said: "We are of opinion that no grant can be presumed from an adverse use of an easement in the land of another, for the term of twenty years, where the owner of the land was, at the expiration of the twenty years, and long before, incapable of making a grant, whether the disability arose from infancy or insanity. Perhaps a disability intervening during the lapse of the term, but not extending to the termination of the period of twenty years, might not be sufficient to rebut the presumption, but it would be absurd to presume a grant, where it was clear that no such grant could have existed. And in this case a grant by a guardian, of an easement in the land of his ward, extending beyond the limit of the guardianship, is not to be presumed; because a guardian is not authorized to grant such incorporeal hereditaments out of the land of the ward." And this is now the weight of authority. See *LIMITATION OF ACTIONS*, vol. 13, p. 736.

1. In *Wallace v. Fletcher*, 30 N. H. 434, it was held that a disability which did not exist when such enjoyment commenced, nor at the time when the twenty years expired, did not defeat the presumption of a grant. See *LIMITA-*

TION OF ACTIONS, vol. 13, p. 736, where this subject is fully treated.

2. *Per Bell J.*, in *Wallace v. Fletcher*, 30 N. H. 434. See also *Bradbury v. Grinsell*, 2 Wm. Saund. 175.

3. *Chasemore v. Richards*, 7 H. L. Cas. 349; *Cooper v. Barber*, 3 Taunt. 99; *Parker v. Hotchkiss*, 25 Conn. 321; *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq. 335; *Webb v. Bird*, 13 C. B. N. S. 841; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156; *Donnell v. Clark*, 19 Me. 174; *Felton v. Simpson*, 11 Ired. (N. Car.) 84.

In *Brace v. Yale*, 10 Allen (Mass.) 441, *Bigelow, C. J.*, said: "If the use or enjoyment has been consistent with the existence of the right or title of the original owner, no such presumption arises. Thus, the erection of a dam across a stream of water, to raise a head for the purpose of driving wheels and machinery in a mill, and the cutting of canals, sluices, and waterways to conduct, apply, and discharge the water, although they may change in some degree the natural flow of the stream, and cause a temporary obstruction to the passage of the water, yet, if they do not essentially affect the reasonable use of the current by riparian proprietors above and below for similar purposes, would not be inconsistent with the rights of such proprietors in the stream, and could not be deemed to confer any right, or take away any title or privilege."

If there is evidence of actual use for

adverse, does no injury, and affords no cause of complaint or action.¹ No proof of actual damage is necessary, however, if there is an invasion of the right, for in such cases the law will presume

the prescriptive period, the question should not be withdrawn from the jury unless there is clear proof that it is not adverse. *White v. Chapin*, 12 Allen (Mass.) 516.

It must have been inconsistent with, or contrary to, the interests of the owner, and of such nature that it was difficult or impossible to account for it except on the presumption of a grant from him, otherwise no such presumption arises. *Morse v. Williams*, 62 Me. 445.

In *Vliet v. Sherwood*, 35 Wis. 229, where an averment stated that the plaintiff had maintained for twenty years the lower mill on the same stream; that water equal to a specified daily average had flowed to the plaintiff's mill from the defendant's dam and reservoir during the whole of that time; that the defendant's mill having been destroyed by fire, etc., a much smaller amount of water was now permitted to pass his dam, not sufficient to run the plaintiff's mill, to her great damage, it was held that the complaint did not show twenty years' usage of such water, adverse to the defendant, and so did not establish a prescriptive right.

The use of a ditch and levee on the party's own land, which is in itself rightful, cannot confer a prescriptive right to injuriously overflow the lands of an adjacent proprietor many years afterward, when the ditch had become actually filled up with sand and dirt, accumulated and deposited therein by the continued flow of water. *Polly v. McCall*, 37 Ala. 20.

Question for Jury.—If it is conceded that the defendant's use of the water for the prescriptive period has been peaceable, undisputed, notorious and continuous, it is proper to leave to the jury the question whether such use was inconsistent with the use claimed by the plaintiff. *Horn v. Miller*, 142 Pa. St. 557.

Burden of Proof.—In *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, it was said that a clear evidence was necessary to sustain a claim of presumption to interfere with the natural flow of a stream, and the importance of such evidence to sustain a claim of

prescription was remarked upon by Story, J., in *Tyler v. Wilkinson*, 4 Mason (U. S.) 397. But in *Bralley's Fish Co. v. Dudley*, 37 Conn. 136, it was said that the proof of an adverse use may be circumstantial as well as direct, and requires no greater amount of evidence than is necessary to prove other facts in civil cases.

Adverse Possession of Land Not Sufficient.—The adverse possession of land belonging to a riparian proprietor does not make the use of waters of the stream upon such land adverse to the riparian owner, such user being to his advantage, and giving him no independent right of action for the diversion of the stream, so long as it was not diverted away from his land, nor used under notice of a claim of right to divert or use it elsewhere. *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217.

1. *Merrick, J.*, in *Pratt v. Lamson*, 2 Allen (Mass.) 288, further said: "But where the proprietor of land upon one shore appropriates, and applies to his individual use, so much of the passing water as he is enabled to do, even if it be the whole of it, by means of structures erected upon and within the limits of his own estate, and the proprietor of the land on the opposite shore neither uses nor seeks to use, nor makes any provision, nor has any occasion for the use of any part of the stream or proportion of the water to which he is entitled, there is nothing adverse in the action of the former. He does nothing for which an action can be maintained against him, or nominal damages recovered in the assertion and vindication of an invaded right. In such circumstances they stand towards each other in the relation, and with substantially the rights, of tenants in common, where the possession of one is deemed to be the possession and for the benefit of all; and their respective rights will continue to be protected and preserved to them, until some positive act of actual or exclusive adverse possession, by which one of the parties is directly interfered with, and prevented from enjoying his equal privilege in the use of the water." See also *Howe Scale Co. v. Terry*, 47 Vt. 109.

damage.¹ The erection of a mill dam across the river, with abutments on the opposite shore, is such an adverse notorious use,² as is the exclusive use of the water;³ or such a use which results in overflowing the land of the party against whom the claim is made.⁴

To be adverse, the user must be under a claim of right not permissive,⁵ with such circumstances of notoriety as that the person against whom the right is exercised may be made aware of the fact, so as to enable him to resist the acquisition of such right before the period of prescription has elapsed.⁶ It is held, however, that it is not necessary to show that a party has had actual

1. *Hobson v. Todd*, 4 T. R., 71; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732.

2. *Bliss v. Rice*, 17 Pick. (Mass.) 23; *Burnham v. Kempton*, 44 N. H. 78; *Pioneer Wood-Pulp Co. v. Chandos*, 78 Wis. 526. This will create an easement after its continuance for twenty years, but will not divest the owner of the opposite bank of his title. *Trask v. Ford*, 39 Me. 437.

3. 3 Kent's Com. (13th ed.) 444; *Shreve v. Voorhees*, 3 N. J. Eq. 25.

4. *Ballard v. Struckman*, 123 Ill. 636. In *Williams v. Nelson*, 23 Pick. (Mass.) 141; 34 Am. Dec. 45, it was held that where a mill owner had in fact exercised the right of keeping up his dam and flowing the land of another person, for a period of twenty years, without payment of damages, and without any claim or assertion by the landowner of the right to damages, it was evidence of a right to flow without payment of damages, and would be a bar to such a claim.

But in *Nelson v. Butterfield*, 21 Me. 221, where land had been flowed by means of a dam erected for the use of a water mill, under an act authorizing the erection and maintenance of dams, upon the payment of damages, it was held that while the owner of the land suffered no damage, and could maintain no suit or process, or in any way prevent such flowing, he could not have been presumed to have granted, or in any manner to have surrendered, or relinquished, any of his legal rights; and no prescriptive right to flow his lands could have been acquired against him.

5. *Coalter v. Hunter*, 4 Rand. (Va.) 58; 15 Am. Dec. 726; *Bell v. Sausalito Land, etc., Co.* (Cal. 1893), 33 Pac. Rep. 449; *Feliz v. Los Angeles*, 58

Cal. 73; *Boynton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781.

In an action to enjoin the closing of a waste gate to the defendant's canal, brought by a plaintiff who alleged a prescriptive right to open the waste gate and divert water from the canal, when not used to run the defendants' mill, a nonsuit was held to be properly granted where the plaintiff's evidence showed that the waste gate was habitually opened by the defendant's express or implied consent, in response to an inquiry of the plaintiff as to whether they desired to use the water, and did not disclose an uninterrupted adverse user of the water for a period of five years to the knowledge of the defendant and his grantors, and with notice to them of a claim of right to open the waste gate, and take the water from the canal without their consent. *Ball v. Kehl*, 95 Cal. 606.

6. *Mason v. Shrewsbury, etc., R. Co.*, L. R., 6 Q. B. 578; *Tickle v. Brown*, 4 Ad. & El. 369; 31 E. C. L. 91; *Eaton v. Swansea, etc., Co.*, 17 Q. B. 267; *Davis v. Morgan*, 4 B. & C. 8; 10 E. C. L. 262; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Cobb v. Davenport*, 32 N. J. L. 369; *Morse v. Williams*, 62 Me. 445; *In re Commissioners Reservation*, 37 Hun (N. Y.) 548; *Colvin v. Burnet*, 17 Wend. (N. Y.) 564; *Mitchell v. Parks*, 26 Ind. 354.

In *Perrin v. Garfield*, 37 Vt. 304, it was held that the mere erection of a dam or other similar structure, and the use of it by means of gates at the outlet, is a sufficiently adverse and notorious use. In this case it was said that the general rule is that the enjoyment of an easement of this character is presumed to be adverse, unless something appears to rebut that presumption. This is the general rule when there is no evidence that the usage was

notice of the adverse possession.¹ Where the usage is contested by the owner during the period of prescription, no right can be acquired,² but it is held that the mere denial of the rights, complaints, remonstrances, or prohibitions of the user, unaccompanied

accompanied by a claim of right, and no express evidence of a disclaimer of the right by the party enjoying the easement. See also *Hickox v. Parmelee*, 21 Conn. 86.

In *Hannefin v. Blake*, 102 Mass. 297, it was held that for the purpose of preventing the establishment of a right to maintain, across one lot of land, a drain leading from another lot, by adverse use continued for twenty years, the testimony of the person who, within that time, owned the first lot, was admissible, if during the time he owned it, he never knew of the existence of the drain.

Evidence of Former Owner.—On the trial of a complaint for flowing land brought in 1850, the defense to which is prescription since 1823, evidence is not admissible that a former owner of the dam paid money in 1838, as damages for flowing land other than that of the complainant. *Tyler v. Mather*, 9 Gray (Mass.) 177.

Burden of Proof.—The burden of proof rests upon the party submitting to the user to show that it was by license or permission. It is not necessary for the party claiming it to prove an express claim of right, in order to characterize the user as adverse. *Law v. McDonald*, 9 Hun (N. Y.) 23; *White v. Chapin*, 12 Allen (Mass.) 519.

Evidence of Persons Having no Interest.—On the question of the accusation of a prescriptive right of flowage, evidence of complaints made of the flowage, by persons having no interest in the land flowed, to others having no interest in, and making no use of, the dam, is irrelevant. *Bucklin v. Truell*, 61 N. H. 503.

1. *Close v. Samm*, 27 Iowa 503. See also *School Dist. No. 8 v. Lynch*, 33 Conn. 330.

2. *Nichols v. Aylor*, 7 Leigh (Va.) 564. In *Powell v. Bagg*, 8 Gray (Mass.) 441; 69 Am. Dec. 262, proof that the party, against whom the claim was made, forbade the party claiming an easement of the flow of water over his premises to enter, and ordered him off, while there for the purpose of repairing the aqueduct, was held to be competent evidence of an interruption. But see *Lehigh Valley R. Co. v. Mc-*

Farlan, 43 N. J. L. 623, where the above case is criticised. It was said that the fact that the owner of the land forbade the other party to enter, and ordered him off, undoubtedly was competent as part of the plaintiff's case; but whether what occurred at that time would amount to an interruption of the easement, would depend upon circumstances, upon the conduct of the party when forbidden to enter, or when ordered off. If the owner of the servient tenement forbade the owner of the easement to enter for the purpose of enjoying it, and ordered him off, and the latter, on a well-grounded apprehension that the former meant to enforce obedience to his commands, desisted and withdrew, an action on the case for the disturbance of the right would lie.

In *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1, it was held that incursions, by an appropriator of a water right, upon the land of a riparian proprietor, for the purpose of obstructing the flow of water in a certain channel, and increasing the flow in another channel of the same river, not assented to by the riparian proprietor, who destroyed the work of the appropriator as often as he discovered it, did not secure to the appropriator any prescriptive right in the water secured thereby, however long the incursions may have continued, or however frequently they may have been repeated.

In *England*, under 2 & 3 Wm. IV., where the adverse use, by the terms of the statute, "must be submitted to or acquiesced in," such interruption or acquiescence would seem certainly to prevent the acquisition of the right. *Bennison v. Cartwright*, 5 B. & S. 1; *Glover v. Coleman*, L. R., 10 C. P. 108.

In *Eaton v. Swansea Water Works Co.*, 17 Q. B. 267, which was a case for disturbing a watercourse, which of right ought to have flowed into the plaintiff's close to irrigate it, evidence that on one occasion, when the plaintiff's servant drew off the water he was summoned before a justice for so doing, and that the plaintiff's son, by his direction, attended and defended the servant and paid a fine, and the plaintiff did not appeal,

by any act which in law would amount to a disturbance, and be actionable, will not prevent the acquisition of a right by prescription.¹ Any acknowledgment or admission, by the claimant, of the owner's right, made to the owner, although made under a mistake as to his own rights, if made within the prescriptive period, will rebut the presumption of a grant.²

b. CONTINUOUS USE.—The adverse use, in order to ripen into prescriptive right, must be continuous during the whole period.³

was improperly rejected by the lower court, as the conviction unappealed against was, under the circumstances, evidence of an acknowledgment of the plaintiff that the usage to draw off the water for irrigation was not as of right.

In *Carr v. Foster*, 3 Q. B. 581, it was held that an interruption which defeats a prescriptive right under this statute, means obstruction and not a mere discontinuance or omission, or anything denoting a mere breach in time; it must be an act indicating that the right is disputed.

1. *Cox v. Clough*, 70 Cal. 345.

In *Connor v. Sullivan*, 40 Conn. 26; 16 Am. Rep. 10, it was held that a single attempted interruption of an adverse user, resulting in no actual interruption and followed by no attempt to test the right, does not necessarily destroy the presumption of a grant founded upon the user, but such a fact is to be submitted to the jury with all the circumstances attending it, to have its natural and proper weight according to those circumstances, upon the question whether the use fairly indicates a grant.

In *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 628, Depue, J., said: "Protests and mere denials of right are evidence that the right is in dispute, as distinguished from a mere contested right. If such protests and denials, unaccompanied by an act which, in law, amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable foundations. Suppose an easement is enjoyed, say, for thirty years. If, after such continuance of enjoyment, the right may be overthrown by proof of protests and mere denials of the right, uttered at some remote, but serviceable, time during that period, it is manifest that a right held by so uncertain a tenure will be of little value. If the easement has been interrupted by any act which places the owner of it in a posi-

tion to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead, or the facts are faded from recollection, he has his own folly and supineness to which to lay the blame. But if, by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles."

In *McGeorge v. Hoffman*, 133 Pa. St. 381, it was held that the fact that the owner of land had made complaint to the owner of a mill on an adjoining tract that the water in his dam was raised to too great a height, unaccompanied by any interference with the use of the water by the mill owner, the bringing of any suit against him, or making of any adjustment, was not evidence of the existence of any controversy, such as would affect the acquisition by the user of the right to maintain the water at the height complained of.

2. *Mitchell v. Walker*, 2 Aik. (Vt.) 264; 16 Am. Dec. 710. See also *Jackson v. Wilkinson*, 3 B. & C. 413; *Liddon v. Hodnett*, 22 Fla. 442.

But admissions made in favor of the claimant, in recognition of the rights of others, will not defeat the prescriptive right as against persons other than those to whom the admissions are made. So, the admission of the owner of the dam that it had been raised, and his promise to restore it to the former height when another dam was built, did not prevent a prescriptive use in favor of the increased height, as against other persons than him to whom the admission and promise were made. *Lynn v. Thomson*, 17 S. Car. 129.

3. *Murgatroyd v. Robinson*, 7 El. & Bl. 391; *Monmouth Canal Co. v. Harford*, 1 C. M. & R. 614; *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396; *Smith v. Miller*, 11 Gray (Mass.)

But this does not mean that it must be constant in the sense of daily use.¹ When one uses the water whenever he sees fit, without asking leave or without objection, the use is sufficiently con-

149; *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Lockwood Co. v. Lawrence*, 77 Me. 320; 52 Am. Rep. 763; *Wood v. Kelley*, 30 Me. 47; *Donnell v. Clark*, 19 Me. 174; *Gilford v. Winnipiseogee Lake Co.*, 52 N. H. 262; *Faul v. Cooke*, 19 Oregon 455; 20 Am. St. Rep. 836; *Smith v. Russ*, 17 Wis. 229; 84 Am. Dec. 739.

In *Totel v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570, it was held that where a ditch was dug and used over adjoining lands for sixteen years, when it was filled, and another dug and used for four years, the time of using the two cannot be tacked together so as to make out an adverse use of twenty years.

A former reasonable use becoming unreasonable within the twenty years, is not justified by the expiration of such time. *Ellis v. Clemens*, 21 Ont. 227.

Adverse Enjoyment by Different Parties.—The time of enjoyment by an ancestor and his heir, or by a seller and purchaser, may be joined, but where the former owner of land had enjoyed an easement for less than twenty years, when the commonwealth confiscated his land and conveyed it to the plaintiff, who likewise enjoyed the easement, it was held that the time of enjoyment by the former owner could not be added to the time of enjoyment by the plaintiff, in order to make up the twenty years. *Sargent v. Ballard*, 9 Pick. (Mass.) 251.

Time of Exercise of Right While Owner Not Included.—When the owner of a mill claims an easement, by prescription, in another's lot, and the mill and the lot in which the easement is claimed are, during part of the twenty years next preceding, owned by the same person, the time of such ownership is excluded from the period required to establish a right by prescription. *Manser v. Blake*, 62 Me. 38.

Prescriptive Period Dates from Completion of Dam.—The time during which the dam is in course of being erected, and before it is completed so as to permanently raise the water and set it back upon the owner's premises, is not to be included in the duration of the use from which the prescriptive right is claimed. Where the defendant at first erected a temporary wood-

en dam, by which the water was raised to the height complained of, but afterward, for his convenience in erecting a permanent stone dam, discharged the water for some time through a waste way, and when the permanent dam was completed the water was again raised by means thereof to the height complained of and so continued, it was held that the period of usage, by virtue of which the prescriptive right was claimed by the defendant, did not commence until the water was permanently raised by the owner of the dam, after its completion. *Branch v. Doane*, 17 Conn. 402; 18 Conn. 233.

Change of Location of Dam.—In *Stackpole v. Curtis*, 32 Me. 383, it was held that, in order to establish a prescriptive right of flowing water by a dam for the use of a mill, it was not necessary that the dam should be maintained for the whole period upon the same spot; but it was sufficient, if shown to have been maintained upon the same mill site, though removed from time to time to different places upon such site.

1. *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503. The use may be every day, or once in every week, as may be required for the purposes of the diversion. *Hesperia Land, etc., Co. v. Rogers*, 83 Cal. 10.

In *Crosby v. Bessey*, 49 Me. 539; 77 Am. Dec. 271, where a tanner had thrown his ground bark into a stream for more than twenty years, it was held that he did not thereby acquire a right by prescription to do so, to the injury of the owner of land on the same stream below, on which the natural action of the water deposits the bark, unless it appeared that the bark had been deposited on the same land, and the owner thereof annually injured thereby for the whole prescriptive period.

In *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241, where the plaintiff had for more than twenty years, by means of a canal, adversely diverted and used the water of a stream, subject to a reservation, in favor of the owners of a meadow through which the canal was cut, of the right to turn the water down a natural channel for six weeks in each year for the purpose

tinuous, and a grant may be presumed.¹ The use of water for irrigating purposes during the spring and summer is such a continuous use as is required.²

A suspension of flowage during low water is not an interruption which will defeat the right,³ nor will the right be affected by an

of getting hay more conveniently and digging clay, it was held that such reservation did not prevent the plaintiff from acquiring the right of diverting the water by an actual use and diversion substantially general and continuous, but operated only as a limitation of the right acquired.

In *Emery v. Raleigh, etc.*, R. Co., 102 N. Car. 210; 11 Am. St. Rep. 727, where it was claimed that a railroad company had acquired a prescriptive right to use a culvert, it was held that the user must have been such as to have subjected the company to an action at any time during the twenty years, and it must be shown that the overflow had, at regular or irregular intervals during the twenty years, covered the very land in controversy.

In *Bodfish v. Bodfish*, 105 Mass. 317, Ames, J., said, in connection with the acquisition of the right of water by prescription, that "mere intermission is not an interruption. The continuity of the enjoyment may be shown by circumstantial evidence; . . . it is sufficient if the jury find such repeated acts of use, of such a character and at such intervals, as afforded a sufficient indication to the owner of the land that the right of way was claimed against him, and if they find that the way had been used in each of the twenty consecutive years, they would be justified in finding the continuous enjoyment, even though the defendant has not given evidence of actual use in each year of the twenty."

1. *Messinger's Appeal*, 109 Pa. St. 290; *Garrett v. Jackson*, 20 Pa. St. 331.

In *Hesperia Land, etc., Co. v. Rogers*, 83 Cal. 10, Thornton, J., said: "The correct rule as to continuity of user, to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation because water does not flow in it every day in the year. The party claimant does not need the ditch every

day in the year, and the law does not require him, to constitute continuity of use, to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as a continuous use. If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require. So it is of the ditch. If, whenever the claimant needs it from time to time, he makes use of it, this is a continuous use. An omission to use when not needed does not disprove a continuity of use shown by using it when needed. Neither such intermission nor omission breaks the continuity."

2. *Huston v. Bybee*, 17 Oregon 140.

In *Hesperia Land, etc., Co. v. Rogers*, 83 Cal. 10, it was held that the adverse use of an irrigating ditch through the land of another during the cropping season only, the ditch not being needed at other times, constitutes a continuous adverse use.

In *Powers v. Osgood*, 102 Mass. 454, on a complaint, under a mill act, for flowing land, the testimony of the respondent that for more than twenty years he had flowed the land all the year round, except during the haying season, that he usually made hay in July and had sometimes been till the middle of August making hay, and that the owners of the land had sometimes been as late as the last of September in getting out their hay, was held not to warrant an instruction to the jury that there was no evidence of prescriptive right to flow the lands during the months of July and August.

3. *Hall v. Swift*, 4 Bing. N. Cas. 381; 33 E. C. L. 383; *Gerenger v. Summers*, 2 Ired. (N. Car.) 229.

Fluctuation in Stream.—The prescriptive right to flow land is not impaired

interruption rendered necessary by repairs.¹ On the other hand, the mere use of the water during a season of abundance of water, without objection by an appropriator, is not a use upon which a prescription may be founded.²

The occasional use of flash boards for short periods during times of low water, as an exception to the general rule not to keep them on, does not amount to the open, uninterrupted, and notorious adverse use necessary to establish a prescriptive right.³ In order to have this result there must be such a continuous use of flash boards, as that they shall, in effect, constitute a part of the permanent structure. Whether the user has been such as to establish the right, is a question of fact for the jury.⁴

3. Extent of Right Acquired.—The extent of the prescriptive right is measured by the extent of the enjoyment, and is confined to the right as exercised originally.⁵ So, one who has acquired a

by fluctuations in the height, caused by floods, drouths, or occasional excessive draughts on the water for the use of the mill. *Johnson v. Boorman*, 63 Wis. 268.

1. *Haag v. Delorne*, 30 Wis. 591; *Wood v. Kelley*, 30 Me. 47.

2. *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.

In *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, it was held that no estoppel can arise from the neglect of a riparian proprietor to object to the use of the water of a stream by another proprietor, during such time as there is an abundant supply of water for the use of all.

3. *Pierce v. Travers*, 97 Mass. 306; *Marcy v. Shults*, 29 N. Y. 346.

4. *Noyes v. Stillman*, 24 Conn. 15; *Carlisle v. Cooper*, 21 N. J. Eq. 576.

In *Hall v. Augsburg*, 46 N. Y. 622, where the defendants had maintained and used a dam upon a stream below the plaintiff's dam, and for more than twenty years had used flash boards at different seasons of the year, when they materially interfered with the plaintiff's mill by flowing back water upon the wheel, and when complaint was made, they removed them, but only sufficiently to satisfy the demand, it was held that the defendant had acquired a prescriptive right to use such boards at any height that would not materially obstruct the plaintiff's wheel.

5. *Bealey v. Shaw*, 6 East 208; *Tyler v. Wilkinson*, 4 Mason (U. S.) 402; *Bigelow v. Battle*, 15 Mass. 313; *Cotton v. Pocasset Mfg. Co.*, 13 Met. (Mass.) 429; *Buddington v. Bradley*, 10 Conn. 213; 26 Am. Dec. 386; *Boynton v.*

Longley, 19 Nev. 69; 3 Am. St. Rep. 781; *Griffin v. Bartlett*, 55 N. H. 119; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq. 335; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40; 93 Am. Dec. 656; *Wright v. Moore*, 38 Ala. 593; 82 Am. Dec. 731; *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Peterson v. McCullough*, 50 Ind. 35; *Mitchell v. Parks*, 26 Ind. 354; *Shrewsbury v. Brown*, 25 Vt. 197; *Mowrey v. Scribner*, 70 Wis. 228. See also *Senhouse v. Christian*, 1 T. R. 560; *Howell v. King*, 1 Mod. 190, where the principle is applied to right of way acquired by prescription.

In *Prentice v. Geiger*, 74 N. Y. 342, the rule and the reason therefor are clearly set out by Andrews, J. He said: "The right acquired by prescription is commensurate with the right enjoyed. The extent of the enjoyment measures the extent of the right. The right is supposed to have had its origin in a grant, and, the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous, and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time. The party claiming a prescriptive right cannot, within the twenty years, enlarge the use, and at the expiration of that time claim, not only the use originally enjoyed, but that use as

prescriptive right to flow water back on another's land is restricted in his enjoyment of this right, to the height to which he has been accustomed to maintain it during the entire period.¹

The right to flow land by an ancient dam is a right to flow the land in a certain manner, and to a certain extent, and not to maintain the dam at a certain height. The right is measured by the actual flowage, and not by the height of the dam.² This, however,

supplemented and enlarged within the period of prescription."

If the enjoyment of the water has been limited to certain days in the week, it cannot lawfully be used on any other day. *Strutt v. Boringdon*, 5 Esp. 56.

The enjoyment of one ditch raises no presumption on the grant, of the right to use another ditch differing therefrom in any appreciable degree, either in locality or dimension. *Porter v. Durham*, 74 N. Car. 767.

Prescriptive Right to Have Pure Water.—In an action brought by the owner of a distillery, which was accustomed to be supplied with water from a stream upon which the defendant built a pen, resulting in the pollution of the waters of the stream, evidence that the father of the plaintiff used the water for the purpose of distilling whiskey, and that it had been used so as far back as living witnesses could remember, that it was pure always, and that the owners of the defendant's land always recognized that right, is admissible to prove the prescriptive right to use the pure water in the race for distillery purposes, and also to show how the race had been used by the former owners, and how the plaintiff's rights had been understood and recognized. *Price v. Lawson*, 74 Md. 499.

1. *Morris v. Commander*, 3 Ired. (N. Car.) 510; *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 175; *Tucker v. Salem Flouring Mills Co.*, 13 Oregon 28.

In *Powell v. Lash*, 64 N. Car. 456, where successive dams at a certain point on a creek had thrown the water back upon the plaintiff's land to a certain extent for more than twenty years, and after that a new dam, no higher than the former dams, but tighter, erected six feet lower down the creek, filled up the bed of the stream with sand, and sobbed the plaintiff's land to a considerably greater extent than before, although it did not pond the water further back, it was held that the

easement acquired by the adverse possession, upon the maxim, *tantum præscriptum quantum possessum*, did not protect the owner of the dam from liability on account of the new injury.

If, after flowing the land of another for ten years by means of a dam of a particular height, the party, by a newly constructed dam, raises the water higher and flows more land than he originally did, although he may be justified, after twenty years, in flowing the land to the extent originally covered, he will be answerable in damages for the increased land he flows. *Baldwin v. Calkins*, 10 Wend. (N. Y.) 175.

In *Morris v. Commander*, 3 Ired. (N. Car.) 510, it was held that it was incumbent upon him who claimed the privilege to pond water, to show that the privilege authorized him to pond the water as high as he then did.

Practice.—In an action against one having a prescriptive right in a stream, for exceeding the right, it is not necessary for the plaintiff to set forth in his declaration the defendant's right. *Whetstone v. Bowser*, 29 Pa. St. 59.

2. *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Burnham v. Kempton*, 44 N. H. 90; *Gilford v. Winnipiseogee Lake Co.*, 52 N. H. 266; *Sargent v. Stark*, 12 N. H. 332; *Mertz v. Dorney*, 25 Pa. St. 519; *Carlisle v. Cooper*, 19 N. J. Eq. 260; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Horne v. Stillwell*, 35 N. J. L. 307; *Sabine v. Johnson*, 35 Wis. 185; *Smith v. Russ*, 17 Wis. 227; *Ellington v. Bennett*, 59 Ga. 286; *Manier v. Myers*, 6 B. Mon. (Ky.) 132; *Turner v. Hart*, 71 Mich. 128; 15 Am. St. Rep. 243; *Jenkins v. Conley*, 70 N. Car. 353.

In *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, the court said: "The question is not how high the dam is, but how high the water has been held; whether it has been held for twenty years so high as to affect the land of the plaintiff as injuriously as it did at the time the action was brought."

In *Turner v. Hart*, 71 Mich. 128; 15

is not the rule maintained in *Massachusetts*.¹ And, again, one who has acquired a prescriptive right to foul a stream, may not pollute it to a greater extent than he has been accustomed to do from the first.²

Am. St. Rep. 243, Champlin, J., in commenting upon the doctrine in *Massachusetts*, said: "We cannot accede to this doctrine. It is antagonistic to the principle which underlies the doctrine of prescription. Title or rights in the lands, founded on prescription, originate from the fact of actual adverse, peaceable, open, and uninterrupted possession, for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land or interest in the land so held adversely. But no one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine, and hence the Statute of Limitations requires that an action shall be brought within fifteen years after the right first accrues, or the adverse entry. The defendants, therefore, acquired no right by prescription to the lands in question, until they showed that the acts which constituted the adverse user injured complainants and gave them, or those under whom they claim title, a right of action."

In *Georgia*, it is held that the extent of the right is to be measured by actual flowage and not by the height of the dam. See *Ellington v. Bennett*, 59 Ga. 286. Yet, it is said, this principle will not apply to a case where, from want of repair or leakage of the dam or other cause, the dam does not gather such a head of water as it might; in such case, it is held that the owner of the mill has a right to build a new dam of the height of the old one, and that if thus the extent of the back water is increased, the owner of the mill is not liable for damages caused by the increased overflow. *Baker v. McGuire*, 53 Ga. 245; *Maguire v. Baker*, 57 Ga. 109.

1. *Massachusetts*. — In *Cowell v. Thayer*, 5 Met. (Mass.) 253; 38 Am. Dec. 400, Shaw, C. J., said: "As a general rule, the height to which such a mill owner will have a prescriptive right to maintain the water, will depend upon the height of the dam by which he has raised it. In speaking of the height of the dam, we mean to be understood as the efficient height of the dam; the height to which such dam, when completed and finished, with its rolling dam,

waste ways, etc., and in good repair and condition, will raise the head of water." And the court further said that where a mere owner had acquired a prescriptive right to keep up a dam, which, in its usual operation, would raise the water to a certain height, although, from the leaky condition of the dam, the rude construction of the machinery, or for other similar reasons, the water had not been usually and constantly kept up to such a height, if repairing the dam without so changing it as to raise the water higher than the old dam, when tight and in repair, would raise it, it was held that this use was conformable to the mill owner's prescriptive right.

In *Ray v. Fletcher*, 12 Cush. (Mass.) 208, the same judge, in remarking that his former decision required some slight modification, said: "It is not the actual height of the dam which will regulate the prescriptive right of the party holding it, but its efficient height, according to its structure and operation to maintain the height of the water, when in repair and in good order; and although the water actually raised by it may to some extent vary, from one season, or one year, to another, owing to the tightness of the dam, the mode of using the water the different seasons, as being dry or wet, and the like, yet these considerations are too variable and uncertain, to be adopted or relied on as the basis of a right acquired by grant or prescription."

These cases seem to be followed in *Maine*, *Voter v. Hobbs*, 69 Me. 19; but are opposed to the weight of authority.

2. *Crossley v. Lightowler*, L. R., 2 Ch. 478; *Moore v. Webb*, 1 C. B. N. S. 673; *Middlesex Co. v. Lowell*, 149 Mass. 509; *Mississippi Mills Co. v. Smith*, 69 Miss. 299; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40; 93 Am. Dec. 656; *Jones v. Crow*, 32 Pa. St. 398.

An owner of an ancient paper mill, where paper had been made from rags, introduced a new vegetable fiber, and carried on the works upon the same scale for making paper from this new material. For more than twenty years

There can be no prescriptive right to pollute a stream by the discharge of sewage in such a manner and to such an extent as to be injurious to the public health.¹

The limitation is in the quantity of water and not in the manner of using it. It is not, therefore, necessary that the water

before this change, the refuse arising from the paper manufacture had been discharged into a stream which ran past the plaintiff's house. It was held that the easement to which the defendant was entitled was to be presumed to be, not a right to foul the stream by discharging into it the washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in a reasonable and proper course of such manufacture, using any proper materials for this purpose, but not increasing the pollution, and that the burden lay on the plaintiff to prove any increase of pollution. *Baxendale v. M'Murray*, L. R., 2 Ch. 790.

Where a tanner had thrown his ground bark into a stream for more than twenty years, he did not thereby acquire the right by prescription to do so to the injury of the owner of the land on the same stream below, on which the natural action of the water deposited the bark, unless it appeared that the bark had been deposited on the same land, and the owner thereof was annually injured thereby, for the whole term of twenty years. *Crosby v. Bessey*, 49 Me. 539; 77 Am. Dec. 271. See also *Donnell v. Clark*, 19 Me. 174.

In *Murgatroyd v. Robinson*, 7 El. & Bl. 391, which was an action by the owner of a mill against an owner of works higher up the stream, for throwing cinders, etc., from his works into the stream, by which they were carried down into the plaintiff's mill pond to the obstruction of his right to the water; the owners of the works made a plea that they had, for more than twenty years, as of right, placed cinders, etc., the refuse of their works, on the banks of the stream, and that the cinders, etc., complained of were such refuse; it was held that the plea was bad, *non obstante veredicto*, as not showing that the defendant had, during twenty years, as of right, caused the refuse to go into the plaintiff's pond.

In *Clarke v. Somersetshire Drainage Comrs*, 57 L. J. M. C. 96, it was held that pollution by the discharge of the refuse of a leather board manufactory

was not justified by prescriptive right to pollute with the refuse from a fell-mongery and the washings of dyes from a colored rug factory, though the new pollution was much less than the former.

Where one having a prescriptive right to a flow of water led by means of a gutter laid in a mill stream, lengthened the gutter for the purpose of irrigating more land, it was held that there was no suspension of the right to the enjoyment of the flow as it formerly existed, caused by the owner of the prescriptive right becoming a wrongdoer, and that the person injured was not justified in stopping the excessive user, by means of a gutter preventing C.'s enjoyment of the water, but only in stopping it by the least injurious means in his power. *Hill v. Cock*, 26 L. T. N. S. 185.

Injunction to Prevent Increase.—If the pollution be substantially increased, whether gradually or suddenly, the court will interfere by injunction to prevent the wrongful excess; and if it be possible to separate the illegal excess from the legal user, the wrongdoer must bear the consequences of any restriction necessary to prevent the excess, even if it unavoidably extends to a total prohibition of the user. *Blackburne v. Somers*, L. R., 5 Ir. 1.

1. Where a man has a right to the use of an ancient stream of water flowing through his land, and sewage is so precipitated into it as to pollute it, it is not allowable for the person causing the nuisance to claim, as against him, a prescriptive right to discharge the sewage into the stream. *Blackburne v. Somers*, L. R., 5 Ir. 1; *Goldsmid v. Tunbridge, etc., Co.*, L. R., 1 Ch. 349.

Pollution of Stream Supplying City.—After the taking of the waters of a stream for the purpose of supplying a city with pure water, a prescriptive right to pollute the stream cannot be acquired. *Martin v. Gleason*, 139 Mass. 183; *Morton v. Moore*, 15 Gray (Mass.) 573; *Brookline v. Mackintosh*, 133 Mass. 215. The pollution of a stream supplying water to a city is a public

should be used in precisely the same manner or applied the same way, provided the change be not injurious to those whose interests are involved.¹ One who has suffered water to flow through his land in a new channel for so long a period as will warrant the presumption of a grant, may not return it to the old channel to the injury of riparian owners who have enjoyed the benefit of the flow in such new channel.²

nuisance, and, therefore, the right to empty a sewer into such stream cannot be acquired by prescription. *Kelley v. New York* (Supreme Ct.), 27 N. Y. Supp. 164.

1. *Terry v. Smith*, 47 Hun (N. Y.) 333; *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453; *Bullen v. Runnells*, 2 N. H. 255; 9 Am. Dec. 55; *Darlington v. Painter*, 7 Pa. St. 473.

In *Saunders v. Newman*, 1 B. & Ald. 258, *Abbott, J.*, said: "The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different."

In *Whittier v. Coheco Mfg. Co.*, 9 N. H. 454; 32 Am. Dec. 382, where a party had for more than twenty years used a certain quantity of water at a particular dam, it was held that he might open his gates and draw that quantity without using it there, in order to use it at other works below on the same stream.

But in *Simpson v. Seavey*, 8 Me. 138; 22 Am. Dec. 228, where, in an ancient mill, a new and different machine was erected, of another description, the operation of which proved to be a nuisance to the mill owners below, the rights acquired by prescription were no protection, and it was held that the new machine should be regarded as an original and independent mill.

In *Darlington v. Painter*, 7 Pa. St. 473, where the defendant had, for more than twenty years, been in the habit of using a ditch to pass off water accumulating upon his land, and he subsequently built a mill and decided that he would use the ditch for mill purposes, it was held that he could not use it for any purpose which would increase the flow, enlarge the ditch, or affect the water in any way different from its former use.

2. *Mathewson v. Hoffman*, 77 Mich. 420; *Murchie v. Gates*, 78 Me. 300;

Delaney v. Boston, 2 Harr. (Del.) 489; *Shepardson v. Perkins*, 58 N. H. 354.

And where the diversion of the stream by one who owns lands, affects other proprietors favorably, and the person on whose land the diversion is made acquiesces in the stream running in the new channel for so long a time that new rights have accrued in fact, or may be presumed to have accrued in faith of the new state of the stream, the owner is bound by such acquiescence as being of the character of a public dedication, and he cannot return the stream to its former channel. *Ford v. Whitlock*, 27 Vt. 265.

In *Woodbury v. Short*, 17 Vt. 387; 44 Am. Dec. 344, where the change was effected by a sudden and unusual flood, and for more than ten years the stream had flowed in its new channel, it was held that it could not be returned to its former bed to the injury of those who had acquired rights therein. See also *Tuthill v. Scott*, 43 Vt. 525; 5 Am. Rep. 301.

Alteration of Stream.—In *Hall v. Swift*, 4 Bing. N. Cas. 381; 33 E. C. L. 382, it was held that a prescriptive right in a watercourse was not destroyed by the owner altering the course of the stream, and that the owner might establish his claim, notwithstanding an interruption, within twenty years, of his action brought to enforce the right.

Where a creek ran through and over the neighboring lands of both the plaintiff and the defendant, and at a certain time its course was changed on the defendant's land from natural causes, so that it no longer ran in the direction of the plaintiff's land, and the defendant's grantor, then in possession, refused to allow the road overseer to obstruct the new channel for road purposes, whereby the stream would have been returned to its former course, and where the new condition so remained with the defendant's consent and acquiescence for more than ten years, during which time several persons purchased lands and made improvements, on the presumption of permanency in

4. **How Lost.**—The rights acquired by prescription may be lost by abandonment. Simple nonuser of the right, however, will not defeat it, but to justify the presumption of abandonment, the enjoyment must have totally ceased for the same length of time as was necessary to create the original presumption,¹ and it has been held that the nonuser, even for so long a time, will not, of itself, extinguish the right, but merely raises a presumption not very strong, unless accompanied by circumstances showing an intention to abandon.² And on the other hand, the nonuser of the right for

the new channel, it was held that the plaintiff acquired a prescriptive right to the existing course of the stream, and was entitled to an injunction restraining the defendant from erecting or continuing a dam on his land, where the effect would be to flow the water back into the original channel, to the injury of the plaintiff's land, the prescriptive period in this state being ten years. *Smith v. Musgrove*, 32 Mo. App. 241.

The proprietor of land at the head of a stream, who has changed the natural flow of the water, and has continued such change for more than twenty years, cannot be permitted, afterward, to restore it to its natural state, where it will have the effect to destroy the mills of other proprietors below, which have been erected with reference to such change in the natural flow of the stream. *Belknap v. Trimble*, 3 Paige (N. Y.) 577.

1. See EASEMENTS, vol. 6, p. 139; *Hillary v. Waller*, 12 Ves. 267; *Wright v. Freeman*, 5 Har. & J. (Md.) 467; *Taylor v. Hampton*, 4 McCord (S. Car.) 96; 17 Am. Dec. 710; *Nitzell v. Paschall*, 3 Rawle (Pa.) 76; *Dyer v. Depui*, 5 Whart. (Pa.) 597; *Hurd v. Curtis*, 7 Met. (Mass.) 94; *Williams v. Nelson*, 23 Pick. (Mass.) 141; 34 Am. Dec. 45; *French v. Braintree Mfg. Co.*, 23 Pick. (Mass.) 216; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Brown v. M. E. Church*, 37 Md. 108; *Corning v. Gould*, 16 Wend. (N. Y.) 530; *Shields v. Arndt*, 4 N. J. Eq. 246. But see *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142; *Farrar v. Cooper*, 34 Me. 394.

In *McConnell v. American Bronze Powder Mfg. Co.*, 41 N. J. Eq. 447, *Van Fleet, J.*, said: "The settled rule on this subject may be stated as follows: No cessation in the use of the right acquired by prescription will extinguish it, unless the cessation be continued

uninterruptedly for the full period of twenty years, or the cessation be commenced or continued under such circumstances as to evince, unmistakably, an intention by the mill owner to abandon the right, and as shall also render a subsequent resumption of it by him clearly inequitable to the owner of the servient tenement."

In *French v. Braintree*, 23 Pick. (Mass.) 216, it was held that the entire and continued disuse of such privilege was strong *prima facie* evidence of a nonuser for an unreasonable length of time, and, unless rebutted by clear and satisfactory proof, was conclusive. See also *Hurd v. Curtis*, 7 Met. (Mass.) 94.

In *Corning v. Gould*, 16 Wend. (N. Y.) 530, the law is thus stated by *Cowen, J.*: "Abandonment is a simple nonuser of an easement; and in order to make out an effectual answer to the claim upon that ground, I find it perfectly well settled that the enjoyment, nay all acts of enjoyment, must have totally ceased for the same length of time that was necessary to create the original presumption. . . . If the nonuser for the twenty years clearly appear, this affords a presumption either that the former presumptive right was extinguished in favor of some adverse right; or, where no such adverse right appears, then simply that the former has been surrendered, or that it never existed."

2. 3 Kent's Com. (13th ed.) 448; *Prescott v. Phillips*, 2 Ev. Poth. 136; *Ward v. Ward*, 7 Exch. 838. See also *Corning v. Gould*, 16 Wend. (N. Y.) 531.

So in *Pratt v. Sweetser*, 68 Me. 344, it was held that though the nonuser of an easement for twenty years was evidence of intention to abandon, yet it is open to explanation and may be controlled by proof, that the owner had no such intention while omitting to use it.

a less time, accompanied with other evidence showing an unmistakable intention to abandon, is sufficient to extinguish the right,¹ as a nonuser in favor of some adverse use.² A mere declaration

This was the rule of the civil law. Pardessers, *Trait des Servitudes*, 458.

1. Ward v. Ward, 7 Exch. 838; Reg. v. Chorley, 12 Q. B. 515; 64 E. C. L. 513; McConnell v. American Bronze Powder Mfg. Co., 41 N. J. Eq. 449; Cooper v. Carlisle, 17 N. J. Eq. 525; 21 N. J. Eq. 576; Steere v. Tiffany, 13 R. I. 568; Mississippi Cent. R. Co. v. Mason, 51 Miss. 234; Agawam Canal Co. v. Edwards, 36 Conn. 476; Dana v. Valentine, 5 Met. (Mass.) 8; Hatch v. Dwight, 17 Mass. 289; 9 Am. Dec. 145.

In Farrar v. Cooper, 34 Me. 394, it was held that though from the time of ceasing to use a mill privilege, twenty years had not elapsed prior to the abandonment of the privilege, still the abandonment might be presumed, if the proprietor, witnessing the erection of a dam and of expenditures upon it, and knowing it must destroy his privilege above, made no effort or remonstrance to prevent it, or claimed a remuneration for it within the residue of the twenty years.

In Shields v. Arndt, 4 N. J. Eq. 234, where a lower riparian owner suffered an upper owner to divert the water of the stream from his land for twenty years, during which period none ran to the land of such lower proprietor, and then the upper proprietor turned the water so that it ran again upon the lower proprietor's land, continuing to do so for a time less than the prescriptive period, it was held that such upper proprietor might again divert it upon his own land, without becoming liable to the lower proprietor.

In Mowry v. Sheldon, 2 R. I. 369, it was held that the proprietor of a dam, who represented that he intended to abandon the dam for mill purposes, was estopped from denying that such was his intent, as against another who had been influenced by his representations to build a dam below, which flowed water back upon the one above. The facts of leaving the dam, not only unoccupied for a length of time, but so injured as not to pond water, and taking a gate out of the bulk-head, are calculated to mislead the owner below, when he goes on and erects his dam in the belief that the privilege has been abandoned.

The possession of land subject to an overflow from the backwater of a mill dam for seven years, under color of title, without its having been overflowed on account of the defective condition of the dam, will not relieve the land of such servitude, there being no evidence of intention, on the part of the owner of the mill, to abandon his right to use his dam to its full capacity. Maguire v. Baker, 57 Ga. 109.

In Crossley v. Lightowler, L. R., 2 Ch. 478, it was held that the mere suspension of the exercise of the prescriptive right was not sufficient to destroy it, without some evidence of the intention to abandon it; but where dye works had not been used for more than twenty years, and had been allowed to go to ruin, it was held that any right of fouling the stream attached to them was lost.

And where, through an artificial watercourse made for the purpose of draining a mine, the water has flowed for twenty years in a pure state, over the premises of a person who has used it for that period, in consequence of the mine's having been discontinued, the working of the mine cannot be resumed so as to foul the water and obstruct the flow. Magor v. Chadwick, 11 Ad. & El. 571.

2. In Taylor v. Hampton, 4 McCord (S. Car.) 96; 17 Am. Dec. 710, which is a leading case, the facts were as follows: General Wade Hampton, the defendant, had purchased of Mr. Pinckney, in 1807, 115 acres of land for a mill pond, the dam and mill being in full operation, which continued until 1814; the pond flowed the land of the plaintiff, and there was no dispute that the defendant had a right to use the flow as servitude by prescription. In 1814, a new mill was erected by the defendant above the place where the old one stood, and upon which the water of the old mill flowed, whereby the lower dam was cut to let the water off, and its use as a mill abandoned. This dam was, however, immediately repaired and the water raised occasionally for the purpose of flowing rice, but in the main the former flow on the plaintiff's land ceased from 1814 to 1823, when the lower mill was torn down and the

of an intention to abandon will not defeat the right,¹ nor will a change in the manner of exercising the right have this effect,² save where the change amounts to a discontinuance of the right.³

The right to an adverse enjoyment of water on one close, issuing from another, acquired by prescription, may be lost by unity of possession.⁴ But unity of possession and title in land above and below on a watercourse, does not extinguish or suspend natural rights therein, that is, rights existing, not by prescription, but *ex jure naturæ*.⁵

upper mill was rebuilt in the former's place, the water being again permanently raised, and the flow resumed over the plaintiff's land. After a learned discussion of the civil and common law in respect to the extinguishment of servitude, it was held that the act of the party entitled to the right was to be taken strongly against him, and that his act in this case resulted in an extinguishment of the right. Nott, J., delivering the opinion of the court in this case, and distinguishing between the suspension by the party, and that as a result of the law or inevitable accident, said: "When a right is suspended by the act of God, as by the drying up of the spring, it will revive again if the spring chance to flow. But if it be suspended by the act of the party, as by building a house or a wall, it would not be restored even though the obstacle should be removed by a stroke from Heaven."

1. Hale v. Oldroyd, 14 M. & W. 789.

2. See *supra*, this title, *Extent of Right*.

3. Where a party who had acquired a right to the use of water and operated a mill with a small wheel, changed the use so as to employ a larger wheel and a greater head of water, which he continued to do long enough to acquire a right, but afterward voluntarily discontinued the use of the larger wheel and resumed that of the small one, it was held that this amounted to an abandonment of the right to the increased head of water. Drewett v. Sheard, 7 C. & P. 465.

4. 3 Kent's Com. (13th ed.) 449; Manning v. Smith, 6 Conn. 289; Hazard v. Robinson, 3 Mason (U. S.) 272.

But if the title to the easement is not as extensive as the title to the land charged, where the same person is the owner of the land, and bound to supply water, and is also one of the persons for whose benefit it is supplied, there

is not such a unity of possession as will cause an extinguishment of the easement. Ivimey v. Stocker, L. R., 1 Ch. 396.

Nothing of absolute necessity to a building, as a gutter *in alieno solo*, is extinguished by unity of possession. Pheysey v. Vicary, 16 M. & W. 484. So in Nicholas v. Chamberlin, Cro. Jac. 121, it was held that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereto.

5. Hazard v. Robinson, 3 Mason (U. S.) 272; Johnson v. Jordan, 2 Met. (Mass.) 234; 37 Am. Dec. 85.

In Surry v. Pigott, Popham 170, the facts were as follows: A was possessed of a rectory of which a curtilage was parcel. From time immemorial a watering place for cattle existed in said curtilage, and a stream had flowed from Milford stream through a piece of land called the hop yard, to fill the pond at the watering place. A afterward purchased the hop yard and thus became possessed of the rectory and hop yard at the same time. He then sold the hop yard to B, under whose title the defendants entered and obstructed the watercourse by erecting a stone dam cross it within the limits of the hop yard. It was held that the right to the watercourse was not extinguished by the unity of possession; and that the plaintiff was entitled to recover for the obstruction. Whitlocke, J., said: "That a way or common shall be extinguished, because they are part of the profits of the land; and the same law is of fishings also; but in our case, the watercourse doth not begin by consent of parties nor by prescription,

V. RIGHTS ACQUIRED BY EXPRESS AGREEMENT—1. In General.—Rights in watercourses may be modified, restricted, or enlarged, by grant or reservation, in a deed conveying the land to which such rights are incident, or by special contract and covenant. The rights of riparian proprietors in the waters of a stream over their lands exist *ex jure naturæ*, as incident to the ownership of land annexed to and considered part and parcel of it,¹ and consequently may pass as appurtenant to the land when conveyed.² Rights in watercourses are not necessarily appurtenant to the land, but they may be severed therefrom and be made distinct subjects of grant³ or reservation.⁴

2. Parol Agreement—License.—No easement or permanent right in land can be acquired by parol agreement, and rights in watercourses, as such, cannot be acquired except by deed.⁵ Never-

but *ex jure naturæ*, and therefore shall not be extinguished by unity of possession." See *Hazard v. Robinson*, 3 Mason (U. S.) 272.

1. See *supra*, this title, *Riparian Rights*.

2. Vermont Cent. R. Co. v. Hills, 23 Vt. 681; Hoskins v. Brawn, 76 Me. 68; Nitzell v. Paschall, 3 Rawle (Pa.) 76; Huntington v. Asher, 96 N. Y. 604; 48 Am. Rep. 652.

3. Gould v. Stafford, 91 Cal. 155; Alta Land, etc., Co. v. Hancock, 85 Cal. 219; 20 Am. St. Rep. 217; Alhambra Addition Water Co. v. Mayberry, 88 Cal. 69.

A reservation of a right to take water through pipes from a spring, and to enter for repairs on payment of damages therefor, is good, and assignable without being attached to any particular estate, or limited in the place or manner of use. *Goodrich v. Burbank*, 12 Allen (Mass.) 459; 90 Am. Dec. 161.

Where a company owned a portion of the lots abutting on a dam, and also the controlling interest in the water power, but was not the owner of any mill or machinery which was propelled by water taken from the dam, under a foreclosure of a mechanic's lien against the company, a decree was made for the sale of its lots, and also of its interest in the dam and the water power, not as appurtenant to the lots, but as separate property. *Clark v. Brown*, 70 Iowa 139.

Rights of Grantor Incident to Land Subsequently Acquired.—If, after making a contract for division of the flow of a stream, a riparian owner, or his successor in interest, acquires title to other land below on the stream, his

right as incident thereto is subordinate to the rights granted to the occupant of the land above it, and if his successor in interest claims any rights in the contract, he cannot claim any right inconsistent therewith. *Alhambra Addition Water Co. v. Mayberry*, 88 Cal. 68.

4. *Allen v. Scott*, 21 Pick. (Mass.) 25; 32 Am. Dec. 238; *Pettee v. Hawes*, 13 Pick. (Mass.) 323; *Everett v. Dockery*, 7 Jones (N. Car.) 390; *Moulton v. Trafton*, 64 Me. 218; *Pennsylvania R. Co.'s Appeal*, 125 Pa. St. 189; *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 305.

In *Burr v. Mills*, 21 Wend. (N. Y.) 290, it was held that a clause in a deed which "Provided, nevertheless, that nothing above mentioned shall be construed as to injure the privileges heretofore enjoyed with regard to raising water for the benefit of my sawmill where it now stands, or others, if erected at or near the same place," should be construed as a reservation commensurate with the grantor's estate in the whole premises previous to the conveyance, and was not limited to his own life.

Where one owned land on one side of a stream, together with the bed of the stream, and conveyed it to another owning land adjoining the stream on the other side, and the land under the water to the middle of the stream, reserving to himself the right to put a dam on both sides or shores of the stream as he should think necessary, the parties were entitled to equal participation in the use of the water, notwithstanding the reservation. *Case v. Haight*, 3 Wend. (N. Y.) 632.

5. See **FRAUDS, STATUTE OF**, vol. 8, pp. 666-667. In addition to the cases

theless, a mere authority by parol license to exercise certain temporary privileges in watercourses will, until revoked, justify acts in pursuance thereof.¹ Although a parol agreement permitting a

there cited, the following may be given: *Hewlins v. Shippam*, 5 B. & C. 221; 11 E. C. L. 207; *Cagle v. Parker*, 97 N. Car. 271; *Wiseman v. Lucksinger*, 84 N. Y. 31; 38 Am. Rep. 479; *Tanner v. Volentine*, 75 Ill. 624; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Stevens v. Stevens*, 11 Met. (Mass.) 251; 45 Am. Dec. 203; *Cook v. Stearns*, 11 Mass. 533; *Hines v. Jarrett*, 26 S. Car. 489; *Banghart v. Flummerfelt*, 43 N. J. L. 28.

License Supplemented by Charter Right.—In *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, *overruling* 19 N. J. Eq. 142, it was held that where a charter of a water power company gave it a right to divert the water of a certain river upon the written consent or permission of those owning the lands and water privileges, such written consent obtained after the act, with the assistance of the act, operating as a substitute of the common-law method, had the effect of granting to the owner a legal right to divert the stream.

Parol Evidence Effecting Deed.—Where, after the execution of a deed conveying a right of watercourse by courses and distances, a parol agreement was made, altering such route for the accommodation of the parties, and carried into effect, it was held that parol evidence of such an agreement could be given. *Le Fevre v. Le Fevre*, 4 S. & R. (Pa.) 241; 8 Am. Dec. 696.

In *Stevens v. Stevens*, 11 Met. (Mass.) 251; 45 Am. Dec. 203, it was held that the defendant was not liable for damages caused by a dam which he had erected in pursuance of a license before it was countermanded, but that he was liable for building a new dam, and repairing the old one, after the revocation.

Exceeding Acquired Right.—In *Carter v. Page*, 8 Ired. (N. Car.) 190, it was held that the license to turn a stream upon the land of the lessee was no authority to stop that, at the lessor's pleasure, and turn another in its stead.

In *Farmer v. McDonald*, 59 Ga. 509, a parol license to overflow land by adding eighteen inches to the height of a dam twelve feet high, was held not to entitle the licensee of the easement to erect a new dam sixteen feet, eleven inches high, after the old dam had

been washed away, and that he was responsible in damages for the overflow caused by the new dam.

1. *Fentiman v. Smith*, 4 East 107; *Hewlins v. Shippam*, 5 B. & C. 221; 11 E. C. L. 207; *Millard v. Reeves*, 1 Mich. 107; *Pursell v. Stover*, 110 Pa. St. 45; *Selden v. Delaware, etc., Canal Co.*, 29 N. Y. 634; *Bell v. Elliott*, 5 Blackf. (Ind.) 113.

An easement is a liberty, privilege, or advantage in land without profit, and existing distinct from the ownership of the soil, and must be founded upon a deed or writing, or upon a prescription which supposes one. It is a permanent interest in another's land with a right to enjoy it without obstruction. A license, on the other hand, is a bare authority to do a certain act or series of acts upon another's land, without possessing any estate therein, and, it being founded on personal confidence, it is not assignable, and it is defeated, if the owner of the land who gives the license transfers his title to another, or if either party dies. 3 Kent's Com. (13th ed.) 452. See also *Hazelton v. Putnam*, 3 Pinney (Wis.) 107; 54 Am. Dec. 158; *Thompson v. Gregory*, 4 Johns. (N. Y.) 81; 4 Am. Dec. 255; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; 30 Am. Dec. 60.

Contract Conveying No Interest in the Land.—In *Hamilton, etc., Hydraulic Co. v. Cincinnati, etc., R. Co.*, 29 Ohio St. 341, it was held that an agreement between the owner of an artificial watercourse and a railway company, whereby the former consented that the latter, in the construction of its road, might fill the channel and divert the water into a new channel on its own land, in consideration that the railroad company would open the old channel and restore the water thereto whenever requested, was not a contract for an interest in land within the meaning of the Statute of Frauds.

In *Corning v. Troy Iron, etc., Factory*, 34 Barb. (N. Y.) 485, it was held that the owner of a water privilege on a stream, who consented to the erection of expensive machinery for the diversion of the water by an owner on the same side above him, but subsequently purchased the lands opposite the said machinery, might demand

party to erect a dam for a permanent purpose, is void under the Statute of Frauds,¹ still it will be a good defense to an action for flowing land,² evidence that the diversion complained of was made by virtue of a parol agreement between the plaintiff and the defendant, is admissible in mitigation of damages, and for the purpose of showing that the defendant was not a trespasser *ab initio* in continuing the diversion after the countermand of his authority by the plaintiff.³ But a license to build a dam and overflow lands will not justify an injury resulting from the unskillful building and operation of the dam.⁴

A release, not under seal, by an owner of lands flowed, of all claims for pecuniary damages therefor, binds him personally;⁵ but it does not bind the land nor estop subsequent grantees thereof from recovering damages for injuries in the future.⁶

restoration of the stream to its natural channel.

Logging.—In *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439, it was held that a grant of the privilege of floating spars down a private stream, not involving the holding or occupation of land, was a mere license and not a contract within the Statute of Frauds.

1. *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; 30 Am. Dec. 60; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Houghtaling v. Houghtaling*, 5 Barb. (N. Y.) 379.

2. *Crosby v. Wadsworth*, 6 East 602; *Woodbury v. Parshley*, 7 N. H. 237; 26 Am. Dec. 739; *Hines v. Jarrett*, 26 S. Car. 480; *French v. Owen*, 2 Wis. 250; *Hazelton v. Putnam*, 3 Chand. (Wis.) 117; 54 Am. Dec. 158; *Millerd v. Reeves*, 1 Mich. 107.

3. *Addison v. Hack*, 2 Gill (Md.) 221; 41 Am. Dec. 421.

In *Johnson v. Lewis*, 13 Conn. 303; 33 Am. Dec. 405, which was an action for the obstruction of a watercourse, the defendant proved that the party under whom the plaintiff claimed was frequently present during the erection of the dam causing the injury, and did not object to it or forbid its erection, and even expressed the opinion that it would be beneficial to his mill, also, that the plaintiff had said that he was satisfied with the manner in which the defendant used the water. It was held that these facts did not amount to a license to erect the dam, but at most only evidence of such license, and that it was proper for the court, on such evidence, to leave it for the jury to say whether there was in fact such a license.

In *Occum Co. v. A. & W. Sprague*

Mfg. Co., 34 Conn. 529, an unacknowledged and unrecorded contract was held to be admissible for the purpose of showing a license to erect and maintain a dam.

4. *Brown v. Bowen*, 30 N. Y. 519; 86 Am. Dec. 406; *Selden v. Delaware, etc., Canal Co.*, 29 N. Y. 634.

5. *Cobb v. Fisher*, 121 Mass. 170; *Seymour v. Carter*, 2 Met. (Mass.) 520; *Smith v. Goulding*, 6 Cush. (Mass.) 154.

An agreement not to claim damages for flowing one's land, if the other party will erect a dam and mill, is not the conferring of any right, interest, or easement in land, but is only a waiver of a claim for pecuniary damages and need not be in writing. *Smith v. Goulding*, 6 Cush. (Mass.) 154; *Short v. Woodward*, 13 Gray (Mass.) 86.

Under Mill Acts.—The right to flow the lands of another, in order to raise water sufficient to carry a mill, is given by necessary implication in the statute regulating rules, and therefore need not be proved by writing. *Clement v. Durgin*, 5 Me. 9; *Benedict v. Parmenter*, 13 Gray (Mass.) 88.

6. *Cobb v. Fisher*, 121 Mass. 169; *Fitch v. Seymour*, 9 Met. (Mass.) 462; *Stevens v. Stevens*, 11 Met. (Mass.) 251; 45 Am. Dec. 203.

In *Craig v. Lewis*, 110 Mass. 377, where the owner of land which was flowed by a dam gave to the owner of the dam a writing, not under seal, in which he acknowledged the receipt of full payment for all dues or demands for damage to the land by flowing, and discharged the owner of the dam from all liability for any flowage, and he afterward conveyed the land by a deed

A parol license is not assignable, but when unexecuted it is revocable at the pleasure of the licensor.¹ But there is considerable conflict of authority as to the revocability of a parol license to build a dam or to flow land where the dam has been erected, or where money has been expended otherwise in the execution of the license. Numerous cases, notably in those states where the distinction in courts of law and equity does not exist, hold that parol licenses are irrevocable, where they have been, in good faith, executed by the expenditure of money, and this upon the ground of equitable estoppel;² and that a court of equity will

in which he covenanted that it was free from incumbrances except the right of flowage, but did not admit any such right, it was held that his grantee was not estopped to claim damages for flowing by the dam subsequent to the conveyance.

1. *Curtis v. La Grande Water Co.*, 20 Oregon 34; *Beidelman v. Foulk*, 5 Watts (Pa.) 308; *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732; *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370.

In *Cheever v. Pearson*, 16 Pick. (Mass.) 266, *Shaw, C. J.*, making a distinction between an executory and executed license, said: "A license which is an authority to do some one act, or series of acts, on the land of another, without passing any estate into the land, is, in its nature, countermandable. Still the distinction between license executed and a license executory, is obvious and well founded in law. To say that an executed license cannot be revoked, is saying, only in other words, that an act lawful when it was done, in virtue of the license and permission of the owner of the land, cannot be rendered unlawful by a subsequent revocation of such authority, and a license which legalizes the act itself, renders lawful also its incidents and necessary consequences. But were it extended further, it would be a right to use the land of another without his consent, which is an interest in the lands."

In *Bass v. Roanoke Nav., etc., Co.*, 111 N. Car. 439, it was held that a license to erect a bridge over a canal could be revoked, and that when revoked the licensor had a right to remove the bridge without paying compensation to the owner.

2. *Bryan v. Collier*, 3 Kelly (Ga.) 82; *Wickersham v. Orr*, 9 Iowa 253; 74 Am. Dec. 348; *Beatty v. Gregory*, 17

Iowa 114; 85 Am. Dec. 546; *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370; *Stephens v. Benson*, 19 Ind. 369; *Lane v. Miller*, 27 Ind. 534; *School District v. Lindsay*, 47 Mo. App. 134; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 467; *Lee v. McLeod*, 12 Nev. 280; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, *reversing Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142; *Swartz v. Swartz*, 4 Pa. St. 353; 45 Am. Dec. 697; *Lacy v. Arnett*, 33 Pa. St. 169; *Rerick v. Kern*, 14 S. & R. (Pa.) 267; 16 Am. Dec. 497; *Olmstead v. Abbott*, 61 Vt. 280; *Hall v. Chaffee*, 13 Vt. 150.

In *Rerick v. Kern*, 14 S. & R. (Pa.) 267; 16 Am. Dec. 497, which is a leading case in favor of this view, the facts were as follows: The plaintiff, in consequence of the permission of the defendant to divert the water of a stream, built a mill to be operated by the water so diverted; no deed was executed, nor was any consideration given subsequent to the erection of the mill. The defendant, the licensor, diverted the watercourse which resulted in a loss to the plaintiff of his mill, whereupon he brought an action on the case for damages. It was held that the licensee going to the expense of erecting his mill in consequence, the parol license, although without consideration, could not be revoked at the pleasure of the licensee, and that he was liable for injury resulting from the diversion by him. *Gibson, J.*, said: "The defense in this case is put on other ground, it being contended that a mere license is revocable, under all circumstances, and at any time. But a license may become an agreement on valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and where the grantee has made improvements or invested capital in consequence of it, he

grant relief as in other cases of part performance of parol contracts for the sale of interests in lands.¹ Yet, there is considerable authority to the contrary, it being well settled in some states that a parol license to flow land is revocable under all circumstances.²

has become a purchaser of it for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived."

In *Curtis v. La Grande Water Co.*, 20 Oregon 34, Lord, J., said: "An executed license is treated like a parol agreement in equity. It will not allow the statute to be used as a cover for fraud. It will not permit advantage to be taken of the form of the consent, although not within the Statute of Frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent when it was given, or had the effect to influence the conduct of another and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel. The ground of the jurisdiction is to prevent injustice or fraud."

In *Short v. Taylor*, 2 Eq. Cas. Abr. 523, pt. 3, where one stood by and saw his watercourse diverted, and instead of preventing it, encouraged the work and afterward brought his action at law, the defendant, on application to the court of chancery, obtained an injunction.

In *Clark v. Glidden*, 60 Vt. 702, it was held that a parol lease to lay an aqueduct to a spring of water on one's land, was irrevocable during the existence of the aqueduct, and that a court of equity would protect the licensee in the use of the aqueduct, and continue an injunction restraining the owner of the spring from interfering with the aqueduct until its decay. See also *Allen v. Fiske*, 42 Vt. 462.

In *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 504, where the proprietors of a mill privilege and part of a river obtained a license from the owners of the opposite land to extend their dam across the stream and join it to his own land, until he should want the privilege on his side of the stream for

his own use, it was held that the subsequent revocation of the license could not affect the right of the proprietors to the head of water thus raised and appropriated.

There are several early English cases which are relied upon in support of the doctrine that there are certain licenses which are irrevocable. See *Webb v. Paternoster*, Palmer 71; *Wood v. Lake*, 1 Sayer 3; *Taylor v. Waters*, 7 Taunt. 374.

The case of *Winter v. Brockwell*, 8 East 308, which has been frequently cited and relied upon both in *England* and in the *United States*, is distinguished in Angell on Watercourses (7th ed.), § 313, where a clear distinction between this and other English cases is explained. This case involved the right to light which it was said was to be distinguished from the right of the water of a natural stream in that the right to light conveys no interest in the land, while the right in the respect of a natural watercourse is a part of the freehold. And it is certainly the weight of authority in English common-law courts that no right to exercise a continuing privilege in the land of another can be given by a mere parol license, even when carried into execution. See *Wood v. Leadbitter*, 23 M. & W. 838; *Fentiman v. Smith*, 4 East 107; *Hewlins v. Shipham*, 5 B. & C. 221; 11 E. C. L. 207.

1. *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190; *Cook v. Pridgen*, 45 Ga. 331; 12 Am. Rep. 582; *Ricker v. Kelly*, 1 Me. 117; 10 Am. Dec. 38; *Olmstead v. Abbott*, 61 Vt. 281; *Adams v. Patrick*, 30 Vt. 516.

2. *Foot v. New Haven, etc., Co.*, 23 Conn. 214; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Wood v. Edes*, 2 Allen (Mass.) 578; *Cook v. Stearns*, 11 Mass. 537; *Stevens v. Stevens*, 11 Met. (Mass.) 251; 45 Am. Dec. 203; *Seiden v. Delaware, etc., Canal Co.*, 29 N. Y. 639; *Carter v. Harlan*, 6 Md. 20; *Seidensparger v. Spear*, 17 Me. 123; 35 Am. Dec. 234; *Trammell v. Trammell*, 11 Rich. (S. Car.) 471; *Fryer v. Warne*, 29 Wis. 511; *Foster v. Browning*, 4 R. I. 47; 67 Am. Dec. 505. See also *Murdock v. Prospect Park, etc., R. Co.*, 73

By the later decisions, the doctrine that an executed license is irrevocable, is confined to those licenses which, when executed, pass no estate or interest in the land, and such as are given for a valuable consideration.¹ In *New York*, although it is distinctly held that a mere license is revocable, even after the expenditure of money by the licensee on the faith of his license, where such a license partakes of the character of a grant, and is a complete and sufficient contract, founded not only upon a valuable consideration, but defined by satisfactory proof accompanied by acts of part performance unequivocally referable to the agreement, a court of equity will compel specific performance.²

N. Y. 579; *Woodward v. Seely*, 11 Ill. 157; 50 Am. Dec. 445.

In *New Hampshire*, the early cases held that where a license was given to enter upon the lands and do acts which involved an expenditure of money, and the license became executed by the expenditure incurred, it was either irrevocable, or could not be revoked without a remuneration, on the ground that a revocation under such circumstances without remuneration would be fraudulent and unconscionable. See *Harris v. Gillingham*, 6 N. H. 9; 23 Am. Dec. 701; *Woodbury v. Parshley*, 7 N. H. 237; 26 Am. Dec. 739; *Carleton v. Redington*, 21 N. H. 291. But later cases, however, sustain the doctrine that a license is, in all cases, revocable so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned. See *Houston v. Laffee*, 46 N. H. 505; *Marston v. Gale*, 24 N. H. 176; *Cowles v. Kidder*, 24 N. H. 364; 57 Am. Dec. 287; *Batchelder v. Hibbard*, 58 N. H. 269.

1. Gould on Waters (2d ed.), § 323; *Clute v. Carr*, 20 Wis. 561; *Liggins v. Inge*, 7 Bing. 682; 20 E. C. L. 287; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, reversing 19 N. J. Eq. 142; *Clark v. Glidden*, 60 Vt. 702; *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370; *Houston v. Laffee*, 46 N. H. 505; *Van Ohlen v. Van Ohlen*, 56 Ill. 528; *Ricker v. Kelly*, 1 Me. 117; 10 Am. Dec. 38.

In *Wood v. Leadbitter*, 23 M. & W. 838, it was said that a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is not capable of being made by parol; but where there is a license by parol coupled with a parol grant of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an inci-

dent to a valid grant, and it is, therefore, revocable. See also *Morse v. Copeland*, 2 Gray (Mass.) 302, where the owner of a mill privilege had given the owner of lands flowed thereby an oral license to erect a dam on the land of the lessee, and also to dig a ditch across the land of the lessor, and to drain the water off a part of the lessee's land, it was held that the lessor could revoke the license to dig the ditch even after the expiration of twenty years, but could not revoke the license to build the dam.

In *Curtis v. Noonan*, 10 Allen (Mass.) 406, this principle seems to have been applied to an executed license, giving a right to commit an act upon the estate of a third person. It was held that if the owner of land to which water was brought through an aqueduct conveyed a portion of the same, with a right to take the water to the conveyed premises by a pipe from the aqueduct on his land, and afterward the owner consented that his grantee might take the water to which he was entitled from the aqueduct at a point above the grantor's land, he could not withdraw such consent after it had been acted upon, and would be liable in damages for cutting off a pipe laid by the grantor in pursuance of such consent.

2. *Wiseman v. Lucksinger* 84 N. Y. 31; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 77; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; 30 Am. Dec. 60; *Miller v. Auburn*, etc., R. Co., 6 Hill (N. Y.) 61; *Selden v. Delaware*, etc., Canal Co., 29 N. Y. 639; *Murdock v. Prospect Park*, etc., R. Co., 73 N. Y. 579; *Jamieson v. Millemann*, 3 Duer (N. Y.) 255; *Eckerson v. Crippen*, 110 N. Y. 585; *Babcock v. Utter*, 1 Abb. App. Dec. (N. Y.) 27. See also *Crosdale v. Lanigan*, 129 N. Y. 604. But see *Greenwood Lake*, etc., R. Co. v. New York, etc., R. Co., 134 N. Y. 435.

A general discussion of this subject will be found elsewhere in this work.¹

3. Grant and Reservation.—The grantor in a conveyance of land may reserve the sole and exclusive right in the watercourses thereon.² An easement in gross is never presumed when it can be construed fairly as appurtenant to some other estate.³ The grant of a mill, or of land with a mill thereon, carries with it the water power, together with the right to maintain a suitable dam.⁴

In *Cronkhite v. Cronkhite*, 94 N. Y. 323, the owners of adjoining lands agreed to lay down pipes upon the lands of one, to carry water from a spring to his buildings for his use, and from thence to the buildings of the other proprietor, each one to bear one half the expense and perform half the labor, in consideration of which the first proprietor agreed that the latter should have the right to take the surplus water from the spring through the pipes. This was held to be a mere revocable license. *Miller, J.*, said: "The most that can be claimed as to the agreement proved is that it was a license which was revocable at the pleasure of the person granting the same, or his heirs or representatives. The right to revoke a license, which does not partake of the character of a grant, and where the rights are not affirmatively and definitely fixed and settled, is fully established by the authorities. Even when a consideration is paid, the right of revocation exists where the terms of the agreement are not of such a nature as to make out a valid agreement which could be enforced in equity. Nor does the fact of the performance of the agreement render it effectual and valid, unless the acts of performance are so clear, definite, and certain in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution."

1. See LICENSE, vol. 13, p. 550.

2. *Provost v. Calder*, 2 Wend. (N. Y.) 517; *French v. Carhart*, 1 N. Y. 96; *Vickerie v. Buswell*, 13 Me. 289; *Newmarket Mfg. Co. v. Pendergast*, 24 N. H. 54.

A grant of a lot across which a mill race for hydraulic purposes runs, gives by implication no right to draw water from the channel. *Fox River Flour, etc., Co. v. Kelley*, 70 Wis. 287.

3. *Washburne on Easements* (4th ed.), pp. 29-161.

A grant of certain lots of land, "to-

gether with the perpetual right to draw from the pond through the headrace on the north end of said lots and use 800 square inches of water," was held to create an easement appurtenant to the lots, if the words of the grant meant that the water was to be drawn at some point on the north line of the said lots, but, if construed as giving the grantee the right to draw the water at any point in the race without regard to the lots, it created an easement in gross, a mere personal right. *Spensley v. Valentine*, 34 Wis. 154.

In *Bank of British North America v. Miller*, 6 Fed. Rep. 545, it was held that a water right granted in gross did not become technically appurtenant to land and a mill upon and for which it was subsequently used by the grantee thereof; but where such water power was taken and applied to run a mill belonging to the owner of the power, and afterward, while the water was being used in that manner, the owner conveyed the premises by metes and bounds without mentioning the water right, it was held that the right might pass therewith as parcel thereof, if such appeared to be the intention of the parties.

4. *Hazard v. Robinson*, 3 Mason (U. S.) 272; *Mack v. Bensley*, 63 Wis. 80; *Rackley v. Sprague*, 17 Me. 281; *Stackpole v. Curtis*, 32 Me. 383; *Dunklee v. Wilton R. Co.*, 24 N. H. 489; *Strickler v. Todd*, 10 S. & R. (Pa.) 63; 13 Am. Dec. 649; *Babcock v. Utter*, 1 Keyes (N. Y.) 428; *Wetmore v. White*, 2 Cal. Cas. (N. Y.) 87; 2 Am. Dec. 323; *Burr v. Mills*, 21 Wend. (N. Y.) 290; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *Tabor v. Bradley*, 18 N. Y. 113; 72 Am. Dec. 498; *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Le Roy v. Platt*, 4 Paige (N. Y.) 77; *Matteson v. Wilbur*, 11 R. I. 545; *Washburn, etc., Mfg. Co. v. Salisbury*, 152 Mass. 346; *Tucker v. Jewett*, 11 Conn. 311; *Central R. Co. v. Valentine*, 29 N. J. L. 561. See also MILLS, vol. 15, p. 494.

And the grant of a mill privilege will operate to convey the land occupied for the purpose and necessary to the enjoyment of the same.¹

Easements as appurtenant exist by implication only by reason of a necessity to the full enjoyment of the property granted, and a mere convenience is not sufficient.²

In *Kilgour v. Ashcom*, 5 Har. & J. (Md.) 82, where in the division of an estate a mill was allotted to B, the dam of which covered a portion of the land allotted to C, it was held that B had a right to use the mill and dam in the same way and to the same extent as they had been used by A in his life time.

In *Elliot v. Shepherd*, 25 Me. 371, an owner of two mills, a shingle mill and a grist mill, upon the same dam, sold the shingle mill to the defendant, with the privilege of using only the surplus water over that required for the grist mill, and afterward sold the grist mill and an upper pond, which he owned, to the plaintiff, who, when there was no water in the lower pond for the shingle mill, but more than enough in both ponds for the grist mill, refused to let down the water from the upper pond. It was held that the defendant had a right to the whole water power or head of water, as it was when purchased, and that the owner might grant the right to draw water from such head without conveying any title to the dams or lands on which they had been erected.

But in *Preble v. Reed*, 17 Me. 169, a distinction was made between a grant and a reservation of a mill site. It was held that where the owner of land flowed by a mill dam, sold the mills and dam, and retained the land, the right to flow the land to the extent it was then flowed, without payment of damages, passed by the grant; but where the owner sold the land flowed and retained the mills and dam, without reserving the right to flow, he was not protected from the payment of damages.

The conveyance of a "mill privilege" bounded by the high water of a dam or pond does not convey the right to raise the dam to the designated mark. The dam must not cause the water to rise above the mark in an ordinary state of the stream, though in that state it was ordinarily swollen by the waters of a reservoir not owned or controlled by the grantee of the privilege. *Brady v. Blackington*, 113 Mass. 238. But the grantee will not be liable for a rise of

the water beyond the mark, due to extraordinary conditions produced by floods or freshets. *Thatcher v. Baker*, 109 Pa. St. 22.

A grant of land bounding on or near a pond and stream, reserving the mill and water privilege, is a reservation of the right of flowing the land as far as is necessary or convenient, or so far as has been usual to flow it. *Pettee v. Hawes*, 13 Pick. (Mass.) 323.

Implied Reservation.—In explaining a deed, the intention of which was to convey to the grantee as much of the privilege of the water as should be sufficient for the use of a fulling mill, whenever there was a sufficiency therefor, was held to be a reservation of the surplus water. *Sprague v. Snow*, 4 Pick. (Mass.) 54.

Grant of State Lands.—A grant by the state, of lands on which there is a mill site but no mill or dam, will not authorize the grantee to erect a dam so as to flow adjoining lands to the injury of subsequent purchasers from the state, unless this privilege is expressly reserved in the grant. *Colvin v. Burnet*, 2 Hill (N. Y.) 620.

1. *Farrar v. Cooper*, 34 Me. 394; *Moore v. Fletcher*, 16 Me. 63; 33 Am. Dec. 633; *Blake v. Clark*, 6 Me. 436; *Whitney v. Olney*, 3 Mason (U. S.) 280.

In *Gibson v. Brockway*, 8 N. H. 465; 31 Am. Dec. 200, in a conveyance under the clause, "a certain tenement being one-half of a corn mill," it was held that the land on which the same was situated passed, together with that portion of the water privilege essential to the use of the mill.

In *Russell v. Scott*, 9 Cow. (N. Y.) 279, the reservation, in a lease, of all water-courses on the demised premises suitable for the right of erecting mills and other works thereon, with three acres of land adjoining thereto, was held to give the lessor a right to all the mill seats, together with the three acres on the demised premises, whenever he chose to make a location. It was held to be the same as reserving all the mill seats of the demised premises with the three acres.

2. *Ogden v. Jennings*, 62 N. Y. 526; *French v. Carhart*, 1 N. Y. 96; *Oakley*

Under a grant of a mill site where mills are standing, or the terms of which indicate that it is the intention of the grantee to construct such, he may appropriate the privilege, at pleasure, to any purpose, with the right to change the purpose whenever he may choose.¹

The grant of a plenary use of the whole body of the stream for any useful purpose does not authorize the grantee, or those claiming under him, maliciously or unnecessarily to throw away the unused water for the mere purpose of depriving the grantor of the use of it.²

The grantor of a water privilege may restrict the purpose for which it is to be used, and when restricted it can be exercised for no other purpose than that prescribed.³

But a grant or reservation of water for a special business, or of

v. Stanley, 5 Wend. (N. Y.) 523; *Le Roy v. Platt*, 4 Paige (N. Y.) 77; *Kent v. Waite*, 10 Pick. (Mass.) 138; *Forbush v. Lombard*, 13 Met. (Mass.) 109; *Kieffer v. Imhoff*, 26 Pa. St. 438.

One who hires a tan yard and bark mill has the right to what is necessary to the enjoyment of the privilege, but not what is merely a convenience, as the right to throw the contents into the stream, and to put his waste on the lessor's land. *Howell v. McCoy*, 3 Rawle (Pa.) 256.

Rights in Artificial Channel on Land Granted.—A purchaser of land through which water flows in an artificial channel constructed for hydraulic purposes, does not thereby impliedly acquire the right to draw the water from such channel, and can acquire it only by grant or arrangement with the owner, or some other method recognized by law. *Fox River Flour, etc., Co. v. Kelley*, 70 Wis. 287.

1. *Deshon v. Porter*, 38 Me. 289; *Ashley v. Pease*, 18 Pick. (Mass.) 268; *Miller v. Lapham*, 46 Vt. 525.

A proprietor of two mills on the same stream, one below the other, directed, in his will, in providing for the sale and conveyance by his executors, that in time of low water the two mills "should have an equal use of the water alternately." It was held that it was not necessary to the ascertainment of the equality of the water, that the lower mill should be of the very kind or capacity of the mill existing at the date of the will; and that the erection of an axe factory, by the owner of the lower mill, did not prejudice his right to an equal quantity of the water of the stream. *Cress v. Varney*, 17 Pa. St. 496.

2. *Paschall v. Passmore*, 15 Pa. St. 295.

3. *Shed v. Leslie*, 22 Vt. 498; *Darlington v. Painter*, 7 Pa. St. 473; *Mandeville v. Comstock*, 9 Mich. 536; *Clement v. Gould*, 61 Vt. 573; *De Witt v. Harvey*, 4 Gray (Mass.) 486.

In *Para Rubber Shoe Co. v. Boston*, 139 Mass. 155, where the inhabitants of the town were authorized to take water from a stream for all ordinary domestic and household purposes and for the generation of steam, it was held an unlawful exercise of their privilege for the corporation to take it for generating steam and for grinding, washing, and cooling rubber.

In *Hathaway v. Mitchell*, 34 Mich. 164, it was held that though a flowage for a paper mill was not justified by a right to flow for a sawmill, or gristmill, equity would not abate the dam, since the flowage might at any time be made lawful.

Pollution.—In *Chadwick v. Marsden*, L. R., 2 Exch. 285, it was held that a reservation of "the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised, in and through the sewers and watercourses made and to be made, etc.," extended to the water and soil coming from such lands and buildings from the ordinary use of the land as for habitation, but did not give the occupier of certain tan pits, who claimed under the lessor, a right of passage for the refuse of those pits.

In *Washabaugh v. Oyster*, 18 Pa. St. 497, the facts were as follows: The owner of land and of water power, on which there was a grist and sawmill,

water power sufficient to propel certain specified machinery, confers a right to a quantity of water which is reasonably necessary to carry on such business, or operate such machinery at all seasons of the year, in the same condition in which the business or machinery was at the time of the grant, and is not limited to the purposes for which it was first used,¹ unless expressly so limited

conveyed to another a part of the ground which had no water running on it, with the privilege of conveying water from the stream to the land for one wheel, but provided that the grantee was not to build certain specified mills; and further provided, however, that the mills of the grantor, or any other that he should think proper to build in lieu of the sawmill, did not take more water than was necessary for a flutter wheel of specified capacity. In an action by the plaintiff, who claimed under the grantor, it was held that, if the water used by the defendant in carrying on a mill not authorized by the grant was only that which was suffered to escape from the plaintiff's dam and could not be reclaimed, the plaintiff could not recover damages for using the same, but could prevent the defendant from operating the mill not authorized by the grant.

1. *Hall v. Sterling, Iron, etc., Co.*, 74 Hun (N. Y.) 10; *Hartwell v. New York Mut. L. Ins. Co.*, 50 Hun (N. Y.) 497; *Borst v. Empie*, 5 N. Y. 33; *Terry v. Smith*, 47 Hun (N. Y.) 333; *Comstock v. Johnson*, 46 N. Y. 615; *Groat v. Moak*, 94 N. Y. 115; *Fisk v. Wilber*, 7 Barb. (N. Y.) 395; *Loverin v. Walker*, 44 N. H. 489; *Johnson v. Rand*, 6 N. H. 22; *Dewey v. Bellows*, 9 N. H. 282; *Davis v. Muncey*, 38 Me. 90; *Warner v. Cushman*, 82 Me. 168; *Hammond v. Woodman*, 41 Me. 177; 66 Am. Dec. 219; *Blake v. Madigan*, 65 Me. 522; *Hanna v. Clarke*, 31 Gratt. (Va.) 36; *Doan v. Metcalf*, 46 Iowa 120.

Where a grant was made to the owners of a mill of a right to draw water from a race sufficient to propel four three hundred pound engines, with all the machinery necessary for making paper, it was held that it was a grant of a quantity of water sufficient to perform the required work with the machinery in use at the mill at the time the grant was made, and the grantees were not restricted to such quantity as, with improved machinery and facilities, would perform the same work. *Griswold v. Hodgman*, 4 Thomp. & C. (N. Y.) 325.

Where a grantor, the owner of water power on both sides of a stream, conveyed a sawmill thereon, "with the right of use of all water not necessary in driving the wheel, or its equal, now used to carry the machinery in the shingle mill, meaning to convey the right to all the surplus of water not required for the shingle mill or other equal machinery," and it appeared that, at the time of the conveyance, the shingle mill contained various other machinery beside the shingle machine, it was held that the parties thereby fixed the measure of the water not conveyed, and that its use was not confined to the specific purpose of driving the shingle machine. *Warner v. Cushman*, 82 Me. 168.

In *Olmsted v. Loomis*, 9 N. Y. 424, it was held that a reservation in a grant of a water privilege, of "so much water as is necessary for the use of a forge and two blacksmith bellows," did not limit the use of the water reserved to the sole object specified, but that the reference was merely to the measure of the quantity of the water.

In an action against the lessee for appropriating more water to his use than was granted by the lease, where the owners of a water privilege leased so much thereof as the lessee might want, except when the whole quantity of water should be insufficient to carry the lessor's mill, and a cotton factory which might be erected, with not more than five thousand spindles, it was held that the true intention of the reservation was, that water should at all times be left sufficient to carry five thousand spindles, which the lessor might apply to what use he pleased. *Biglow v. Battle*, 15 Mass. 313.

In *Wakeley v. Davison*, 26 N. Y. 387, a grant of a privilege of water "sufficient to carry a trip hammer in said blacksmith shop, when the same is not wanted by the parties of the first part, their heirs, etc., for carding machines and fulling mill, said water to carry said trip hammer to be taken out to the best advantage," did not limit the purpose to which the water was to be

by the terms of the grant, or by the intention of the parties.¹ And

applied, but the quantity to be taken. And on the other hand, the quantity of water reserved for carding and fulling purposes might be used for any other manufacturing purposes.

In *Cromwell v. Selden*, 3 N. Y. 253, a grant of "water sufficient to keep a sawmill in operation at all times, when there is more than is wanted to drive a gristmill with three run of stone, one set of carding machines, and picker, and fulling mill, and other machinery for dressing cloth," did not restrict the grantee in the use of the water to the particular objects mentioned in the deed; but it was held that he might use the quantity reserved for any other purpose.

In *Terry v. Smith*, 47 Hun (N. Y.) 333, it was held that a grant of gristmill property and water power, including the right to the use of the water as "then used," is a limitation of quantity only, and the grantee may substitute a new wheel that uses no more water than the old one.

In *Mudge v. Salisbury*, 110 N. Y. 413, where there was a conveyance of a gristmill, "together with the gristmill privilege, being the first on the stream for two run of stone, with the necessary apparatus for the same," it was held that the grant was not limited to power for the gristmill as it stood at the time of the conveyance, but that the water privilege was made appurtenant to the land conveyed, and could be used either for the mill then standing, or for any other erected on the land, or for any other purpose.

Where the plaintiff owning a mill seat, and the land and mills on each side of the stream, conveyed an undivided half of the land and mills on one side to the defendant, and afterward conveyed the other half of that land, describing it, to another, "with one undivided half of the buildings thereon, with a privilege to draw the water from said sawmill pond sufficient for one tub wheel, at all seasons of the year," it was held that the quantity must be governed by the amount required to propel the tub wheel before used to run the mill, although, at the time of the conveyance, the wheel had been carried away by a freshet, and had not been restored. *Loverin v. Walker*, 44 N. H. 489.

The owners of a mill pond executed a deed to the owners of a gristmill

situated below, and supplied by, a race way from the pond, in which, after reciting the fact that the grantees and those under whom they held title "had been accustomed to take water from the pond for operating their said gristmill," conveyed to them, their heirs and assigns, "the right, at all times hereafter, of taking and using the water from said pond for operating any other mill which shall be hereafter erected upon the site of their present gristmill, to the same extent that they now have a right to do, or have been accustomed to do, for the operating of their said gristmill." It was held that the effect of the grant was not merely to extend to the new mill, that might be substituted for the gristmill, the rights already existing, as such, with regard to the gristmill, but to give the grantees a right to all the use of the water to which they and their grantors had been accustomed, without reference to the question whether such customary use had ripened into a right. *Avon Mfg. Co. v. Andrews*, 30 Conn. 476.

In *Howe Scale Co. v. Terry*, 47 Vt. 109, the covenant that "in case that there is not at any time a full supply of water for the simultaneous operation of the works connected with the dam, a gristmill shall draw its requisite quantity of water exclusive of all other works," was held to convey, not merely a right to use the water exclusively in the manner and for the time it was then accustomed to be used, but a right to use the water in quantity as then used, and for such length of time during the season of scarcity as the custom and and business of the mill might require.

Water for a Certain Business.—A conveyance of a tannery and the right to draw water sufficient to carry on the business of tanning, and "the privilege of using more water when there shall be waste water," transfers the right to use a quantity, the power of which may be used for any other purpose. *Covel v. Hart*, 56 Me. 518.

A deed of a tract of land with a right to take water, reserving "sufficient water at all times to work" the tannery wheels "as now used," was held to reserve the quantity actually used by the tannery at the time of the execution of the deed. *Wyman v. Farrar*, 35 Me. 64.

1. See *Clement v. Gould*, 61 Vt. 573;

under a grant of the use of water for a certain purpose, with a prohibition against certain uses specified, the water may be used for any purpose not prohibited.¹

Where, from the terms of the grant, it is left doubtful whether the kind of mill or particular machinery mentioned indicates the quantity of water, and measures the extent of the power intended to be conveyed, or is referred to as limiting the use to a particular kind of mill or specified machinery, the former construction will be adopted as being more favorable to the grantee, and for the general interests of the public.² But it has been held that when a right to use water for a specific purpose is granted, without being appurtenant to a grant of land, the presumption is strong that the grant is intended to be limited to the purpose named.³

Tyler v. Hammond, 11 Pick. (Mass.) 193.

Under a grant of water for the use of a certain tract, "to be conducted where it formerly was," where there was evidence that the former use was for a small turning mill on that tract, it was held that the grant was limited and could not be construed to warrant the diversion of the stream away from both tracts for railroad purposes a mile distant, and not at all for the purposes of the tract for which it was granted. *Pennsylvania R. Co.'s Appeal*, 125 Pa. St. 189.

In *Strong v. Benedict*, 5 Conn. 210, there was a grant of land, "with the privilege of building a mill for the purpose of fulling cloth, . . . together with the privilege of drawing so much water as would be necessary to carry or draw a good, well-built, overshot fulling mill, at any time when the grantee shall have occasion to use said fulling mill." It was said that the fact that it was stated that the grantee was to have as much water as was necessary "when he should have occasion to use the fulling mill," was a limitation of the use as well as of the quantity. This, however, was not necessary to the decision of the case, as it was clear, from the condition and situation of the parties, and other facts known to them at the time, that it was clearly intended that the use of the water, as well as the quantity, should be restricted.

In *Ashley v. Pease*, 18 Pick. (Mass.) 268, there was a grant of a water privilege for a fulling mill, the grantor covenanting that when there should be a sufficiency of water to carry on all the mills then standing, he would per-

mit him to draw from the flume "so much water as might be necessary to carry and supply the fulling mill of the grantee which now stands, or which may hereafter stand, on the same spot," but that when there was not a sufficiency, he was to draw water for the use of his mill or mills twelve hours in the day and no more. The grantee covenanted that he would not use or occupy the fulling mill or any other mill thereafter standing in the same place, so as to interfere with the working of the grantor's mill or any other building or mill which he might erect. It was held that it was clearly the intention of the parties that the grantee should be limited to the use of the water granted for driving the fulling mill, and that the use of the water for any other purpose was not authorized, the grantee having covenanted not to obstruct or interfere with the grantor's mill, except by drawing water to carry and supply his fulling mill.

1. *Izard v. Mays Landing Water Power Co.*, 31 N. J. Eq. 511.

2. *Tourtellot v. Phelps*, 4 Gray (Mass.) 370; *Ashley v. Pease*, 18 Pick. (Mass.) 268; *Pratt v. Lamson*, 2 Allen (Mass.) 275; *Hines v. Robinson*, 57 Me. 324; 99 Am. Dec. 772; *Covel v. Hart*, 56 Me. 518; *Carleton Mills Co. v. Silver*, 82 Me. 215; *Deshon v. Porter*, 38 Me. 289.

The use of a mill privilege purchased from the owner of a lower privilege on the same stream, is not regulated by the use made of it before such purchase, but by what is reasonable and proper, conformably to the wants and usages of the community. *Haskins v. Haskins*, 9 Gray (Mass.) 390.

3. *Garland v. Hodsdon*, 46 Me. 511.

The extent of a grant of water is sometimes measured by the quantity of water which will pass through a given aperture under a certain head or pressure.¹ Such a grant is a grant of a certain quantity of water, and not of a certain power, but the power to be used is measured by what can be produced by the specified amount of water granted.² In the absence of any specification as to the pressure, none will be construed to be in the deed unless clearly so intended.³

4. Covenants—Real.—A covenant as to water rights and privileges which relates to and is for the benefit of the land, where there is privity between the contracting parties, is said to run with the land, and may be enforced by each successive assignee.⁴

1. *San Diego Flume Co. v. Chase*, 87 Cal. 561; *Read v. Erie R. Co.*, 97 N. Y. 342; *Bardwell v. Ames*, 22 Pick. (Mass.) 333; *Chesapeake, etc., Canal Co. v. Hill*, 15 Wall. (U. S.) 94; *Norris v. Showerman*, 2 Dougl. (Mich.) 16; *Bissell v. Grant*, 35 Conn. 288.

The grant of one hundred and fifty square inches of water for propelling machinery, to be furnished on the premises conveyed, and to be taken by the grantee "at the side thereof," at an opening or openings between the bottom and top of the race, provided no more water be taken at the said opening or openings than would be discharged at a point as low as the surface of the river "at the said premises, by an aperture of 150 square inches," was held to convey the right to use, not as much water as would flow into the open space through an aperture of 150 square inches as low down as the surface of the river, without reference to the manner of taking it, but only as much as would naturally flow through an opening of 150 square inches at the side of the main race, as low as the surface of the river. *Blanchard v. Doering*, 21 Wis. 484.

2. *Palmer v. Angel*, 69 Hun (N. Y.) 471.

3. In *Gray v. Saco Water Power Co.*, 85 Me. 526, where a right to use as much water out of a pond as would pass through a hole ten inches square was granted, it was held that so long as the water in the dam was not drawn down so low that it did not, at any and at all times, fill the entire aperture, the grantee had all the water he bargained for, and that, in the absence of any provision for any specific head of water in the pond, it could not be construed into the deed.

But in *Chesapeake, etc., Canal Co.*

v. Hill, 15 Wall. (U. S.) 94, under a lease from the canal company of the right to draw "so much water as would pass through an aperture of 200 square inches, to be used solely for propelling the machinery of a paper mill and appurtenant works, the lower edge of the aperture not to be nearer the bottom than two feet," it was held that the quantity of the water was to be ascertained from the character and depth of the canal, the circumstances under which the water was to be drawn, and the state of things existing at the time the grant was made, and that, although no head of water was mentioned in the lease, it was to be presumed that the parties contracted in reference to such head as depending upon the usual depth and height of water in the canal. But in this case the fact that the water leased was to be appropriated to a purpose specified in the lease helped this conclusion.

Pipes.—Where the quantity is regulated by the size of the pipe through which it is drawn, the amount is limited to so much as will run through the pipe without increasing its head. *Stevenson v. Wiggin*, 56 N. H. 308.

4. See *REAL COVENANTS*, vol. 19, p. 1004. For illustration of covenants running with the land, see *Manderbach v. Bethany Orphan's Home*, 109 Pa. St. 231. A covenant to repair a tail race leading from the mill of the covenantor over the land of another, in consideration of the grant of the right to make the race and use it for the purpose of a mill, creates an obligation which passes it, and rests upon everyone to whom the mill may be transferred. *Carr v. Lowry*, 27 Pa. St. 257.

A covenant to repair a canal built for the purpose of draining the lands of the parties to the covenant binds

There must be privity between the contracting parties, in order that the covenant may run with the land.¹ But it has been held that the character of the covenant depends upon the effect of the entire agreement, of which it is a part, and that where the benefit and the burden are so inseparably connected that one is necessary to the existence of the other, they must go together.²

the subsequent assignees. *Norfleet v. Cromwell*, 64 N. Car. 1.

A covenant by a railroad company to build its track above the overflow of a river, in consideration of a grant of the right of way over it, is a covenant which runs with the land. *St. Louis, etc., R. Co. v. O'Baugh*, 49 Ark. 418. See also *Peden v. Chicago, etc., R. Co.*, 73 Iowa 328; 5 Am. St. Rep. 680.

A covenant in a grant of a mill site not to let or establish any other site on the same stream to be used for the purpose for which the mill was made, was held to be a covenant running with the land, for a breach of which an action might be sustained by the assignee. *Norman v. Wells*, 17 Wend. (N.Y.) 136.

In *Congleton v. Pattison*, 10 East 130, it was held that a lease of ground, with full liberty to make a watercourse and erect a mill, in which there was a covenant not to hire certain persons to work in the mill, did not run with the land and bind the assignee. Lord Ellenborough said: "The covenant in question does not affect the thing demised immediately, but only, if at all, in respect of collateral circumstances; that is, through the medium of an increased population, and the increased expense of providing for them, on the one hand, with the increased value of the lands to be set against it on the other hand. . . . The covenant, therefore, not directly affecting the nature, quality, or value of the thing demised, nor the mode of occupying it, is a collateral covenant, which will not bind the assignee of the term, though named."

In *Wheelock v. Thayer*, 16 Pick. (Mass.) 68, it was held that a conveyance of a privilege of drawing water not being a conveyance of land, a covenant respecting this privilege could not be said to run with the land, and could not be enforced in an action by an assignee.

Personal Right.—Where a grantee of a mill and appurtenances reserved the right of "shipping his own logs free of toll," it was held to be a person-

al right merely, and not assignable. *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525.

1. *Lyon v. Parker*, 45 Me. 474. In *Hurd v. Curtis*, 19 Pick. (Mass.) 459, where the parties owning independent estates entered into covenants with each other as to the kind of wheels they should use in their respective mills, it was held that there was no privity of estate between the parties to the indenture; consequently, the covenant did not run with the land and bind the grantee of the mills. See also *Wheeler v. Schad*, 7 Nev. 204.

In *Lawrence v. Whitney*, 115 N. Y. 410, an agreement among purchasers, dictating by personal covenants the manner of using the property purchased, was held not to run with the land.

2. In *Horn v. Miller*, 136 Pa. St. 640, the parties to the contract, owning respectively adjoining lands on a stream, made an agreement, in settlement of an action between them for diverting water from one channel to the other, which provided that one, his heirs and assigns, should enjoy the water right or power for two wheels on any part of his land, and that the other, his heirs and assigns, should enjoy water to his mill only when there was a surplus. There was no privity of estate between the contracting parties, but the covenants, being in adjustment of their respective rights to the use of the water, were held to be mutual benefits to, and not as burdens upon, the lands of either, and to run with the land. *Clark, J.*, said: "We are of opinion that covenants run with the land, and define the rights, not only of the parties thereto, but of their respective heirs and assigns. To the general rule that between the covenantor and the covenantee there must be such privity of estate as would formerly have given rise to the rule of tenure, there are in this state, and perhaps in some of the other states, well recognized exceptions. Covenants capable of running with an assignment of a present estate in land may, it seems,

A covenant by a lessor, or by one of the owners of two adjacent premises, to supply the lessee or other owner respectively with water, will pass to a subsequent assignee from the covenantee, who may make it the foundation of a suit in his own name against the covenantor.¹

A mere right of election conferred by a deed, when not coupled with an interest, does not run with the land, and is not descendable.²

5. Construction.—The ordinary rules of construction are to be invoked in ascertaining the extent of rights acquired by grant or contract, when the terms of the instrument are ambiguous.³ But the grant of a water privilege cannot be modified by any of

have that capacity in certain cases, although no estate passed between the covenantor and the covenantee at the time of covenant made. The obligation of contract is, in general, limited to the parties making them; where privity of contract is dispensed with, there must ordinarily be privity of estate; but justice sometimes even requires that the right to enjoy such contracts should extend to all who have a beneficial interest in their fulfilment, not to impose a burden upon an ignorant innocent third person, but to enable purchasers of land to avail themselves of the benefit to which they are in justice entitled."

In *Campbell v. Hand*, 49 Pa. St. 234, where, by written agreement, the owners of land on opposite sides of the river agreed to build and keep in repair a dam for the use of their respective properties, and the mill and interest in one of them was sold by execution on a judgment entered into before the agreement was made, it was held that the sheriff's vendee and his assignees, by claiming and receiving the benefit of the dam according to the terms of the original contract, made themselves liable to the other owner for contribution for their portion of repairs.

In *Lindeman v. Lindsey*, 69 Pa. St. 93; 8 Am. Rep. 219, where the owners on both sides of the stream agreed jointly to erect a dam, each to have the use of one-half of the water, covenanting for themselves, their heirs, and assigns, to repair and rebuild, it was held that the covenant ran with the land, the dam being constructed for the mutual benefit and advantage of the parties, with direct relation to the enjoyment and use of the land. The dam could not be built except by mutual consent. *Sharswood, J.*, said: "When, therefore, they

enter into an agreement to erect such a dam, with a covenant for themselves, their heirs and assigns, to repair or rebuild it if necessary, it is not a personal covenant merely, but runs with the lands of the respective proprietors, and the stipulations contained in such agreement, in respect to the enjoyment of the water power created by the dam, form the basis of their respective rights." See also *Jamison v. McCredy*, 5 W. & S. (Pa.) 129.

1. *Jourdain v. Wilson*, 4 B. & A. 266; *Sharp v. Waterhouse*, 7 El. & Bl. 876; 90 E. C. L. 815; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Shaber v. St. Paul Water Co.*, 30 Minn. 179. And see *Spencer's Case*, 1 *Smith's Lead. Cas.* 225.

2. In *Vandenburgh v. Van Bergen*, 13 Johns. (N. Y.) 212, a sawmill, with the ground and stream of water thereto belonging, was granted to B, and also the full liberty and license to erect and build another mill on any other place, at or on the same creek, with like liberty of ground and stream of water. It was held that although B, in his lifetime, might have erected a mill on the creek, yet never having elected a place for a mill or exercised his right, it became extinct at his death, and the right could not be claimed or exercised by his heirs or assigns.

3. See *INTERPRETATION*, vol. 11, p. 507.

As illustrating the construction of grants under a particular state of facts, the following may be consulted: *Ely v. Stewart*, 2 Md. 408; *Dewey v. Belows*, 9 N. H. 282; *Winnipisseege Lake Cotton, etc., Mfg. Co. v. Perley*, 46 N. H. 83; *Moore v. Sinks*, 2 Ind. 257; *City Power Co. v. Fergus Falls Water Co.* (Minn. 1893), 56 N. W. Rep. 685; *Wamesit Power Co. v. Ster-*

the rules of construction, when the intention of the party is clearly expressed in the language used.¹

As in the case of other deeds, both grant and reservation are to be construed most favorably to the grantee.² But the grant of a water privilege will not be construed so as to interfere with the rights of established mills, if such construction can be avoided.³

A grant of a "watercourse," as such, is merely the creation of an easement, a right to the flow of the water, and does not transfer the bed of the stream, unless such an intention can be gathered from the context.⁴ And the grant by the legislature of an exclusive right to the waterpower of a navigable stream, does not

ling Mills, 158 Mass. 435; Alhambra Addition Water Co. v. Mayberry, 88 Cal. 68.

The extent of an exception in a deed conveying mills and water privileges, of "the privilege of one-half of the bark mill owned by" certain third persons, is to be determined by ascertaining the extent of the title which such third persons had to the water at the time for the use of the bark mill. Rogers v. Bancroft, 20 Vt. 250.

The grant of "a full and perfect right to flow all land belonging to" the grantors "situated in" a certain town "and adjoining the Brown brook, so-called, meaning, nevertheless, to grant no right of flowage which would injure or affect the privilege of the Philpot mill, so-called," was held to convey the right to flow such only of the grantors' lands there, as would be flowed by a dam so constructed as not to interfere with the Philpot mill privilege: as it existed at the date of the grant. Webster v. Holland, 58 Me. 168.

Interruptions—Implied Conditions.—

The grant of a water power is subject to a qualification as in a case of occasional interruptions. For instance, should a party having possession of a manufactory, with a water power only, stipulate with another having adjoining premises, to furnish these premises with water power during all regular working hours for several years, without exception, it is to be presumed that they know that such power may be, and must of necessity be, interrupted occasionally; as, on a few very cold days in winter, ice will so clog the wheel that it will take several hours to clear it, or by freshets, which may carry away a gate which it will take a few days to replace; and the covenants, though in general terms, are to be taken with these necessary and implied exceptions.

Mill Dam Foundry v. Hovey, 21 Pick. (Mass.) 417.

Dam.—The term dam in a reservation was held to be construed as including the flume, or as being of equivalent import. Kennedy v. Scovil, 12 Conn. 317.

"Free From Interference or Detention."

—A grant of a mill site and a right to the use of the water of a river for the purpose of operating the mill, and "also the right to perpetually use the water from the said dam and canal free from charge or rent, or from interference, or detention," does not, in effect, convey the use of all the water in a regular flow, nor in its natural condition, uninterrupted or unaffected by the reasonable use of the stream above, but the grant must be construed as subject to the reasonable use of the stream by the grantor, giving to each party a community right to the use of the water, but leaving the question of what constitutes a lawful or reasonable use to be settled by general principles of law, independent of a grant. Red River Roller Mills v. Wright, 30 Minn. 249; 44 Am. Rep. 194. See also Merritt v. Brinkerhoff, 17 Johns. (N. Y.) 306; 8 Am. Dec. 404.

1. Deshon v. Porter, 38 Me. 289.

2. Darling v. Crowell, 6 N. H. 421; Emery v. Three Rivers, 78 Mich. 438; Cocheco Mfg. Co. v. Whittier, 10 N. H. 305.

3. Miller v. Shenandoah Pulp Co., 38 W. Va. 558.

4. A grant of a river, *eo nomine*, will not pass the soil of the river or an island within it. Jackson v. Halstead, 5 Cow. (N. Y.) 216.

In Egremont v. Williams, 11 Ad. & El. N. S. 688; 63 E. C. L. 687, the lease contained a grant of waters and watercourses, excepting to the lessor "a watercourse flowing or descending from

pass a title to the body of the water, nor prevent its use for the ordinary purposes of life.¹ On the other hand, a grant of water flowing in a stream is not limited to the water as it is at the instant of the execution of the deed, but clearly means a right to the water thereafter flowing.²

When the terms of a grant are general or indefinite, so that the construction is uncertain and ambiguous, the acts of the parties contemporaneous with the grant, giving a practical construction to it, should be deemed to be the true interpretation of the intent of the parties.³

a head weir . . . for watering and improving the same and other lands of" the lessor. It was held that the lease did not except the channel over which the water flowed, but only subjected it to the easement. Coleridge, J., said: "Without saying that a watercourse may never mean a channel in which the water flows, it certainly may mean, also the stream or flow of the water itself; whether it means one or the other, in any instrument, will very materially depend upon the context. And, in the case before us, it appears to us that that which flows through the lands named, for the purpose of watering them and other specified lands, must be taken to be the water itself and not the channel through which it flows."

In *Taylor v. St. Helens*, 6 Ch. Div. 264, there was a grant to a company of all the watercourses, dams, and reservoirs upon certain lands — which watercourses, dams, and reservoirs were laid down upon an annexed plan, which was to be taken as a part of the deed—with the right for the company to take and use the water from the said springs or streams of water, watercourses, dams, and reservoirs. The right was reserved to the grantor to use the waste or overflow water, providing its exercise did not interfere with the rights of the company. The property indicated on the annexed plan consisted of an artificial watercourse partly covered, with dimensions specified in the plan. This watercourse, it appeared, was large enough to carry off the water which flowed into it except after heavy rains. The grantees having occasion for more water, proceeded to enlarge the channel of this watercourse. It was held that the grant was of the artificial channel, of the definite springs and streams on the land, and of such other water as should find its way into and run down the channel,

and that the grantee had no right to alter the levels or enlarge the channel so as to enable the company to carry off the water which ran into it at the time of heavy rain. Jessel, M. R., said: "A grant of a watercourse in law, especially when coupled with other words, may mean any one of three things. It may mean the easement or the right to the running of water, it may mean the channel pipe or the drain which contains the water, and it may mean the land over which the water flows. Which it does mean must be shown by the context, and if there is no context I apprehend that it would not mean anything but the easement, a right to the flow of the water. . . . I think that in this case the word watercourse means a corporeal hereditament, and not merely an easement or right to the running of water, and that it bears the second meaning, that is, the channel through which the water runs, the pipe or drain which, so to say, contains the water."

1. *Philadelphia v. Spring Garden*, 7 Pa. St. 348.

2. *Doyle v. San Diego Land, etc., Co.*, 46 Fed. Rep. 709.

3. In *Jennison v. Walker*, 11 Gray (Mass.) 423, this rule of construction was applied to the right to lay an aqueduct from a spring, granted in general terms. Bigelow, J., said: "Where an easement in land is granted in general terms, without giving definite location or description to it, so that the part of the land over which the right is to be exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate, without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised and fixed in definite course, with the full acquiescence and consent of both parties, it cannot be changed

VI. RIGHTS OF TENANTS IN COMMON.—Water rights and easements may be held by tenants in common as other rights and property;¹ and when so held, a partition may be effected by mutual agreement between the cotenants, or in the manner provided by law.²

at the pleasure of the grantee." See also *Marsh v. Haverhill Aqueduct Co.*, 134 Mass. 106; *Prentiss v. Wood*, 118 Mass. 589.

In *Barret v. Hosmer*, 1 Root (Conn.) 271, it was held that where an ancient grant was made to erect a mill and raise a dam without limitation, a long course of practice will determine the construction of the grant. See also *Davidson v. Fowler*, 1 Root (Conn.) 358.

In *Onthank v. Lake Shore, etc.*, R. Co., 71 N. Y. 194; 27 Am. Rep. 35, *affirming* 8 Hun (N. Y.) 131, under a grant of right to enter upon the grantor's land and lay a water pipe, without specifying the place or size of the pipe, it was held that after the grantee had once laid the pipe, he could not increase the size, or lay it in another place.

Use Not Limiting Grant.—A deed of "two undivided ninth parts of the aqueduct and spring of water, with full liberty to take said portion of water from said premises," was held to convey, not the right to take the said portion of water from the aqueduct, but a portion of the spring, with the privilege of taking the water by other means than the aqueduct. The fact that the grantors had always taken their portion of the water from the aqueduct did not limit the grant. *Arnold v. Farr*, 61 Vt. 444.

1. *Bradley v. Harkness*, 26 Cal. 69.

In *Kimball v. Gearhart*, 12 Cal. 27, *Baldwin, J.*, said: "It is true that the mere right to water is a sort of incorporeal thing; but the water itself is substantial and tangible, and as the right gives the control and possession of this commodity, and entitles the party to damages for its diversion by another, we do not see why this right cannot be acquired by two or more acting together, or why, when they do acquire it, they do not hold it as other property and may not sue for an unlawful interference with it."

Persons separately appropriating the waters of a stream, and severally using the same under certain regulations as to the time and manner of such use, are tenants in common, and each of them may maintain an action to enjoin a trespasser from diverting any part of

the water thus appropriated. *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447.

When landowners have entered into covenants defining and securing their respective rights in the use of the water of a stream, their agreement is equivalent to a grant, and, as in other cases of grants and easements, the proper remedy of one of the parties for a disturbance of his right by the other, and those claiming under him, is by an action of trespass, and not by an action of covenant. *Horn v. Miller*, 136 Pa. St. 640.

2. *Smith v. Smith*, 10 Paige (N. Y.) 470; *Doan v. Metcalf*, 46 Iowa 120; *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa 398; *Hansom v. Willard*, 12 Me. 142; 28 Am. Dec. 162; *Kennedy v. Scovil*, 12 Conn. 317.

Partition by Metes and Bounds.—In *Morrill v. Morrill*, 5 N. H. 134, in the partition of a mill site and mill privilege, distinct portions of the premises were assigned to some of the parties by metes and bounds, with the right of taking, within the river limits of the lands assigned to them respectively, so much water as would flow through a gateway of certain prescribed dimensions, together with a passageway or other portion of the premises not assigned to them.

In *Warren v. Baynes*, 2 Blunt's Amb. 589, *Lord Hardwicke*, in a case of partition of property, the principal value of which was the use of the water, directed such a partition. See *Smith v. Smith*, 10 Paige (N. Y.) 470.

The same effect is to be given to a judgment of partition of water privileges, as if the premises were conveyed by deed. So, where a partition was made of property on which there were mills, one mill being situated below the other on a stream running through the premises, and the commissioners allotted to one of the parties a certain portion of the premises on which the lower mill was situated, together with all the mills, machinery, etc., with water privileges belonging to the same, and allotted to the other party the residue of the premises, though at the time of the partition, and long before it, the

The partition need not be by metes and bounds, but where an actual partition cannot be made, there may be a partition in equity, either by apportioning the time and extent of the use, or by a sale of the right and a division of the proceeds;¹ and the latter

water raised by the lower mill flowed a portion of the premises on which the upper mill was situated; it was held that by the partition, the party to whom the lower mill was allotted acquired, not only the premises particularly described as allotted to him, but also the right to flow the lands of the other party in the same manner and to the same extent as they were flowed previous to the partition. *Hills v. Dey*, 14 Wend. (N. Y.) 206. See also *Clark v. Debaugh*, 67 Md. 430. See *supra*, this title, *Rights Acquired by Express Agreement*.

Partition by Deeds of Release—Mutual Covenants.—In *Hamilton v. Farrah*, 128 Mass. 492, where tenants in common of an estate, part of which was a mill privilege, made a partition thereof executing mutual deeds of release, which stipulated that neither the grantor, nor his heirs, nor any person claiming under him, "should claim any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof forever," it was held that there was an extinguishment of the privileges which could not be revived by the grantor or any one of the cotenants against the other. See also *Watrous v. Watrous*, 3 Conn. 373.

If the water in a stream be owned by two persons whose lands are on opposite sides, and they agree to erect mills on the lands of one and turn the whole stream to the mills, it is an appropriation of the water to the mills, and if they be held jointly or in common, a release of the right of one tenant in the mills will pass his rights in the water also. *Wetmore v. White*, 2 Cai. Cas. (N. Y.) 87; 2 Am. Dec. 323.

Implied Partition.—Where there were several mill privileges originally owned together, but afterward for a long series of years occupied by different persons in severalty, and from time to time transferred from one to another by deed, levy, or descent, it was held that a court was authorized to infer an ancient partition among the several proprietors, and a division of the water privilege into proportionate parts, as it had been used and occupied, excepting so much as may have been parted with

by common consent. *Munroe v. Gates*, 48 Me. 463.

In *Wisconsin*, there is a statutory proceeding for the settlement of rights between owners of water powers, or between the owners of any rights or interests therein. *Wisconsin Rev. Stat.*, § 149 *et seq.* As to the validity of this statute, see *Janesville, etc., Co. v. Ford*, 55 Wis. 197.

In a complaint for partition of water, it is sufficient to aver generally that several parties have certain interests therein, and the nature of such interests, without setting forth the history and evidences of their respective titles. *Spensley v. Janesville Cotton Mfg. Co.*, 62 Wis. 549. And it is sufficient as to the disagreement to state in the complaint that the parties are unable to agree and determine their rights. *Clark v. Stewart*, 56 Wis. 154.

Where a partition judgment has prescribed the method in which the respective parties interested in a water power shall use the water therefrom, the parties must abide by such method until it is changed by the court, and a use in a different manner, by one of the parties, may be enjoined. *Mulberger v. Koenig*, 62 Wis. 558.

1. *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9; *DeWitt v. Harvey*, 4 Gray (Mass.) 486; *Bliss v. Rice*, 17 Pick. (Mass.) 23; *Hansom v. Willard*, 12 Me. 142; 28 Am. Dec. 162; *Brown v. Turner*, 1 Aik. (Vt.) 350; 15 Am. Dec. 696.

In *Bliss v. Rice*, 17 Pick. (Mass.) 23, the plaintiff and defendant, being tenants in common of a mill on one side of a stream and of the mill dam and water power, occupied the mill alternately, in pursuance of a verbal agreement, each of them several days at a time, in proportion to his interest; and the defendant, being the owner of the land on the opposite side of the river, cut a channel from the mill pond above the dam, on his several land, and thereby conducted a portion of the water to drive the machinery on his several land. It was held that such alternate use of the common property was an equitable and legal division so long as the parol agreement should remain in force, and that each cotenant, during his turn, had a right

is the usual course adopted in the case of a partition of water conducted in ditches for mining purposes, and owned by tenants in common.¹

One tenant in common may maintain an action against his cotenant for diverting the water from the common mill for his separate purposes.² And generally, a court of equity will interfere and adjust the rights of the owners having equal interests in water rights.³

VII. ARTIFICIAL WATERCOURSES—1. In General.—The law relating to artificial watercourses is totally unlike that relating to natural streams. As was said in a leading case on the subject, there is no doubt that the right to the water of a river flowing in a natural channel through one's land, and the right to the water flowing to it through an artificial watercourse constructed on his neighbor's land, do not rest upon the same principle. In the former case, each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it; in the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.⁴

to use the whole of the water in such a manner as he pleased, doing no injury to the common property. The court refused to enjoin the defendant to fill up his channel, it not appearing to be injurious to the common property, or to desist from drawing water by it during his turn, but enjoined him against drawing water during the plaintiff's turn.

1. *McGillivray v. Evans*, 27 Cal. 92; *Lorenz v. Jacobs*, 59 Cal. 262.

2. *Blanchard v. Baker*, 8 Me. 255; 23 Am. Dec. 504; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91.

In *Odiorne v. Lyford*, 9 N. H. 502; 32 Am. Dec. 387, it was held that if one cotenant of land, upon which a mill is situated, erects a dam below, on the same stream, on his private estate, and thereby flows the common property to the injury of his cotenant, the latter may maintain an action against him.

3. *Bliss v. Kennedy*, 43 Ill. 67.

A court of equity has power to ascertain and determine, as between several proprietors of the waters of a natural stream, the extent of the respective rights of each in the waters therein flowing, to regulate the use thereof in such a way as to maintain equality of rights in the enjoyment of the property, and to enjoin a subsequent appro-

priator from interfering with the rights of the prior appropriators as ascertained and established by the court. *Frey v. Lowden*, 70 Cal. 550.

4. *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*, 6 Indian App. 33, 31 Moak 771. See also *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Nield v. London, etc., R. Co., L. R.*, 10 Exch. 4; *Sutcliffe v. Booth*, 32 L. J. Q. B. 136; *Greatrex v. Hayward*, 8 Exch. 291; *Wood v. Waud*, 3 Exch. 748.

In *Magor v. Chadwick*, 11 Ad. & El. 571, it was held that it was no misdirection to the jury to say "that the law of watercourses is the same whether natural or artificial." But in *Wood v. Waud*, 3 Exch. 748, it was said that this expression was to be considered as applicable to the particular case, and that as a general proposition it was too broad. In this latter case, it was held that the diversion of water from an artificial watercourse made for the purpose of drainage, by one through whose land it flows, is not unlawful as against the lower owner through whose land it also flows, or through whose land flows a natural watercourse into which it empties, as it is obvious that the enjoyment depends upon temporary circumstances.

In *Arkwright v. Gell*, 5 M. & W.

So the water in a canal is the property of the canal owners,¹ and the acquisition of title to the land across which the water runs in an artificial channel, constructed for hydraulic purposes, does not carry with it the right to draw water from such channel.²

But where an artificial watercourse is constructed under circumstances showing that it was intended as a permanent structure,

203, a mill owner, on the ground of alleged user for upward of twenty years, claimed a right to the flow of water discharged from a mine above him, but it was held that the mine owner, nevertheless, might divert the stream when deeper draining was required, as the mill owner could not acquire a prescriptive right to the flow of the water, it appearing that the original user had notice that the supply might be discontinued.

In *Greatrex v. Hayward*, 8 Exch. 291; 22 L. J. Exch. 137, it was held that one who for more than twenty years had used water discharged from a drain upon his neighbor's land, acquired no prescriptive right to the water, as it was apparent that the maker of the watercourse never intended to give the other the use of it as a matter of right.

In *Green v. Carotta*, 72 Cal. 267, an action was brought to enjoin the defendants from interfering with the flow of the waters of an alleged natural stream. The water in dispute was contained in a lagoon located upon the land of the defendants and never had any natural outlet. More than ten years prior to the commencement of the action, a former owner of the lands of the plaintiffs and defendants cut a ditch over that portion of his land now owned by the defendants, through which he conducted the water of the lagoon for purposes of irrigation and drainage, and ever since he and the defendants had continuously used all the water flowing in the ditch, except such as they wasted, as their own, and adversely to the whole world. The ditch was located upon the border of the plaintiffs' land, and by the parol leave of the defendants and their predecessors, they had used the waste water of the ditch, but had no further claim or right therein. It was held that the defendants were absolute owners of the water, and that the plaintiffs had never acquired any riparian right thereto.

Artificial Stream as Boundary.—In *Dunklee v. Wilton R. Co.*, 24 N. H.

489, it was held that if lands were conveyed, described as bounding on an artificial watercourse, such watercourse would be regarded, as between the parties, as a natural stream. In this case, the plaintiff was the owner of a valuable mill with a race way to conduct the water from the mill in the most direct manner to the stream below. This race way was constructed by consent of the parties, and had been in use for several years, until the original channel had been to a great extent obstructed and could not readily be restored. The plaintiff conveyed a portion of his land in which the race way was situated, describing it as "bounding on the sawmill brook," which it was admitted was this artificial race way, and "on the bridge meadow brook," which was the original channel. The court said: "We think the mention of this race way as the sawmill brook is a recognition of it as being, as between the parties, the brook, the natural channel." See also *Warner v. Southworth*, 6 Conn. 471.

In *Goodyear v. Shanahan*, 43 Conn. 210, it was held that land bounded on a canal extended to the center of the canal. See also *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

But in *Carter v. Chesapeake, etc., R. Co.*, 26 W. Va. 644; 53 Am. Rep. 116, where a grantor, having title to lands lying on both sides of a head race of a mill owned by him below the land which he granted, conveyed to the grantee by a deed lands on the opposite sides of this mill race bounded by it, the tracts on each side of the mill race being described by metes and bounds extending around the whole of each tract separately and not extending around both of them together as one tract, it was held that the grantee got no part of the bed of such mill race.

1. *Rochdale Canal Co. v. King*, 14 Q. B. 122.

2. *Fox River Flour, etc., Co. v. Kelley*, 70 Wis. 287; *Lawson v. Mowry*, 52 Wis. 219.

rights therein, similar to the riparian rights in natural watercourses,¹ may be acquired by prescription.

Where several proprietors by agreement have diverted a natural watercourse into an artificial channel, and the old course is abandoned as to all the parties and those who claim under them, the new channel must be regarded as the natural channel, and, in the absence of any special agreement between them, their rights must be determined according to the rules which prevail among riparian proprietors.² As a general rule, in the absence of any agreement to the contrary, there is an implied obligation between the

1. *Ivimey v. Stocker*, L. R., 1 Ch. 396; *Greatrex v. Hayward*, 8 Exch. 293; *Beeston v. Weate*, 5 El. & Bl. 986; *Arkwright v. Gell*, 5 M. & W. 203; *Gaved v. Martyn*, 19 C. B. N. S. 732; *Murchie v. Gates*, 78 Me. 300; *Reading v. Althouse*, 93 Pa. St. 400.

In *Wood v. Waud*, 3 Exch. 748, the court said: "We entirely concur with Lord Denman, C. J., in 'the proposition that a watercourse, of whatever antiquity and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water if proved to have been originally artificial, is quite indefensible.' But on the other hand, the general proposition, that under all circumstances the right to watercourses arising from enjoyment is the same whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse; whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character and liable to variations."

In *Sutcliffe v. Booth*, 32 L. J. Q. B. 136, the direction to the jury to the effect that if the stream were an artificial one no right could have been acquired in it, is incorrect "because, although it may have been an artificial watercourse, it may still have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have had, had it been a natural stream." In this case, the plaintiff was the owner of a farm supplied with water from a

small watercourse, originating in a natural spring on the plaintiff's land, flowing, first, through the plaintiff's land, next through the defendant's land, and then through the plaintiff's land to the plaintiff's house. For seventy years and upwards, prior to 1879, the plaintiff had enjoyed the watercourse almost exclusively. In 1879, however, the defendant, by means of a pipe, appropriated nearly all the water for the use of newly built houses. The plaintiff claimed the exclusive use of the water, and alleged that the watercourse through the defendant's land was artificial, and constructed, at a time immemorial, for the sole benefit of the plaintiff and his predecessors. It was held that as no one could tell when the artificial part (if any) of the watercourse was made, the watercourse must be deemed to be a natural stream; or, if in any part artificial, to have been made so as to give all the rights of a riparian proprietor to the defendant and his predecessors in title. Considered and approved in *Roberts v. Richards*, 50 L. J. Ch. 297; 44 L. T. 271. In chancery appeal order discharged on undertaking. See *Weekly Notes* 1881, p. 156; 51 L. J. Ch. 944.

In *Freeman v. Weeks*, 45 Mich. 335, it was held in an action brought for obstructing a ditch, that where a ditch dug as a neighborhood drain had remained open as a watercourse for some years, it ought to be governed by the rules that apply to other watercourses.

In *Greatrex v. Hayward*, 8 Exch. 291, it was held that the flow of water from a drain, even for twenty years, the drain being made for the purposes of agricultural improvements, did not give a right to a neighbor so as to preclude the proprietor from ordering the leveling of his drain for the improvement of his land.

2. *Townsend v. McDonald*, 12 N. Y. 389.

several proprietors, that each will make the necessary repairs upon the section of the structure lying within his premises.¹ And where a proprietor at the head of a stream has changed the natural flow of the water, and has continued such change for more than twenty years, he may not restore it afterward to its natural channel, when to do so will have the effect to destroy the mills of other proprietors below which have been established in reference to such change in the natural flow of the stream.² The right to have the water in an artificial channel pure and unpolluted, may be acquired by prescription in a watercourse of a permanent character, though artificial in its origin.³

Although an artificial watercourse cannot rightfully be made to flow upon the land of a neighbor without his consent, yet, if the water has been so conducted for more than twenty years, an easement is thereby acquired which is entitled to protection; the right to drain upon the lands of another may also be acquired by prescription.⁴

2. **Canals**—*a*. **AUTHORIZATION AND CONSTRUCTION**.—Canals, the artificial waterways so extensively used for inland navigation, are purely of statutory creation. In the *United States*, they are created by statutes or charters, and are constructed and operated either by the state through its officers or by private incorporated bodies.⁵ A waterway, however, which is a mere private enterprise,

1. *Winslow v. Fuhrman*, 25 Ohio St. 638. But here it was held further, that where the nature and uses of the structure are such as to render the method above stated impracticable or unreasonable, then no such implication arises, and the rule does not apply.

2. *Shepardson v. Perkins*, 58 N. H. 354; *Belknap v. Trimble*, 3 Paige (N. Y.) 577. See also *supra*, this title, *Diversion*.

So, where one has acquired a prescriptive right to discharge water from his mill into such a watercourse made by another, the latter cannot restore the water to the original channel. *Delaney v. Boston*, 2 Harr. (Del.) 489.

3. In *Magor v. Chadwick*, 11 Ad. & El. 571, it was held that, where an artificial drain had been constructed for the purpose of draining a mine, and the pumping of the water had been discontinued for twenty years, during which period pure water had flowed naturally and continuously in the watercourse, a later riparian owner gained the right by prescription to have the water so flow, and that the resumption of pumping the water from a mine into the drain, and consequent pollution thereof, was a nuisance.

4. *Ivimey v. Stocker*, L. R., 1 Ch. 396; *Earl v. DeHart*, 12 N. J. Eq. 280; 72 Am. Dec. 395; *White v. Chapin*, 12 Allen (Mass.) 516; *Smith v. Miller*, 11 Gray (Mass.) 145; *Ashley v. Ashley*, 6 Cush. (Mass.) 70. See also *DRAINS AND SEWERS*, vol. 6, p. 2.

5. In *New York*, there are several canals of great importance which are the sole property of the state, as the Erie and Champlain canals, connecting the waters of Lake Erie and Lake Champlain with the waters of the Hudson river respectively, and the Cayuga, the Seneca, the Oswego, and several others. At a very early period in the history of the state, the legislature authorized the state to aid existing canal companies. As early as 1817 (*New York Laws of 1817*, ch. 262) five commissioners were appointed, known as the canal commissioners of the canal fund, instituted for the purpose of completing the canals, and by this and subsequent legislation the state acquired all the rights in the Erie and Champlain canals. By the constitution of 1876, art. 5, § 3, the office of superintendent of public works was created, and the office of canal commissioner abolished, and all the duties of the last named

is like a private road over which the public may be permitted to travel, but in which it obtains no vested rights, unless dedicated to its use.¹

The importance of canals to the interest and progress of the community, as highways for commerce, makes them clearly within the class of public uses, for which the rights of individuals, provided compensation be made therefor, may be taken, whether these rights are to become vested in the state, or in the company incorporated for the purpose of constructing and operating the canals, and authorized to compel the payment of tolls from the public.²

officer transferred to such superintendent.

In *Illinois*, the state is the owner of the Illinois and Michigan canal, together with its locks, dams, and other improvements, provided for the navigation of the Illinois and Little Wabash rivers, the control and management of its property being intrusted to three commissioners. As to the powers and duties of these commissioners, as well as the rules and regulations for the navigation of these waters, reference must be made to the general laws of the state. See *Starr & Curt. Illinois Annot. Stat.*, vol. 2, ch. 19, p. 375.

In *Ohio*, the state canals are intrusted to the care of the board of public works. See *Ohio Rev. Stat.*, § 9519 *et seq.* See also *Hubbard v. Toledo*, 21 Ohio St. 379.

In *Indiana*, the state constructed and operated, by a board of canal commissioners, the Wabash and Erie canal. *Indiana Acts of 1832*, p. 1; *Nelson v. Fleming*, 56 Ind. 310.

Basin.—A basin separated from the canal by a public highway, is not to be considered part of the canal. *Jackson v. Daley*, 5 Wend. (N. Y.) 526; *Hart v. Albany*, 3 Paige (N. Y.) 213.

Canal Boat Not a Vessel.—A canal boat or scow is not a "vessel of the *United States*," within the meaning of the act of Congress (1 U. S. Stat. at L. 288) concerning the registration of ships or vessels, providing that no bill of sale, mortgage, etc., of any vessel or part of a vessel of the *United States*, shall be valid, unless the same shall be recorded in the office of the collector of customs where such vessel is registered or enrolled. *Hicks v. Williams*, 17 Barb. (N. Y.) 523.

1. *Patten v. Indiana, etc.*, R. Co., 95 Mich. 389; *Ward v. Warner*, 8 Mich. 508.

2. *Chesapeake Canal Co. v. Key*, 3 Cranch (C. C.) 599; *Farnum v. Blackstone Canal Corp.*, 1 Sumn. (U. S.) 46; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1; *Harness v. Chesapeake, etc., Canal Co.*, 1 Md. Ch. 249; *Willyard v. Hamilton*, 7 Ohio, pt. 2, 111; 30 Am. Dec. 195; *Hazen v. Essex Co.*, 12 Cush. (Mass.) 475; *Com. v. Breed*, 4 Pick. (Mass.) 463; *Dalles Lumbering Co. v. Urquhart*, 16 Oregon 67.

As to the damages to be assessed and the mode of ascertaining the sum, the following cases may be consulted: *Van Schoick v. Delaware, etc., Canal Co.*, 20 N. J. L. 249; *Chesapeake, etc., Canal Co. v. Hoye*, 2 Gratt. (Va.) 514; *People v. Wells*, 12 Ill. 102; *Union Canal Co. v. Stump*, 81* Pa. St. 355.

In *Wheelock v. Young*, 4 Wend. (N. Y.) 648, it was held that the appraisal of damages may be made as well for the temporary use of lands adjacent to the line of the canals, for the destruction of crops in consequence of the removal of fences, and for materials taken, as for lands permanently appropriated, the fee of which vests in the state.

Statutes authorizing the benefits inuring to the lands remaining, and adjacent to the lands taken, to be estimated, and the value of such benefits set off against the value of the lands taken, have been held constitutional. *Eldridge v. Binghampton*, 42 Hun (N. Y.) 202; *Livingston v. New York*, 8 Wend. (N. Y.) 85; 22 Am. Dec. 622.

Damages Where Construction of Canal Is Not Authorized.—In *Matter of Townsend*, 39 N. Y. 171, it was held that where lands had been taken already or appropriated without authority, or had been injured by the construction of a canal, a statute authorizing a commissioner to appraise the damages already

But no appropriation of land or right to the flowage can be made without compensation, nor until the requirements of the law authorizing such taking have been complied with.¹ Unless expressly provided, it is not necessary, however, that compensation be first made.²

Where a state has authorized its agents to appropriate a fee simple in the land for the construction of its canals, the former owner, of course, retains no rights therein, such as the right to use the water, or to take ice therefrom.³ So, under the authorizing statutes of *New York*⁴ and *Pennsylvania*,⁵ the states respectively acquired a fee simple absolute, whether by condemnation, or deed, in the lands appropriated for canal purposes.

The appropriation of land by the authorized agents of the state, confers the right to enter upon and use the soil, although the absolute fee does not rest in the state until the payment of damages.⁶ But a mere easement by the state, as a right to flow,

sustained, and making the award and the payment or tender of the sum awarded a bar to any action of the owners to recover such damages, was unconstitutional.

Right to Confer Authority on a Foreign Corporation.—In the Matter of Townsend, 39 N. Y. 171, it was held that the legislature might authorize a foreign corporation to take land for the purposes of its canal, notwithstanding the fact that the lands were to be used for a navigable canal along the border of, but without, the state.

1. Binney v. Chesapeake, etc., Canal Co., 8 Pet. (U. S.) 101; Farnum v. Blackstone Canal Corp., 1 Sumn. (U. S.) 46; Trenton Water Power Co. v. Raff, 36 N. J. L. 336; Ten Eyck v. Delaware, etc., Canal Co., 18 N. J. L. 201; 37 Am. Dec. 233.

In Morris Canal, etc., Co. v. Central R. Co., 16 N. J. Eq. 419, it was held that the filing of the survey required by the act incorporating the canal company, was a necessary prerequisite to the taking of any lands under the powers given by the charter. People v. Wells, 12 Ill. 102.

Where the charter of a canal company provided that the company should not begin to construct its canal, or take any land or property therefor, until it had deposited a certain sum with the treasurer of the commonwealth as security for the payment of damages for taking land, a deposit by the corporation of *United States* bonds of the par value of the sum required, was a sufficient compliance with the charter. Briggs

v. Cape Cod Ship Canal Co., 137 Mass. 71.

2. Den v. Morris Canal, etc., Co., 24 N. J. L. 587.

3. Cromie v. Wabash, etc., Canal, 71 Ind. 208; Indianapolis Water Works Co. v. Burkhart, 41 Ind. 365; Kimble v. White Water Valley Canal Co., 1 Ind. 285; Card v. McCaleb, 69 Ill. 314.

4. Rexford v. Knight, 15 Barb. (N. Y.) 627; affirmed 11 N. Y. 308; Jermaine v. Waggener, 1 Hill (N. Y.) 279; Varick v. Smith, 5 Paige (N. Y.) 137; 28 Am. Dec. 417; Mark v. State, 97 N. Y. 572.

5. Haldeman v. Pennsylvania Cent. R. Co., 50 Pa. St. 425.

The vendees of the state, a canal company, become liable for damages occasioned by the taking, in the mode pointed out by the law. North Branch Canal Co. v. Hireen, 44 Pa. St. 419.

Whether the state in the construction of a canal has appropriated a piece of land for permanent or temporary use, is a question for the jury. In the latter case, the owner's title is not divested, but his enjoyment is interrupted temporarily. Pennsylvania, etc., Canal, etc., Co. v. Billings, 94 Pa. St. 40.

6. Baker v. Johnson, 2 Hill (N. Y.) 342; Wheelock v. Young, 4 Wend. (N. Y.) 647; Rodgers v. Bradshaw, 20 Johns. (N. Y.) 735.

The owner of such land is entitled to have his damages appraised as soon as the agents of the state have taken possession of the property and commenced work. People v. Hayden, 6 Hill (N. Y.) 359.

confers no other rights in the land flowed, and the right to take ice belongs to the owner of the servient estate.¹

Where the mode of ascertaining damages or making compensation is provided by the charter incorporating the company, or by special legislation, the compensation must be sought in the way pointed out, and not otherwise.²

b. POWER TO EXACT TOLLS.—A canal company may not demand toll, except under authority given by its charter, nor in any other manner than is therein provided. Where certain articles are specified as being subject to toll by the charter, such as are not enumerated cannot be made subject thereto.³ For example, where the charter of a canal company provides for the payment of toll upon merchandise conveyed, but makes no mention of passengers, no toll can be required of them.⁴ The rule of construction in such cases is, that where there is any ambiguity in the statute authorizing the collection of toll, it must be taken most strongly against the company and in favor of the public.⁵ A company

1. *Brookville, etc., Co. v. Butler*, 91 Ind. 134; *Edgerton v. Huff*, 26 Ind. 35. See also *Julien v. Woodsmall*, 82 Ind. 568.

2. *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588; *Kimble v. White Water Valley Canal Co.*, 1 Ind. 285; *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161; *Stevens v. Middlesex Canal*, 12 Mass. 467. But see *Van Rensselaer v. Read*, 26 N. Y. 558; *Fryeburg Canal Co. v. Frye*, 5 Me. 38.

3. *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. (U. S.) 172; *Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792; 22 E. C. L. 185; *Dock Co. at Kingston-upon-Hull v. Browne*, 2 B. & Ad. 58; 22 E. C. L. 23.

In *Virginia*, it is provided by statute that where the tolls of any canal are not prescribed by its charter, the board of public works shall fix such as may seem to it reasonable, and may alter the same at its pleasure. *Virginia Code* 1887, § 1199.

Liability on Contracts.—In *Muir v. Louisville, etc., Canal Co.*, 8 Dana (Ky.) 161, the right to make contracts and agreements for the passage of boats is a necessary incident to the powers specifically granted to the corporation to which the canal belongs, and for any failure to perform a contract or undertaking of that sort, the corporation is liable in the same manner and to the same extent that a natural person would be.

4. Under the *Erie and Champlain Acts of New York*, Sess. Acts 43, ch.

202, imposing tolls on property carried and articles conveyed, no toll could be imposed on passengers. *Myers v. Foster*, 6 Cow. (N. Y.) 567. This act, however, has been amended, and toll now extends to passengers. *New York Act* of April 12, 1827.

5. *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 793; *Barrett v. Stockton, etc., R. Co.*, 2 M. & G. 134; 40 E. C. L. 298.

Construction of Statutes Authorizing Toll.—In *Leeds, etc., Canal Co. v. Hustler*, 1 B. & C. 424; 8 E. C. L. 181, where a canal act directed that no boat navigating thereon, which should not be capable of carrying a greater burden than twenty tons, or which should not have a load of twenty tons on board, be allowed to pass through any of the locks, unless the owner or navigator of such boat should pay tonnage equal to a boat of twenty tons, it was held that the clause was confined to boats carrying some load, and did not attach upon an empty boat, as it did not appear that in any part of the act a boat *per se* was made liable to any toll.

An act authorizing toll on coals, lime, timber, bricks, stone, and all other goods, wares, or merchandise, shall impose the toll upon gravel and materials for the repair of turnpike roads. *Coulton v. Ambler*, 13 M. & W. 403.

Under an act imposing a toll on "every ton of butter or other goods, wares, merchandise, and commodities," and a lower toll "on every ton of coals, cinders, lime and limestone, gravel, and

may not exceed the rate of charges provided by its charter, nor make unjust discrimination therein.¹

manure," it was held that blocks cut with wedges from the quarry to be used as railway sleepers were liable to the toll as stones only, not as merchandise. *Fisher v. Lee*, 12 Ad. & El. 622; 40 E. C. L. 136.

Where, by an act, the toll of one shilling per ton was imposed upon all coal, etc., navigated in a part of the canal from a specified place, or from any place within two miles thereof, it was held that the toll was to be charged only upon voyages commencing within the specified limit, and that no such toll was payable for coal loaded at a place more than two miles from the spot specified, although conveyed upon a part of the canal within the two miles. *Brittain v. Cromford Canal Co.*, 3 B. & A. 139.

In *Tamar Manure Nav. Co. v. Wagstaff*, 4 B. & S. 288; 32 L. J. Q. B. 295, it was held that the canal company, authorized to execute certain works within certain specified distances, and, in consideration of the great charge and expense which the company would be put to in carrying out the work, to be charged toll for the use of the same, was entitled to recover rates for the conveyance of goods along a portion of the way which had been completed by the company, although that way was a very small portion of the proposed canal.

Power to Distrain for Toll.—Where a canal company was empowered, in case of non-payment of tolls, to seize the goods in respect to which the toll was to have been paid, or any part thereof, and the boat laden therewith, and to detain the same till payment of such rates, and if such goods were not redeemed within seven days, to sell the same, as in cases of distress for rent, it was held that the company was not empowered to distrain goods when no longer upon the canal. *Fraser v. Swansea Canal Nav. Co.*, 1 Ad. & El. 354; 28 E. C. L. 105.

1. In *Monmouthshire Canal v. Kendall*, 4 B. & Ald. 453, where an act provided that the Monmouthshire Canal Company should not receive any higher rate of tonnage than should, for the time being, be taken by the Brecknock Canal Company, and the latter, by a resolution at a general meeting, reduced their tolls, it was held that the

Monmouthshire company could not question the collateral validity of such resolution, but was bound by it.

Where a canal company was empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding one pence per ton per mile upon coal, and they were also empowered to reduce the rates at a general assembly held on certain notice, but no reduction was to be made without the consent of the greater part in value of the proprietors, a contract made by individuals with the company, but not at such general meeting, whereby, in consideration that those individuals would make a navigable cut to convey water from their collieries, etc., the latter should permit them to carry their coals through the cut and along the canal for one shilling per ton, was illegal and void, as enabling the company to alter the rates other than by a meeting of the general assembly. *Lees v. Manchester Canal, etc., Co.*, 11 East 645.

Change of Rate.—Where a corporation was authorized to demand toll not exceeding a certain rate, and it first established the toll at one rate and afterward at a higher rate, it was held that it was not necessary, in a suit to recover the higher rate of toll, that the corporation should show that the defendant had notice that the rate had been changed. *Quincy Canal v. Newcomb*, 7 Met. (Mass.) 276.

Discrimination in Toll.—Upon complaint by the D. colliery that the toll charged for coal sent from their colliery by canal to K. was greater in proportion to the distance than the toll charged for the coal similarly sent by other colliery proprietors, whose collieries were also situated in or near the same canal, but at a distance from K. exceeding by several miles the distance therefrom of the D. colliery, it appeared that the toll charged on coal to K. from the D. colliery was thirteen pence, and from the other collieries thirteen and a half pence, and that the coal traffic on the canal between the D. colliery and K. was worked with less expense to the canal owners than the traffic between the other collieries and K.; it was held that the D. colliery was subjected to an undue and unreasonable prejudice and disadvantage by being

The proprietor of a tract of land has the right to excavate, entirely within his own boundaries, and exclusively at his own expense, a canal, for the purposes of navigation, and to require payment for its use from those who choose to avail themselves of its facilities.¹

The period for the payment of tolls depends entirely upon the express or implied understanding of the parties, without respect to the time of passage.²

c. DUTY AND LIABILITY OF OWNERS—(1) *In General*.—A canal company is bound to construct and operate its works with due regard to the rights of others, and it will be liable in damages for injuries arising from its failure to do so. A riparian owner, or one whose premises are injured by an overflow caused by the faulty construction of a canal, or failure to keep it in repair, or the negligent operation thereof, is entitled to recover against the company, or against the state when the owner of the canal.³ But

charged only one halfpenny less in amount than the toll charged to the other colliery proprietors. *Denaby Main Colliery Co. v. Manchester, etc., R. Co.*, 4 Ry. & C. T. Cas. 28.

"Long and Short Haul."—In *Strick v. Swansea Canal Co.*, 16 C. B. N. S. 245, it was held that an act authorizing a company to alter and vary the tolls granted to them, either upon the whole or for any particular portion or portions of their canal, according to local circumstances or the quantity of traffic, or otherwise, as they should think fit, and providing that such tolls were to be charged equally to all persons and at the same rate, whether per mile or per ton per mile, in respect of all boats of like description passing along or using the same portion of the canal, authorized the company to take a proportionally less toll per ton per mile for goods carried a given distance along any part of the canal, than for goods carried less than that distance.

1. *Harvey v. Potter*, 19 La. Ann. 264; 92 Am. Dec. 532.

In *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525, in an action of assumpsit on account of slipping logs along a stream, which had been made floatable by the application of artificial means, at the expense of the owner, although the right to exact toll was questioned, it was held that the proprietor might open a passage through his land for his own accommodation, and permit others to use it under an agreement for compensation which could be enforced.

2. *Pennsylvania Coal Co. v. Dela-*

ware, etc., Canal Co., 29 Barb. (N. Y.) 589; *affirmed* 1 Keyes (N. Y.) 72. In this case, the defendants agreed with the plaintiffs to allow the latter to transport coal on the canal of the former, providing specially for a rate of tolls to be established on the first of May in each year, by ascertaining the quantity of the lump coal belonging to the defendants which at that time they should have contracted to sell and to deliver by transportation on their canal during the year. In case the quantity of lump coal, which on the first of May should have been sold, should be less than one-half of the estimated sales for the year, then the toll charged that year should be calculated on the average price per ton at which the sale should have been actually made. It was held that the employment of the word "toll" in the agreement did not *ex vi termini* give the canal company any right to the collection of it before its amount was ascertained; and that as the amount of the tolls payable by the coal company could not be ascertained precisely before the expiration of the year, it was further held that the canal company could not, previous to that period, enforce payment from the coal company on account, by a proximate estimate of the tolls.

3. *McKee v. Delaware, etc., Canal*, 125 N. Y. 353; 21 Am. St. Rep. 740; *Sayre v. State*, 123 N. Y. 291; *Cuddeback v. Delaware, etc., Canal Co.*, 20 N. Y. Wkly. Dig. 454; *McArthur v. Green Bay, etc., Canal Co.*, 34 Wis. 139.

One whose premises are injured by

the company is not liable for damages caused by a merely accidental breach of their canal.¹

The company is, however, liable in damages for personal injuries resulting from a failure to keep its bridges and works in repair.²

The *Pennsylvania* acts authorizing the sale of the state canals imposed upon the purchasers the duties and liabilities of the commonwealth only.³

a break in the canal in consequence of the want of proper care on the part of the lock tender, has a right to recover against the state. *Sipple v. State*, 99 N. Y. 284.

In *Reed v. State*, 108 N. Y. 407, the state was held liable for damages to an adjoining owner, caused by the percolation of water through a bed of gravel constituting the side of a reservoir established by the state as a feeder to a canal, such bank having been denuded of soil in constructing the reservoir, and no precaution taken to avoid leakage.

Right to Overflow as Permanent Easement.—In *Benedict v. State*, 120 N. Y. 228, where the plaintiff claimed damages for the overflow of his lands, caused by a permanent dam, constructed under legislative act, it was held that the overflow was the taking of a permanent easement by the state, that the land was appropriated when the dam was completed, and that the neglect to present the claim within a year, as prescribed by the statute, was a waiver of damages.

Obligation to Build Levee.—In *New Orleans v. Carondelet, etc.*, Nav. Co. (La. 1890), 7 So. Rep. 63, it was held that no contract and no law imposed on the defendant company the particular duty of building levees along the banks of its canal. Whether or not, as the operator and custodian of a canal, it was bound under a general law to restrain its waters within its banks, the responsibility for damages for not doing so was the sole sanction of an obligation to build such levees, and the city was not justified in building an expensive system of levees and claim from the defendant the cost thereof.

1. *Higgins v. Chesapeake, etc.*, Canal Co., 3 Harr. (Del.) 411.

Extraordinary Rainfall.—Where, in a case of extraordinary rainfall, a canal company discharged more water into a stream than it could carry, and it overflowed, injuring the plaintiff's coal mines, it was held a good defense that if

the canal company had not so discharged the water, it would have burst and inundated the country and the plaintiff's mines. It was a case of *injuria sine damno*. *Thomas v. Birmingham Canal Co.*, 49 L. J. Q. B. 851.

2. In *Pennsylvania, etc.*, Canal Co. v. *Graham*, 63 Pa. St. 290, which was an action for damages to a traveler who was passing over one of the canal bridges when it gave way, and who was precipitated with his wagon into the canal, it was held that the charter was a law imposing on the company the burden of performing a duty to the public, and if that duty was not performed, the company was responsible to those who thereby suffered special injury, also that a corporation bound, in consideration of its franchise, to keep a road or bridge in repair, was liable for injury to a person from want of repair, whether the defect was patent or latent, unless the party injured was himself in default, or the defect was from inevitable accident, or the wrongful act of a third person, and this although ordinary care was used in the erection or repair, and the work was done by competent workmen. See also *Brown v. Susquehanna Boom Co.*, 109 Pa. St. 57; 58 Am. Rep. 708.

In *Veeder v. Little Falls*, 100 N. Y. 343, where it was shown that the death of a person drowned by falling from a street into a canal was attributable to the want of a barrier between the street and the canal, the canal company was held not to be liable in damages, as the land on which its barrier was required was the property of the state, and that further it was not the duty of the canal company to build a barrier, if, when erected, it would so reduce the width of the street as to render travel along it dangerous.

3. *Delaware Division Canal Co. v. McKeen*, 52 Pa. St. 117; *Freeland v. Pennsylvania R. Co.*, 66 Pa. St. 91; *West Branch, etc.*, Canal Co. v. *Mulliner*, 68 Pa. St. 357; *Com. v. Pennsylvania R. Co.*, 51 Pa. St. 351.

(2) *As to Bridges*.—Although there is no express provision in its charter requiring it, it is the duty of the canal company to construct and keep in repair bridges for the use of all public roads which it crosses.¹ And it has been held that the owner of a private road may, by *mandamus*, compel the company to bridge the canal when it obstructs the road.² But, in the absence of

The purchaser of the state canal took it subject to the provision of a prior contract with a private corporation. *Williamsport, etc., R. Co. v. Com.*, 33 Pa. St. 288.

1. *Rex v. Kerrison*, 3 M. & S. 526; *Rex v. Kent*, 13 East 220; *Rex v. Lindsey*, 14 East 317; *In re Trenton Water Power Co.*, 20 N. J. L. 659; *Leopard v. Chesapeake, etc., Canal Co.*, 1 Gill (Md.) 222; *Chesapeake, etc., Canal Co. v. Allegany Co.*, 57 Md. 201; *Eyler v. Allegany County*, 49 Md. 258; 33 Am. Rep. 249; *Franklin County v. White Water Valley Canal Co.*, 2 Ind. 162; *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205.

In *Dyerg v. Schenck*, 23 Wend. (N. Y.) 446; 35 Am. Dec. 575, an action was maintained for any injury received by a person, owing to the defective condition of a bridge erected by the owner of the soil, who had cut through the public road in constructing his race way. Cowen, J., said: "Defendant certainly committed no trespass in digging the ditch. It was his own soil. The only right adverse to his was one to have a common highway for the purposes of travel. All the public could require was that he should make and keep the road as good as it was before he dug the ditch. That he accomplished, by building a substantial bridge originally which did not get out of repair for a number of years. The road, however, in the end, proved to be less safe than it was when the bridge was first built; certainly less so than before the ditch was dug. In suffering this, the defendant came short of his obligation to the public." See also *Burton Tp. v. Tuttle*, 30 Ohio St. 68.

In *Union Canal Co. v. Pinegrove Tp.*, 6 W. & S. (Pa.) 560, it was held that an act requiring a company to erect and keep in repair a bridge wherever the canal crossed a public or privately laid out road, did not apply to a road merely dedicated to the public use, and over which the supervisors had not exercised any authority, and if such bridge should subsequently become a state road, the

company would be absolved from any further charge in respect to it.

Obligation to Bridge Streets in Incorporated Town.—In *Lowrey v. Delphi*, 55 Ind. 250, in the absence of any express requirement binding a canal company to keep in repair any bridge across such canal, upon any public street within the limits of the city, it was held that a canal company was not obliged to build and keep such bridge in repair, but that it was the duty of the city, its charter of incorporation providing that "the common council shall have exclusive power over the streets, highways, bridges, etc., within such city."

Obligation of State as Canal Owner.—In *Illinois*, it seems that the same obligation to erect bridges over public highways, in the case of a private corporation, does not rest upon the state as the owner of the canal. For the burden of opening and repairing highways, constructing and maintaining bridges, rests upon the counties as representatives of the state, and the maintaining of the roads and highways is a matter of discretion of the county courts. In *People v. Canal Trustees*, 14 Ill. 402, it was held that the mere fact that the state built a number of bridges across a canal, at the crossing of certain highways, for the use of the public, did not render it obligatory upon her to build bridges at the crossing of the canal at each highway; and that where the state had made an assignment of her interest in the canal to trustees who were to take the property and carry out the plans of the trustees, there was no distinction between the obligation resting upon the state at the time of the assignment of her interest in the canal to the trustees, and those of the trustees since.

2. *Habersham v. The Savannah, etc., Canal Co.*, 26 Ga. 665.

In *Ammerman v. Wyoming Canal Co.*, 40 Pa. St. 256, it was held that the owner of a farm, for whose use a bridge was built, could maintain an action against the canal company for failing to keep it in repair, although a railroad

express requirement, a canal company is not bound to bridge over its canal for a highway, or private way, laid out after its construction.¹

(3) *As to Navigation*.—A company maintaining for its own profit a canal open to public navigation on payment of tolls, is bound to take reasonable care that it may be navigated without danger. Canal companies are not liable, however, for accidents which do not arise from the want of reasonable care, for, unlike common carriers, they are not subject to the responsibilities of insurers.²

company had built its road on the banks of the canal and altered the bridge in length and height so as to increase considerably the cost of maintaining it.

Where Rights Are Acquired by Agreement, Obligations to Bridge Are Dependent Thereon.—In *Brearley v. Delaware etc., Canal Co.*, 20 N. J. L. 236, it was held that under a section of the charter of a canal company, providing that when its canal or feeder should intersect the farm or lands of any individual, it should be the duty of the company to provide, and keep in repair, a suitable bridge or bridges over the canal or feeder, so that the owner or owners and others may pass the same, did not apply where the company had acquired the land for the construction of its canal by a deed from the owner, on the principle that the company was empowered to take lands by condemnation only, in cases where such land could not be obtained by agreement with the owner; and the provisions cited apply only when the lands were acquired by condemnation, and that where the company acquired title by agreement, the liability in relation thereto depending not upon the provisions of the charter but upon the contract of the parties. See also *Perry v. Pennsylvania R. Co.* (N. J. 1893), 26 Atl. Rep. 829.

1. *Morris Canal, etc., Co. v. State*, 24 N. J. L. 62; *Delaware, etc., Canal, etc., Co. v. Mifflin*, 1 Yeates (Pa.) 430.

2. *Exchange F. Ins. Co. v. Delaware, etc., Canal Co.*, 10 Bosw. (N. Y.) 180; *Steele v. Western Inland Lock Nav. Co.*, 2 Johns. (N. Y.) 283; *Weitner v. Delaware, etc., Canal Co.*, 4 Robt. (N. Y.) 234; *Pennsylvania R. Co. v. Patterson*, 73 Pa. St. 491; *Gibbs v. Liverpool Dock*, 3 H. & N. 164.

A canal company is not responsible for an injury resulting from an unknown obstruction in its canal, which could not have been guarded against by the exercise of ordinary care and

diligence. *Pennsylvania Canal Co. v. Burd*, 90 Pa. St. 281.

In *Byrne v. Chicago*, 80 Ill. 195, it was held that a canal company was not required to have the water drawn off periodically, in order that the bed of the canal might be inspected, and if, after the bed of a canal was cleaned out, a rock was deposited there by reason of a slide from some point near the slope of the land, the company was not liable for damages done to boats thereby.

State Canals.—In *Illinois*, in an action against the board of trustees of the Illinois and Michigan canal to recover damages for the loss of a canal boat, occasioned, as alleged, by the negligence of the defendants, it was held that the action was alone maintainable against the state trustee, and did not lie against the defendants as a board of trustees. *Illinois, etc., Canal v. Daft*, 48 Ill. 96; *Illinois, etc., Canal v. Adler*, 49 Ill. 311; *Illinois, etc., Canal v. Daft*, 56 Ill. 121.

In *New York*, it is provided expressly by statute (*New York Laws* 1870, ch. 321) that the state is liable to all persons for damages sustained from the canals of the state, or from their use or management, or from the negligence of the state officers in charge thereof, resulting or arising from any accident or other matter connected with the canals, if the facts proved shall make out a case which would create a legal liability against the state were they established in a court of justice against an individual or corporation. Under this statute, it is held that the state is liable for injuries caused by officers' negligence in failing to repair bridges or other canals. *Woodman v. State*, 127 N. Y. 397. Formerly the superintendent was personally liable in an action on the case for damages sustained by an individual due to the neglect of his duty, or the negligence of workmen employed in making repairs. *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 249; *Ad-*

An individual cannot maintain an action against the incorporated proprietors of a canal, for damages caused by their omission to construct a canal according to the requirements of their act of incorporation, or their omission to keep the canal in repair, if his damage be such only as he suffers in common with all others.¹ But the rule is otherwise if he suffers special damage arising from the want of due care in cleansing the canal and maintaining it in a fit condition for use.²

When a boat is induced by the company to enter its canal, in the expectation that for a fair compensation it shall have a passage through, there is an implied agreement on the part of the corporation that the boat shall go through in a reasonable time; and if, by neglect or other failure of duty on the part of the company,

sit *v. Brady*, 4 Hill (N. Y.) 630; 40 Am. Dec. 305; *Hicks v. Dorn*, 9 Abb. Pr. N. S. (N. Y.) 47, *affirming* *Lans. (N. Y.)* 81.

Injunction to Prevent Obstruction on Public Canal.—In *Morris Canal, etc., Co. v. Fagin*, 22 N. J. L. 430, it was held that, considering a canal as a public highway, the granting of an injunction to restrain encroachments on it will depend upon the extent to which such encroachments impede navigation, and where an alleged encroachment does not carry the water away materially within the width it has for navigation, and does not interfere with the tow path, the injury, if a public nuisance, can be remedied by indictment, and if a private one, an action of law will afford sufficient protection and relief. See also *London R. Co. v. Grand Junction Canal Co.*, 1 Rail. Cas. 224.

In *Pennsylvania Canal Co. v. Philadelphia, etc., R. Co.*, 2 Pearson (Pa.) 354, an injunction was granted to prevent a railroad company from building a swinging bridge over a canal where the bottom of the bridge was to be within three feet of the surface of the water.

1. *Quincy Canal v. Newcomb*, 7 Met. (Mass.) 276; *Moore v. Wabash, etc., Canal*, 7 Ind. 462.

2. *Riddle v. Locks & Canals*, 7 Mass. 169.

In *Lancaster Canal Co. v. Parnaby* 11 Ad. & El. 223, the canal company was held liable for an injury arising from a boat which had been sunk in the canal so that vessels passed with difficulty in the day, and at night were in danger of running foul of it, of which the company had notice. *Denman, C. J.*, said: "The defendants invite the whole

public to navigate on their canal in consideration of the tolls paid. They have lawful power to make the canal in all respects fit for navigation, and particularly to remove the kind of obstruction by which the plaintiff suffered. It is the same, in principle, as if they announced the carrying on of a business at premises accessible only by a certain road over their land, which was open to the public for that purpose, but which they only, and not the public, had a right to repair, and they left that road in so bad a state that a person's leg was broken when he came to transact business with them there. A more familiar example, and not of very rare occurrence, is that of a shopkeeper who leaves a trapdoor open in his shop, and causes a customer to fall down and suffer injury."

In *Gibbs v. Liverpool Docks*, 3 H. & N. 164, an action was maintained by the owners of a ship, to recover for an injury done to the cargo, by reason of the ship, upon entering, having struck a bank of mud carelessly and negligently left in and about the entrance of the dock, although the defendants were not individually profited by the operations of the company, of which they were trustees, but were bound by statute, as such trustees, to apply the tolls received in maintaining the docks, and in paying the debts contracted in making them. It was held that the knowledge upon their part that the entrance to the dock was dangerous, imposed upon them the duty of closing the dock against the public, as soon as they became aware of its unsafe condition, and that they had no right, with a knowledge of its condition, to keep it open and invite the vessel in question

the boat is detained to the injury of the owner, it is liable for a breach of the implied agreement.¹ The company may make such rules and regulations for the navigation of its waters as are not inconsistent with its charter, nor in conflict with the constitution and laws of the state, to which those using them must submit.²

d. LEASE OF SURPLUS WATER.—The power to appropriate the waters of streams for canal purposes, does not authorize the taking of more than is necessary for canal navigation, either by a private corporation or by the state, as, for instance, to take an extra amount of water which may be disposed of for the purpose of creating hydraulic power to be sold or leased.³ Surplus water,

into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on the payment of the tolls to them, might enter the dock.

1. *Muir v. Louisville, etc., Canal Co.*, 8 Dana (Ky.) 161.

A wrongful refusal by a canal company to permit a tug engaged in the effort to tow a vessel laden with merchandise to pass through its canal, the character of the channel being such as to require the agency of tugs, whereby damage results to the vessel or cargo, was held to be such a proximate cause of the damage as to enable such owner to maintain an action against the company. *Buffalo Bayou Ship Channel Co. v. Milby*, 63 Tex. 492.

2. *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 31 N. Y. 91.

Unreasonable Regulation — Sunday Law.—In *McArthur v. Green Bay, etc., Canal Co.*, 34 Wis. 139, it was held that a canal is a public highway which all persons, on complying with all lawful requirements, may not only navigate at their pleasure on all days except Sunday, but may also navigate on Sunday in a case of necessity; and a regulation that "no boat shall be allowed to pass the lock on Sunday without a written permit from the superintendent or his assistant, and this permit will not be granted unless in case of actual necessity," was unreasonable and one which neither the superintendent nor the board of directors of the company had power to establish.

Rules for Navigation of State Canals.—In *New York*, the canal regulations have adopted the American law of the road. It is the duty of the masters of boats which meet, to turn out to the right so as to be wholly on the right side of the center of the canal. Packets have preference over freight boats on

any part of the canal, at a lock as well as elsewhere. *Farnsworth v. Groot*, 6 Cow. (N. Y.) 698.

A boat eleven feet wide in the hull, and ninety feet long, built with locker seats, inside, finished off for carrying passengers, and used chiefly for that purpose on the Erie canal, was held to be fairly a passenger boat within the terms of the statute (1 *New York Rev. Stat.* 545 (5th ed.), p. 627, § 24), and entitled to a preference over other boats. *Houghton v. Walce*, 64 Barb. (N. Y.) 613.

It is held that, in the case of collisions of boats on canals where both parties are equally in the wrong, neither of the owners can maintain an action against the other; indeed, it seems that a party suing for negligence must be wholly without fault. *Rathbun v. Payne*, 19 Wend. (N. Y.) 399; *Dygert v. Bradley*, 8 Wend. (N. Y.) 469.

In *Pennsylvania*, where an ascending and descending boat have to pass each other near to or at a narrow place in a canal, it is the duty of the ascending boat to wait at such a distance therefrom as to permit the other to pass with safety. But where the boat of a third party, properly moored to the bank, is concerned, and the ascending boat will not comply with the directions of the statute, it is the duty of the descending boat to keep at a proper distance so as to insure safety, and for an omission to do so, the owners of the descending boat are liable in damages for the injury sustained by such third boat. *Sheerer v. Kissinger*, 1 Pa. St. 44.

3. *Varick v. Smith*, 5 Paige (N. Y.) 137; 28 Am. Dec. 417; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345; *Cromie v. Wabash, etc., Canal*, 71 Ind. 227; *Edgerton v. Huff*, 26 Ind. 37.

however, that is, such water as is necessary for the navigation of the canal, but which can be used for other purposes without interfering with the navigation, may be disposed of for hydraulic purposes with a view to raising revenue.¹

e. ADMIRALTY JURISDICTION OVER.—A canal used as a highway for commerce between ports and places in different states, although wholly artificial and wholly within the body of a state, is the public water of the *United States*, and within the legitimate

In *Buckingham v. Smith*, 10 Ohio 288, it was held that the canal commissioners had power to appropriate enough water from a stream for canal navigation, but not for the purpose of creating hydraulic power, to sell or lease, on behalf of the state. Wood, J., said: "The state, notwithstanding the sovereignty of her character, can take only sufficient water from private streams for purposes of the canal. So far the law authorizes the commissioners to invade private right, as to take what may be necessary for canal navigation, and to this extent, authority is conferred by the constitution, provided a compensation be paid in money to the owner. The principle is founded on the superior claims of a whole community over an individual citizen, then in those cases only where private property is wanted for public use, or demanded by public welfare. We know of no instance in which it has, or can be, taken, even by state authority, for the mere purpose of raising a revenue by resale, or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum* and annihilate them forever, at the pleasure of the state." *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; 7 Am. Dec. 526.

1. *Cooper v. Williams*, 5 Ohio 392; 24 Am. Dec. 299, *affirming* 4 Ohio 252; 22 Am. Dec. 745; *McArthur v. Kelly*, 5 Ohio 139; *Fishback v. Woodruff*, 51 Ind. 102; *Wabash, etc., Canal v. Reinhart*, 22 Ind. 463.

So in *Armstrong v. Pennsylvania R. Co.*, 38 N. J. L. 1, it was held that it was not *ultra vires* for a canal company, having the right to drain water from a public river for its chartered purpose, to agree to discharge its waste water at a certain point. In this case, Beasley, C. J., said: "It is here denied that this canal company can utilize its superfluous and waste water. This seems to be pushing necessary doctrine

to an extreme. I see no legal obstacle to this canal company, being in need of a place over which to discharge its waste water, agreeing with a landowner that, in consideration of such privilege, he shall have the use of such water as long as it is consistent with the convenience, or well being, of the company to let it off at that point."

In *Sweet v. Syracuse*, 129 N. Y. 316, it was held that a constitutional provision prohibiting the sale of the state canals, did not prevent the lease of the surplus waters of such canals, this having been authorized by an act of the legislature.

In *Detwiller v. Toledo*, 5 Ohio Circ. Ct. Rep. 360, it was held that the state commissioners and a lessee of surplus water, sufficient to run certain machinery, whose lease did not specify the quantity, might fix the quantity by a subsequent written agreement.

In *Ohio*, special provision is made by law for the disposition by lease, or otherwise, of the surplus water of the canals owned by the state. See *Little Miami El. Co. v. Cincinnati*, 30 Ohio St. 629. But the board of public works is not authorized by the act to in any manner surrender, abridge, or restrict, its power to resume at any time the water leased or sold for hydraulic purposes, wherever it may be necessary for the purposes of navigation. *Fanger v. Board of Public Works*, 42 Ohio St. 607. And upon the abandonment of public canals by the state, there is no liability on her part to respond in damages resulting therefrom to parties holding the lease of surplus water. *Hubbard v. Toledo*, 21 Ohio St. 379.

Rights of Successive Lessees.—In *Wabash, etc., Canal v. Reinhart*, 22 Ind. 463, it was held that where successive leases of the water power were executed by the trustees to different persons, and the water in the canal proved insufficient to supply the requisite amount to all the lessees, but was sufficient to supply some of them, the

scope of the admiralty jurisdiction conferred by the Constitution and the statutes of the *United States*.¹

f. ABANDONMENT.—When a canal company abandons its rights and property, it is under no duty to restore the stream taken by it, or to replace in its original condition everything which has been changed by it in the construction of the canal.²

The abandonment of a state canal and the conveyance thereof to trustees by the state, does not revest in the original owners, the title to the lands used for canal purposes.³ The principles governing the forfeiture of corporate charters for non-user have been fully treated elsewhere in this work.⁴

lessees should be supplied in the order in which their leases were executed.

1. *Ex p. Boyer*, 109 U. S. 629; *Malony v. Milwaukee*, 1 Fed. Rep. 611; *The Steamer Oler (Va.)*, 14 Am. Law Reg. 300; *The Avon*, 1 Brown Adm. 170; *The B. & C.*, 18 Fed. Rep. 543. See also ADMIRALTY, vol. 1, p. 195.

In *Malony v. Milwaukee*, 1 Fed. Rep. 611, Choate, J., said: "Without going at large into a discussion of the reasons for and against this jurisdiction, it is enough for the disposition of the point in this case to say that, upon a careful perusal of the opinions delivered by the supreme court which touch upon the question, it seems to me that the test established for determining the jurisdiction in admiralty, in a case of alleged maritime tort not on tide water, is whether the place in which it was committed is upon the 'navigable waters of the *United States*,' and that an artificial water way or canal opened by a state to public use for purposes of commerce, and while in fact used as a highway of commerce, between the states of the Union, and between foreign countries and the *United States*, is 'navigable water of the *United States*' within the meaning of that term as used to define and limit the jurisdiction of the admiralty courts. Nor, as it seems to me, is there any force in the suggestion that this proposition trenches upon the rightful power and jurisdiction of the state through whose territory and by whose law, in force for the time being, the canal is so opened and used, because the exercise of this jurisdiction does not in any way in itself impair or affect the right of

the state (whatever that right may be) to withdraw or terminate that dedication of its property to the public uses of commerce."

In *The Avon*, 1 Brown Adm. 170, the jurisdiction of the Admiralty in a collision in the Welland canal (an artificial canal, wholly in Canadian territory, extending from Lake Ontario to Lake Erie), with an American vessel on her way from one American port to another American port, was upheld.

2. *Agawam Canal Co. v. Edwards*, 36 Conn. 476. See also *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St. 50.

3. *Mason v. Lake Erie, etc.*, R. Co., 9 Biss. (U. S.) 239; *Collett v. Vanderburgh County*, 119 Ind. 27; *Genesee Valley Canal R. Co. v. Slaughter*, 49 Hun (N. Y.) 35; *Rexford v. Knight*, 11 N. Y. 308, *overruling* *People v. White*, 11 Barb. (N. Y.) 26; *People v. Stephens*, 13 Hun (N. Y.) 17; *Craig v. Allegheny*, 53 Pa. St. 477; *Robinson v. West Pennsylvania R. Co.*, 72 Pa. St. 316. Otherwise if the fee is not acquired. *Whitney v. State*, 96 N. Y. 240.

The state, by taking land for the benefit of a canal, does not enter into a contract that its use shall be perpetual. *Whitney v. State*, 96 N. Y. 240.

In *Robinson v. West Pennsylvania R. Co.*, 72 Pa. St. 316, it was held that a reservation in the grant to the state, and the omission of the grantor to have his damage assessed for the taking of the land, did not prevent the vesting of the fee in the state.

4. See CORPORATIONS (PRIVATE), vol. 4, p. 184; FORFEITURE, vol. 8, p. 443; FRANCHISES, vol. 8, p. 584; INFORMATION (CRIMINAL), vol. 10, p. 702; QUO WARRANTO, vol. 19, p. 660.

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